

THE CODE OF CIVIL PROCEDURE
(V OF 1908)

TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

THE
CODE OF CIVIL PROCEDURE
ACT V OF 1908

WITH

EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

BY

V. V. CHITALEY, B. A., LL. B.,

Senior Advocate, Federal Court & Editor, All India Reporter, Nagpur

AND

K. N. ANNAJI RAO, B. A., B. L.,

Advocate, High Court, Madras

*Authors of the Commentaries on "The Code of Criminal Procedure"
and "The Indian Limitation Act".*

ASSISTED BY

D. V. CHITALEY, B. A., LL. B.,

Vakil and Publisher, All India Reporter, Nagpur.

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PREFACE TO THE THIRD EDITION

It is necessary for a lawyer always to know the law as it is today. And this is specially so in respect of the Law of Procedure. It is now five years since the last edition of this work was published, and during this period several changes have been introduced into the provisions of the Code by legislation. Further, the case-law has enormously increased, sometimes settling conflicts of judicial opinion which existed before, and sometimes giving rise to new conflicts of opinion. Under the circumstances, no apology is needed for bringing out this edition.

In the preparation of this edition the authors have not confined themselves to merely incorporating the subsequent case-law, but have examined all the old cases once again with a view to remove any defects that might have crept in. The legislative changes in the provisions of the Code and recent case-law have rendered it necessary to re-write many portions of the work, abridging the discussion where the point has been settled by authority, and fully discussing points about which a conflict of opinion has arisen. Beyond this, however, the method of treatment of the subject has not been departed from.

The case-law has been brought up-to-date. References to Official Reports are invariably given in all cases found in the Official Reports.

The authors feel it their duty to express their gratefulness to the Bench and the Bar for their very cordial reception of the previous editions of their work.

Their thanks are also due to Messrs. S. Appu Rao, B.A., B.L., Advocate, Coimbatore, N. Krishna Iyer, M.A., B.L., Coimbatore, G. B. Shidhaye, B.A., LL.B., and V. S. Balkundi, B.A., LL.B., of Nagpur, for the very valuable help rendered by them in revising and bringing the work up-to-date.

V. V. C.

K. N. A.

January 1st, 1940.

PREFACE TO THE SECOND EDITION

THE CORDIAL RECEPTION accorded by the members of the Bench and the Bar to the first edition of this work, which was almost exhausted in less than a year from the date of its publication has necessitated the publication of a second edition of the same. The Authors feel it their duty to thank the members of the legal profession for the warm reception and high appreciation of the work.

THIS SECOND EDITION has been carefully revised, brought up-to-date and re-written, wherever necessary, in the light of the various decisions since the publication of the first edition.

The style in printing has also been changed to facilitate easy reading. In the synopsis, the main headings have been differentiated from subordinate headings by a difference in type. The difficulty in reading the closely printed matter of the foot-notes has been removed by giving a separate line for each case which thus gives a great relief to the eye.

February 11th, 1935.

V. V. C.

K. N. A.



PREFACE TO THE FIRST EDITION

JUDICIAL DECISIONS on the Law of Civil Procedure occupy a considerable portion of our Law Reports and Digests. There are, on many points of importance, conflicts of opinion between the several High Courts, and sometimes between the decisions of the same High Court. Full Bench decisions of various High Courts and decisions of the Judicial Committee of the Privy Council, no doubt, often help to settle such conflicts, but on a few occasions, while settling the conflicts, they open up further fields for controversy. Decisions differing in the interpretation or application of a ruling of the Judicial Committee are not rare.

In this state of judicial decisions, a practitioner or a Judge, who has to ascertain the law on any important point of procedure, has to collect all the decisions bearing on the point, study them carefully, and then deduce, *if possible*, a definite rule of law. In cases of conflicts of opinion, he has to find out how far a decision of the Full Bench or of the Judicial Committee, has settled, or helped to settle the conflict. In the absence of such help, he has to choose between the conflicting views, and find arguments in support of the view adopted by him. This is no doubt an interesting process of ascertaining the law, but the regret of a Judge or a busy practitioner is that sometimes, he does not find the necessary time for it.

It is the aim of the authors to be of some service to the Bench and the Bar in this direction, and this, they hope, will justify the addition of one more to the already existing commentaries on the Code. The authors have attempted to ascertain all the important questions that arise for consideration under the several provisions of the Code and have tried to collect together all the decisions of all the Superior Courts of India and Burma and of the Judicial Committee of the Privy Council, on such

PREFACE TO THE FIRST EDITION

questions. These decisions have been studied carefully and analytically and definite rules of law, wherever possible, have been attempted to be deduced therefrom. In cases of conflicts of opinion, the authors have discussed the questions on first principles and have attempted to test the conflicting views in the light of these principles and to arrive at definite conclusions.

In the course of their practice at the Bar, the authors have often found that there are still many difficulties arising in daily practice, which are not covered either by the provisions of the Code or by the existing voluminous case-law. An attempt has been made to solve these difficulties by discussing such questions and suggesting solutions. In thus discussing subjects not provided for in the Code, the authors have kept in view the future course of law on the subject.

The application of a rule of law to the facts of particular cases is a matter of some difficulty in some cases. It has, therefore, been indicated, within brackets, against important decisions collected in the foot-notes, as to how rules of law have been applied to the facts of those cases. In the commentary, the general propositions of law as derived from the decisions are given. These, the authors hope, will enable the lawyer to pick out the case he requires without much loss of time.

The conclusions of law, dissociated from facts, or discussions of law, are sometimes necessary for quick reference during the course of arguments in Courts. The particular pages, where such conclusions can be found, are indicated in every case with only a few exceptions in the case of very old Reports.

August 31st, 1932.

V. V. C.

K. N. A.

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10	12	11	...	2	50	234	234	...
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107	582	" 3	28	28	...
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109	595	595	" 5
110	596	596	" 6	29	29	...
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115	622	622	35	...	" 12	35	35	...
116	631	" 13	34	34	...
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118	634	" 2	43	43	...
119	635	635	" 3	45	45	...
120	638 & 639	638	" 4	44A	44A	...
121	" 5	144B, 44	144B	...
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124	"	O. 3, R. 1	36	36, 49, 50, 417, 418 & 435.	...
125	"	" 2	37	37	...
126	"	" 3	38	38	...
127	"	" 4	39	39	...
128	"	" 5	40	39 & 40	...
129	652, para. 3	" 6	41	41	...
130	652, para. 2	O. 4, R. 1	48	48	...
131	652, para. 4	" 2	58, last para.	58	...
132	640	640	...	21	O. 5, R. 1	64	64, 68	...
133	641	641, 93	...	22, 23	" 2	65
134	" 3	66	66 & 67	...
135	642	642	" 4	67	66 & 67	...
135A	New	" 5	68	64 & 68	...
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" 8	71	71	" 2
" 9	72	72	...	47	" 3	"
" 10	73	73 & 74	...	48	" 4	"
" 11	74	73 & 74	...	48	" 5	"
" 12	75	75	...	49	" 6	111	111	...
" 13	76	76	" 7
" 14	77	77	...	61	" 8
" 15	78	78	...	53	" 9	112	112	...
" 16	79	79 & 80	...	51	" 10	113	113, 370	...
" 17	80	80	...	55	O. 9, R. 1	96	96	...
" 18	81	81	...	56	" 2	97	97	5
" 19	82	82	...	57	" 3	98	98 & 99	...
" 20	82, para. 2, 83, 84	82, 83, 84	...	57, 58, 85	" 4	99	98 & 99	...
" 21	85	85	...	59	" 5	99A	...	...
" 22	86	86	...	...	" 6	100	100, 101	...
" 23	85	85	...	59	" 7	101	100 & 101	...
" 24	87, 88	87, 88	...	...	" 8	102	102 & 103	...
" 25	89	89 & 104	...	60	" 9	103	103, 108,	...
" 26	90	90, 92	...	66	" 10	105	109, 588.	...
" 27	422	422 & 468	...	62, 68	" 11	106	105	...
" 28	468	468, 561	...	62, 348	" 12	107	106	...
" 29	468	468	...	62	" 13	107	107	...
" 30	91, 92	91, 92	...	64, 65	" 14	108	108, 109,	...
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" 2	"	O. 10, R. 1	117	109	...
" 3	"	" 2	118	114	...
" 4	"	" 3	119	118 & 119	...
" 5	"	" 4	120	119	...
" 6	"	O. 11, R. 1	121	120	...
" 7	"	" 2
" 8	"	" 3	123
" 9	"	" 4
" 10	"	" 5	124
" 11	"	" 6	125	125	...
" 12	"	" 7
" 13	"	" 8	126	126	...
" 14	51, 115	51	...	27	" 9
" 15	51, 52, 115	51 & 52	...	27	" 10
" 16	" 11	127
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" 18	Cl. 53	Cl. 53	...	29	" 13	129 para 2	129	...
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" 2	50	50	...	26	" 15	131	130	...
" 3	" 16	...	131	...
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" 5	50, para. 5	50, Cl. 5	" 18	193 & 194
" 6	50, para. 6	50, Cl. 6	...	26	" 19	...	193 & 194	...
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" 8	" 21	196	195	...
" 9	58	58	...	38	" 22	...	196	...
" 10	57	57	...	30	" 23
" 11	53, 54	53, 54	...	29, 31, 32	O. 12, R. 1
" 12	55	55	" 2	128
" 13	56	56	...	86	" 3	"
" 14	59	58, 59, 62 & 63	...	89	" 4	"
" 15	60	60	" 5	"
" 16	61	61	" 6	"
" 17	62	58, 62, 63	...	89	" 7	"

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" 2	493	493 & 493	...	98	" 2	598	598	...
" 3	494	494	...	95	" 3	600	600	...
" 4	496	498 & 493	...	98	" 4
" 5	495	" 5	601	601	...
" 6	493	493	" 6	602	602	...
" 7	499	499	...	...	" 7	608	...	...
" 8	500	...	...	91	" 8	604	...	...
" 9	501	501	...	91	" 9	...	...	...
" 10	502	502	...	95 & 248	" 10	605	...	...
O.40, R. 1	508	508	...	248	" 11	606	606	...
" 2	508 Cl. (a)	508	" 12	607
" 3	508 Cl. (a) to (b)	508 Cl. (a) to (b)	...	248	" 13	608	608	...
" 4	" 14	609
" 5	504	504	...	92	" 15	610	610	...
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" 2	542	542	...	884	" 17
" 3	543	543	...	885	O.46, R. 1	617	617	26
" 4	544	544	...	886	" 2	618	618	29
" 5	545	545	...	887	" 3	619	619	82, 88
" 6	546	546	888, 888	888	" 4	620	620	84
" 7	547	547	...	889	" 5	621	621	...
" 8	...	...	...	890	" 6	621A	...	...
" 9	548	548	...	891	" 7	621B	...	...
" 10	549	549	...	892	O.47, R. 1	622	622	...
" 11	551	551	...	893	" 2	624	624	...
" 12	552	552	...	894	" 3	625	625	...
" 13	553	553	...	895	" 4	626	626 & 629	...
" 14	554	554	...	896	" 5	627	...	...
" 15	555	555	...	897	" 6	628	627	...
" 16	556	556	...	898	" 7	629	629	...
" 17	557	557	...	899	" 8	630	630	...
" 18	558	558	...	900	" 9	630 last para.	629	...
" 19	559	559	...	901	O.48, R. 1	93	93	2
" 20	560	560	...	902	" 2	94 Cl. 2, 122
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" 22	562	562	...	904	O.49, R. 1	686
" 23	563	563	...	905	" 2
" 24	564	564	...	906	" 3	688
" 25	565	565	...	907	O.50, R. 1
" 26	566	566	...	908	O.51, R. 1	...	...	...
" 27	567	567	...	909	" 2	...	...	...
" 28	568	568	...	910	" 3	...	...	...
" 29	569	569	...	911	" 4	...	...	...
" 30	570	570	...	912	" 5	...	...	...
" 31	571	571	...	913	" 6	...	...	...
" 32	572	572	...	914	" 7	...	...	...
" 33	573	573	...	915	" 8	...	...	...
" 34	574	574	...	916	" 9	...	...	...
" 35	575	575	...	917	" 10	...	...	...
" 36	576	576	...	918	" 11	...	...	...
" 37	577	577	...	919	" 12	...	...	...
" 38	578	578	...	920	" 13	...	...	...
" 39	579	579	...	921	" 14	...	...	...
" 40	580	580	...	922	" 15	...	...	...
" 41	581	581	...	923	" 16	...	...	...
" 42	582	582	...	924	" 17	...	...	...
" 43	583	583	...	925	" 18	...	...	...
" 44	584	584	...	926	" 19	...	...	...
" 45	585	585	...	927	" 20	...	...	...
" 46	586	586	...	928	" 21	...	...	...
" 47	587	587	...	929	" 22	...	...	...
" 48	588	588	...	930	" 23	...	...	...
" 49	589	589	...	931	" 24	...	...	...
" 50	590	590	...	932	" 25	...	...	...
" 51	591	591	...	933	" 26	...	...	...
" 52	592	592	...	934	" 27	...	...	...
" 53	593	593	...	935	" 28	...	...	...
" 54	594	594	...	936	" 29	...	...	...
" 55	595	595	...	937	" 30	...	...	...
" 56	596	596	...	938	" 31	...	...	...
" 57	597	597	...	939	" 32	...	...	...
" 58	598	598	...	940	" 33	...	...	...
" 59	599	599	...	941	" 34	...	...	...
" 60	600	600	...	942	" 35	...	...	...
" 61	601	601	...	943	" 36	...	...	...
" 62	602	602	...	944	" 37	...	...	...
" 63	603	603	...	945	" 38	...	...	...
" 64	604	604	...	946	" 39	...	...	...
" 65	605	605	...	947	" 40	...	...	...
" 66	606	606	...	948	" 41	...	...	...
" 67	607	607	...	949	" 42	...	...	...
" 68	608	608	...	950	" 43	...	...	...
" 69	609	609	...	951	" 44	...	...	...
" 70	610	610	...	952	" 45	...	...	...
" 71	611	611	...	953	" 46	...	...	...
" 72	612	612	...	954	" 47	...	...	...
" 73	613	613	...	955	" 48	...	...	...
" 74	614	614	...	956	" 49	...	...	...
" 75	615	615	...	957	" 50	...	...	...
" 76	616	616	...	958	" 51	...	...	...
" 77	617	617	...	959	" 52	...	...	...
" 78	618	618	...	960	" 53	...	...	...
" 79	619	619	...	961	" 54	...	...	...
" 80	620	620	...	962	" 55	...	...	...
" 81	621	621	...	963	" 56	...	...	...
" 82	622	622	...	964	" 57	...	...	...
" 83	623	623	...	965	" 58	...	...	...
" 84	624	624	...	966	" 59	...	...	...
" 85	625	625	...	967	" 60	...	...	...
" 86	626	626	...	968	" 61	...	...	...
" 87	627	627	...	969	" 62	...	...	...
" 88	628	628	...	970	" 63	...	...	...
" 89	629	629	...	971	" 64	...	...	...
" 90	630	630	...	972	" 65	...	...	...
" 91	631	631	...	973	" 66	...	...	...
" 92	632	632	...	974	" 67	...	...	...
" 93	633	633	...	975	" 68	...	...	...
" 94	634	634	...	976	" 69	...	...	...
" 95	635	635	...	977	" 70	...	...	...
" 96	636	636	...	978	" 71	...	...	...
" 97	637	637	...	979	" 72	...	...	...
" 98	638	638	...	980	" 73	...	...	...
" 99	639	639	...	981	" 74	...	...	...
" 100	640	640	...	982	" 75	...	...	...
" 101	641	641	...	983	" 76	...	...	...
" 102	642	642	...	984	" 77	...	...	...
" 103	643	643	...	985	" 78	...	...	...
" 104	644	644	...	986	" 79	...	...	...
" 105	645	645	...	987	" 80	...	...	...
" 106	646	646	...	988	" 81	...	...	...
" 107	647	647	...	989	" 82	...	...	...
" 108	648	648	...	990	" 83	...	...	...
" 109	649	649	...	991	" 84	...	...	...
" 110	650	650	...	992	" 85	...	...	...
" 111	651	651	...	993	" 86	...	...	...
" 112	652	652	...	994	" 87	...	...	...
" 113	653	653	...	995	" 88	...	...	...
" 114	654	654	...	996	" 89	...	...	...
" 115	655	655	...	997	" 90	...	...	...
" 116	656	656	...	998	" 91	...	...	...
" 117	657	657	...	999	" 92	...	...	...
" 118	658	658	...	1000	" 93	...	...	...
" 119	659	659	...	1001	" 94	...	...	...
" 120	660	660	...	1002	" 95	...	...	...
" 121	661	661	...	1003	" 96	...	...	...
" 122	662	662	...	1004	" 97	...	...	...
" 123	663	663	...	1005	" 98	...	...	...
" 124	664	664	...	1006	" 99	...	...	...
" 125	665	665	...	1007	" 100	...	...	...
" 126	666	666	...	1008	" 101	...	...	...
" 127	667	667	...	1009	" 102	...	...	...
" 128	668	668	...	1010	" 103	...	...	...
" 129	669	669	...	1011	" 104	...	...	...
" 130	670	670	...	1012	" 105	...	...	...
" 131	671	671	...	1013	" 106	...	...	...
" 132	672	672	...	1014	" 107	...	...	...
" 133	673	673	...	1015	" 108	...	...	...
" 134	674	674	...	1016	" 109	...	...	...
" 135	675	675	...	1017	" 110	...	...	...
" 136	676	676	...	1018	" 111	...	...	...
" 137	677	677	...	1019	" 112	...	...	...
" 138	678	678	...	1020	" 113	...	...	...
" 139	679	679	...	1021	" 114	...	...	...
" 140	680	680	...	1022	" 115	...	...	...
" 141	681	681	...	1023	" 116	...	...	...
" 142	682	682	...	1024	" 117	...	...	...
" 143	683	683	...	1025	" 118	...	...	...
" 144	684	684	...	1026	" 119	...	...	...
" 145	685	685	...	1027	" 120	...	...	...
" 146	686	686	...	1028	" 121	...	...	...
" 147	687	687	...	1029	" 122	...	...	...
" 148	688	688	...	1030	" 123	...	...	...
" 149	689	689	...	1031	" 124	...	...	...
" 150	690	690	...	1032	" 125	...	...	...
" 151	691	691	...	1033	" 126	...	...	...
" 152	692	692	...	1034	" 127	...	...	...
" 153	693	693	...	1035	" 128	...	...	...
" 154	694	694	...	1036	" 129	...	...	...
" 155	695	695	...	1037	" 130	...	...	...
" 156	696	696	...	1038	" 131	...	...	...
" 157	697	697	...	1039	" 132	...	...	...
" 158	698	698	...	1040	" 133
" 159	699	699	...	1041	" 134
" 160	700	700	...	1042	" 135
" 161	701	701	...	1043	" 136
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COMPARATIVE TABLE OF THE SECTIONS OF THE CODES (1882 AND 1908.

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4	S. 4	50	O. 7, rr. 1, 2, 4, 5, 6.	102	O. 9, r. 8.
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5	S. 7.	52	O. 6, r. 15 (2, 3).	104	Omitted.
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20 & 21	Omitted.	69	O. 5, r. 6.	122	Cf. O. 48, r. 2.
22	Ss. 22, 23 (1).	70	O. 5, r. 7.	123	O. 11, r. 3.
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558	O. 41, r. 19.	605	O. 45, r. 10.	649	Ss. 36, 37.
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CHRONOLOGICAL TABLE OF AMENDING ACTS (*concluded.*)

Year.	No. of Act.	Short Title.	How affected.
1925	XX	The Code of Civil Procedure (Amendment) Act	Amending S. 60.
1925	XXIII	The Legislative Members Exemption Act	Inserting new S. 1-5A.
1925	XXXII	The Oath Courts (Supplementary) Act	Amending S. 122 and S. 123
1926	1	The Small Cause Courts (Attachment of immovable property) Act	1. Amending S. 7. 2. Inserting new R. 13 in O.
1926	VI	The Code of Civil Procedure (Amendment) Act	Amending S. 103.
1926	XXII	The Code of Civil Procedure (Second Amendment) Act	Amending O. 3 R. 1 and R.
1926	XXX	The Negotiable Instruments (Interest) Act	Amending O. 37 R. 2 and Fo in Appendix B.
1926	XXXIV	The Sind Courts (Supplementary) Act	Amending S. 122 and S. 123
1927	X	The Repealing and Amending Act	Amending — i. O. 5 R. 27 and R. 28. ii. Heading of O. 28. iii. O. 28 R. 1, R. 2 and R.
1928	XVIII	The Repealing and Amending Act	Adding new sub-section (3) to
1929	XXI	The Transfer of Property (Amendment) Supplementary Act	1. Substituting new Rules 2 to and 15 for the old Rules i 2. Substituting new Forms 3 Appendix D for the old Fo 3. Inserting new Rule 8A in O
1930	XVI	The Transfer of Property (Amendment) Supplementary Act	Amending O. 43 R. 1.
1932	X	The Code of Civil Procedure (Amendment) Act	1. Amending S. 78. 2. Inserting new Rules 19, 20 and 22 in O. 26 with heading.
1934	XXXV	The Amending Act	Amending S. 2, clause (17) sub-section (1), clause (j), O. and R. 28 and O. 28.
1936	XXI	The Code of Civil Procedure (Amendment) Act	1. Amending S. 51 and O. 21 2. Substituting new Rule 40 in place of the old Rule.
1937	VIII	The Code of Civil Procedure (Amendment) Act.	1. Inserting new S. 44A. 2. Amending O. 21 R. 22.
1937	IX	The Code of Civil Procedure (Second Amendment) Act	Amending S. 60.
1937	XVI	The Code of Civil Procedure (Third Amendment) Act	Amending O. 32 R. 3.
1937		The Government of India (Adaptation of Indian Laws) Order	
1939	XXVI	The Code of Civil Procedure (Amendment) Act	Amending O. 21 R. 48.

ABBREVIATIONS

A. I. R. 1921 All., Bom., etc.	...	All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
All. or I. L. R. All....	...	Indian Law Reports, Allahabad Series.
Agra. ...	...	Agra High Court Reports.
All. L. Jour.	...	Allahabad Law Journal.
All. W. N.	...	Allahabad Weekly Notes.
App. Cas.	...	Law Reports, Appeal Cases (England).
Beng. L. R.	...	Bengal Law Reports.
Bom. or I. L. R. Bom.	...	Indian Law Reports, Bombay Series.
Bom. H. C. R.	...	Bombay High Court Reports.
Bom. L. R.	...	Bombay Law Reporter.
Bom. P. J.	...	Bombay Printed Judgments.
Bourke. ...	...	Bourke's Reports.
Bur. L. Jour.	...	Burma Law Journal.
Bur. L. R.	...	Burma Law Reports.
Bur. L. Tim.	...	Burma Law Times.
Cal. or I. L. R. Cal.	...	Indian Law Reports, Calcutta Series.
Cal. L. Jour.	...	Calcutta Law Journal.
Cal. L. R.	...	Calcutta Law Reports.
Cal. W. N.	...	Calcutta Weekly Notes.
C. P. L. R.	...	Central Provinces Law Reports.
Cor. ...	...	Coryton's Reports.
Cr. C. ...	...	Criminal Cases.
Cr. L. J. ...	...	Criminal Law Journal.
E. R. ...	...	English Reports (England).
Hay. ...	...	Hay's Reports.
Hyde. ...	...	Hyde's Reports.
Ind. App.	...	Law Reports, Indian Appeals.
Ind. Cas. ...	...	Indian Cases.
Ind. Jur. (N.S.)	...	Indian Jurist (New Series).
Ind. Jur. (O.S.)	...	Indian Jurist (Old Series).
Ind. Rul. ...	...	Indian Rulings.
Kar. (I. L. R.)	...	Indian Law Reports, Karachi Series.
K. B. ...	...	Law Reports, King's Bench (England).
Knapp. ...	...	Knapp's Reports.
Lah. or I. L. R. Lah.	...	Indian Law Reports, Lahore Series.
Lah. L. Jour.	...	Lahore Law Journal.
L. J. ...	...	Law Journal (England).
L. R. ...	...	Law Reports (England).
L. R. A. ...	...	Law Reporter, Allahabad.
Low. Bur. Rul.	...	Lower Burma Rulings.

CHRONOLOGICAL TABLE OF AMENDING ACTS (*concluded.*)

No. of Act.	Short Title.	How affected.
XX	The Code of Civil Procedure (Amendment) Act	Amending S. 60.
XXIII	The Legislative Members Exemption Act	Inserting new S. 1 5A.
XXXII	The Oudh Courts (Supplimentary) Act	Amending S. 122 and S. 123.
I	The Small Cause Courts (Attachment of immovable property) Act	1. Amending S. 7. 2. Inserting new R. 13 in O. 38.
VI	The Code of Civil Procedure (Amendment) Act	Amending S. 103.
XXII	The Code of Civil Procedure (Second Amendment) Act	Amending O. 3 R. 1 and R. 4.
XXX	The Negotiable Instruments (Interest) Act	Amending O. 37 R. 2 and Form 1 in Appendix B.
XXXIV	The Sind Courts (Supplimentary) Act	Amending S. 122 and S. 123.
X	The Repealing and Amending Act	Amending — i. O. 5 R. 27 and R. 28. ii. Heading of O. 28. iii. O. 28 R. 1, R. 2 and R. 3.
XVIII	The Repealing and Amending Act	Adding new sub-section (3) to S.
XXI	The Transfer of Property (Amendment) Supplementary Act	1. Substituting new Rules 2 to 8, 10 and 15 for the old Rules in O. 2. Substituting new Forms 3 to 10 in Appendix D for the old Forms. 3. Inserting new Rule 8A in O. 34.
XVI	The Transfer of Property (Amendment) Supplementary Act	Amending O. 43 R. 1.
X	The Code of Civil Procedure (Amendment) Act	1. Amending S. 78. 2. Inserting new Rules 19, 20, 21 and 22 in O. 26 with heading.
XXXV	The Amending Act	Amending S. 2, clause (17), S. 2, sub-section (1), clause (j), O. 5 R. 28 and O. 28.
XXI	The Code of Civil Procedure (Amendment) Act	1. Amending S. 51 and O. 21 R. 2. 2. Substituting new Rule 40 in C in place of the old Rule.
VIII	The Code of Civil Procedure (Amendment) Act.	1. Inserting new S. 44A. 2. Amending O. 21 R. 22.
IX	The Code of Civil Procedure (Second Amendment) Act	Amending S. 60.
XVI	The Code of Civil Procedure (Third Amendment) Act	Amending O. 32 R. 3.
	The Government of India (Adaptation of Indian Laws) Order	
XXVI	The Code of Civil Procedure (Amendment) Act	Amending O. 21 R. 48.

C. A.	...	...	...	...	Court of Appeal.
Cl.	...	...	...	...	Clause.
Cr.	...	...	...	...	Criminal.
F. B.	...	...	...	...	Full Bench.
F. N.	...	...	...	...	Foot-note.
Jour.	...	...	...	...	Journal.
N.	...	...	...	...	Note.
O.	...	...	...	...	Order.
P.	...	...	...	...	Page.
P. C.	...	...	...	...	Privy Council.
Pt.	...	...	...	...	Point.
R.	...	...	...	...	Ryle.
S.	...	...	...	...	Section.
S. B.	...	...	...	...	Special Bench.

In Foot-notes —

('66) means (1866)

('04) means (1904)

('27) means (1927)

('39) means (1939)

Full year reference is given prior to 1866, like (1818) and *not* ('18), (1865) and *not* ('65) and so on and to all English cases.

Important Note:—References to Official Reports are invariably given in all cases found in the Official Reports.

Luck. or I. L. R. Luck.	...	...	Indian Law Reports, Lucknow
Luck. Cas.	...	...	Lucknow Cases.
Mad. or I. L. R. Mad.	...	...	Indian Law Reports, Madras
Mad. H. C. R.	...	...	Madras High Court Reports
Mad. Jur.	...	...	Madras Jurist.
Mad. L. Jour.	...	...	Madras Law Journal.
Mad. L. Tim.	...	...	Madras Law Times.
Mad. L. W.	...	...	Madras Law Weekly.
Mad. W. N.	...	...	Madras Weekly Notes.
Marsh.	...	...	Marshall's Reports.
Moo. Ind. App.	...	...	Moore's Indian Appeals.
Moo. P. C. C.	...	...	Moore's Privy Council Cases
Nag. (I. L. R.)	...	...	Indian Law Reports, Nagpur
Nag. L. Jour.	...	...	Nagpur Law Journal.
Nag. L. R.	...	...	Nagpur Law Reports.
N. W. P. H. C. R.	...	...	North-West Provinces High Court Reports
Oudh Cas.	...	...	Oudh Cases.
Oudh L. Jour.	...	...	Oudh Law Journal.
Oudh W. N.	...	...	Oudh Weekly Notes.
Pat. or I. L. R. Pat.	...	...	Indian Law Reports, Patna
Pat. H. C. C.	...	...	Patna High Court Cases.
Pat. L. Jour.	...	...	Patna Law Journal.
Pat. L. Tim.	...	...	Patna Law Times.
Pat. L. R.	...	...	Patna Law Reporter.
Pat. L. W.	...	...	Patna Law Weekly.
Pat. W. N.	...	...	Patna Weekly Notes.
Pun. L. R.	...	...	Punjab Law Reporter.
Pun. Re.	...	...	Punjab Record.
Pun. W. R.	...	...	Punjab Weekly Reporter.
Q. B.	...	...	Law Reports, Queen's Bench
R. & J.'s.	...	...	Rafique and Jackson's Oudh Decisions.
Rang.	...	...	Indian Law Reports, Rangoon
Rang. L. R.	...	...	Rangoon Law Reports.
R. R.	...	...	Revised Reports (England)
R. S. C.	...	...	Rules of the Supreme Court
Sar.	...	...	Saraswati's Privy Council Cases
Shome L. R.	...	...	Shome's Law Reports.
Sind L. R.	...	...	Sind Law Reporter.
Suther.	...	...	Sutherland's Privy Council Cases
Suth. W. R.	...	...	Sutherland's Weekly Reports
Times L. R.	...	...	Times Law Reports.
U. P. L. R.	...	...	United Provinces Law Reports
U. P. B. R.	...	...	United Provinces Board of Reports
Upp. Bur. Bul.	...	...	Upper Burma Bulletin.
Weir.	...	...	Weir's Criminal Bulletin.
W. R. (Eng.)	...	...	Weekly Reporter (England)

C. A.	...	...	...	...	Court of Appeal.
Cl.	...	...	...	...	Clause.
Cr.	...	...	...	...	Criminal.
F. B.	...	...	...	...	Full Bench.
F. N.	...	...	...	...	Foot-note.
Jour.	...	...	...	...	Journal.
N.	Note.
O.	Order.
P.	Page.
P. C.	Privy Council.
Pt.	Point.
R.	Ryle.
S.	Section.
S. B.	Special Bench.

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THE CODE OF CIVIL PROCEDURE, 1908

(ACT V OF 1908)

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THE
CODE OF CIVIL PROCEDURE
ACT V OF 1908
Volume I

ACT No. 5 of 1908.

[21st March, 1908.]

An Act to consolidate and amend the laws relating to the
Procedure of the Courts of Civil Judicature.

WHEREAS it is expedient to consolidate and amend² the
laws relating to the procedure of the Courts of Civil Judicature;¹⁷
it is hereby³ enacted as follows:—

PREAMBLE

Synopsis

- | | |
|--|--|
| 1. History of the Code. | 10. Reference to Preamble and headings
prefixed to Sections. |
| 2. Scope and applicability of the Code. | 11. Marginal notes to Sections. |
| 3. Retrospective operation of the Code. | 12. Illustrations. |
| 4. Code, if and when exhaustive. | 13. Punctuation marks. |
| 5. Inherent powers—See Section 151. | 14. Proviso. |
| 6. Judicial discretion. | 15. Judicial precedents. |
| 7. Interpretation of statutes—General. | 16. English and American decisions. |
| 8. Reference to pre-existing state of the
law. | 17. "Laws relating to the procedure of the
Courts of Civil Judicature." |
| 9. Reference to proceedings of the Legis-
lature. | 18. Revenue Courts. |
| | 19. Mamlatdars' Courts. |

Other Topics

"Consolidate and amend." See Note 2.
"Courts of Civil Judicature." See Note 17, Pt. 2.
"Enforcement of rights under the Code." See
Note 3.

Plain and natural meaning. See Note 7.
Previous procedure. See Note 1.
Sections and Rules. See Note 7, Pt. 15.

1. History of the Code.—Before the year 1859, there was no law of procedure applicable to the *whole* of India. The Courts in the Presidency Towns were governed by their own rules and orders and certain Acts,¹ while the Provincial Courts were governed by certain Regulations and Acts particularly applicable to them.

In 1859 the first Civil Procedure Code² was passed and it enacted that *where it came into force*, the procedure of Civil Courts was to be regulated by it alone.³

The Code did not, however, apply to Courts established by Royal Charter and consequently the Supreme Courts and the Sudder Dewanny Adawlat followed their original procedure.

In 1862 when the Supreme Courts and the Sudder Courts were abolished, and the High Courts established, the Code was made applicable to the High Courts as well.

After various amendments in the years 1860, 1861 and 1871,⁴ a second Code was enacted in 1877,⁵ which very considerably amended and altered and added to the Code of 1859.⁶

The Code of 1877 was soon followed by two amending Acts, Act XVIII of 1878 and Act XII of 1879, and in the year 1882 a third Code came into being as Act XIV of 1882.

This was also amended and repealed in part by various subsequent Acts⁷ and in 1908, the present Code was enacted consolidating and amending the law up to that date.⁸

2. Scope and applicability of the Code.—The Code, as the preamble shows, consolidates and amends the laws relating to the procedure of the Courts of Civil Judicature in India. The object of consolidation is “to collect the statutory law bearing upon a particular subject and to bring it down to date in order that it may form a useful Code applicable to the circumstances existing at the time when the consolidating Act was passed.”¹ In the case therefore of a consolidating statute the construction must be not with reference to the circumstances existing at the time of the preceding Acts but in relation to those existing at the time of the consolidating Act itself² and the law should thenceforth be ascertained from that enactment itself instead of

Preamble — Note 1

1. Act XVIII of 1852 and Act VI of 1853.
2. Act VIII of 1859.
3. Section 388 of Act VIII of 1859.
4. Some of the Acts passed modifying and amending the Code are as follows:—
 Act IV of 1860—Civil Procedure—Repealed by Act XXIII of 1861 and by Act X of 1877.
 Act XLIII of 1860—Amending Act—
 Repealed by Act VIII of 1868 ;
 Do. do. by Act XIV of 1870 ;
 Do. do. by Act XII of 1873 ;
 Do. do. by Act XVI of 1874 ;
 Do. do. by Act XII of 1876.
 Act XXIII of 1861 — Civil Procedure —
 Repealed by Act X of 1877.
 Act XXXII of 1871—Civil Courts—Repealed
 by (Excepting S. 40) Act XIII of 1879 (S. 40
 repealed by Act XXII of 1859).
5. Act X of 1877.

6. Whereas the 1859 Code contained 388 Sections, the 1877 Code contained 652.
7. Repealed in part by—Acts XIV of 1885—S. 3; XIV of 1886 — S. 2; X of 1886 — S. 24 (2); VIII of 1887 — S. 2; XIII of 1889 ; VIII of 1890—S. 2.
 Amended by Acts XV of 1882—S. 3 ; VII of 1887 — S. 11 ; VI of 1888 — Ss. 2-8 ; X of 1888—Ss. 1-3 ; VIII of 1890—S. 53 ; VI of 1892 — Ss. 2-8 ; V of 1894 ; VII of 1895 — Ss. 1-2 ; XIII of 1895.
8. Act V of 1908. See the Preamble to the present Act.

Note 2

1. ('95) 22 Cal 788 (798) : 22 Ind App 107 (P C). ('30) AIR 1930 All 225 (230) : 52 All 619 (FB). (“Consolidation” means reduction to a systematic form of the whole of the statute law relating to the same subject-matter as illustrated by judicial decisions.)
2. ('95) 22 Cal 788 (798) : 22 Ind App 107 (P C).

searching for the law as laid down in prior decisions.³ It must be noted that in applying a consolidating Act, statutes not expressly repealed should be held to continue in force without modification.^{3a}

The Code applies to the procedure of all Courts of Civil Judicature except that it does not affect any special or local law or any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force.⁴ See also Section 4, sub-section (1). As a matter of fact where there is a conflict between the Civil Procedure Code and a special law, the latter prevails over the former on the principle that the special law prevails over the general.^{4a}

For instance, the jurisdiction and procedure in Insolvency is specially provided for by the Presidency Towns Insolvency Act III of 1909 and the Provincial Insolvency Act V of 1920,⁵ the jurisdiction and procedure in testamentary and intestate matters

3. ('96) 28 Cal 563 (571, 572): 23 Ind App 18 (PC).
 ('01) 28 Cal 517 (523, 529, 530).
 ('09) 36 Cal 354 (364).
 ('09) 4 Ind Cas 442 (445) (Cal).
 ('26) AIR 1926 Mad 906 (908): 49 Mad 728 (FB).
 (A reference to earlier case-law is however permitted for construing the words of the statute but not for the purpose of adding something to it.)
 ('23) AIR 1923 Mad 523 (525): 46 Mad 605 (FB).
- 3a. ('30) AIR 1930 All 225 (230): 52 All 619 (FB).
4. See Section 4 of the Code.
 ('32) AIR 1932 Oudh 199 (201): 7 Luck 716 (F B). (C. P. C. and U. P. Land Revenue Act, 1901.)
 ('21) AIR 1921 P C 80 (82, 84): 46 Cal 481: 48 Ind App 76 (P C). (Code applies to High Courts except where otherwise provided by Letters Patent or the Rules for the exercise of Original Civil Jurisdiction.)
 ('25) AIR 1925 All 154 (155): 47 All 179. (Code applies to proceedings under the Arbitration Act, 1891.)
 ('22) AIR 1922 All 55 (55). (The provisions of the Code as to cross-objections do not apply to Letters Patent appeals.)
 ('19) AIR 1919 Bom 133 (134): 43 Bom 363. (Procedure in S. 145 of the Army Act overrides S. 60 of the Code.)
 ('84) AIR 1934 Cal 725 (729): 61 Cal 450. (The C. P. Code is not applicable to proceedings before the controller of accounts under the Patents and Designs Act.)
 ('32) AIR 1932 Cal 1 (2): 59 Cal 370. (Rules under the Letters Patent prevail against rules of the Code.)
 ('31) AIR 1931 Cal 688 (692): 58 Cal 510. (C. P. Code applies to Original Side of High Courts subject to O. 49 and High Court rules.)
 ('31) AIR 1931 Cal 604 (605): 59 Cal 68. (C. P. C. applies to proceedings in Civil Courts under Ss. 476, 476B of the Cr. P. Code.)
 ('09) 1 Ind Cas 55 (55, 56) (Lah). (Insolvency proceedings taken under Punjab Laws Act, IV of 1872—Ss. 351 and 354 of the C. P. C. of 1882 are not applicable.)
 ('88) AIR 1938 Mad 497 (498). (Madras Village Courts Act, S. 15—Such Courts being

special tribunals, general provisions of C. P. Code do not apply.)

- (35) AIR 1935 Mad 755 (757). (Provisions of Civil Procedure Code are not in terms applicable to the proceedings of the Hindu Religious Endowments Board under Madras Hindu Religious Endowments Act.)
- (30) AIR 1930 Mad 795 (795). (C. P. Code does not apply to proceedings before village Courts.)
- (16) AIR 1916 Mad 544 (546). (Code does not apply to village Munsif's Court, following 13 Mad 145.)
- (32) AIR 1932 Oudh 163 (164). (S. 109, C. P. Code is subject to special jurisdiction under S. 12 (1), Oudh Courts Act.)
- (31) AIR 1931 Oudh 385 (385). (Oudh Laws Act, S. 19—Recording of evidence—O. 18, R. 6 excluded.)
- (36) AIR 1936 Pat 150 (150). (C. P. C. does not apply to the Panchayat Court under Bihar and Orissa Village Administration Act.)
- (06) 3 Low Bur Rul 241 (242). (Cases under Code of 1882—Special provisions of Insolvency Act not overridden by the Code.)
- (11) 9 Ind Cas 712 (715): 4 Sind L R 196. (Proceedings in arbitration—C. P. C. cannot be strictly applied.)
- (09) 3 Sind L R 162 (163). (Stay of proceedings under the Arbitration Act must be made under S. 19 thereof and not under Para. 18 of the Second Schedule of the Code.)
- (12) 17 Ind Cas 902 (902): 6 Low Bur Rul 88. (S. 89 of the Code excepts arbitration under the Arbitration Act (IX of 1899) from the operation of the Code.)
- 4a. ('32) AIR 1932 Oudh 163 (164). (S. 124 of Oudh Courts Act prevails over S. 109, C.P.C.)
 [See also ('32) AIR 1932 Oudh 193 (195): 8 Luck 1 (F B).]
5. ('86) 12 Cal 629 (634). (Orders in insolvency are orders under a special law. Code not applicable.)
 ('92) 17 Bom 334 (340). (Provisions of S. 545, old C. P. Code for stay of execution held inapplicable in case of appeals from orders in insolvency.)
 ('36) AIR 1936 All 80 (82): 58 All 639.

by the Indian Succession Act XXXIX of 1925⁶ and those in matrimonial matters by the Indian Divorce Act IV of 1869. In the absence of any provision, however, on any particular matter in those Acts, the Code will apply.⁷ It must, however, be applied with reference to the circumstances peculiar to those matters.⁸ Thus, unless a will is proved in some form no probate can be granted on the consent of the parties.⁹ The reason is that the order is one *in rem* affecting all individuals and cannot therefore be passed with the consent of only the parties to the proceeding.

Foreigners are not exempted from the operation of the Code,¹⁰ nor is property having a foreign origin outside the jurisdiction of British Courts.¹¹

The Code being an adjective law, it is not primarily intended to create new rights or to take away existing rights. It mainly regulates the procedure in Civil Courts.¹²

3. Retrospective operation of the Code.—It is a general principle of law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction.¹ In fact a statute which

6. ('93) 17 Bom 388 (391). (Succession Act is regulated by the C. P. C.)

('91) 18 Bom 237 (238) (Do.)

('95) 17 All 475 (477) (Do.)

7. See section 5 of the Provincial Insolvency Act, 1920; S. 45 of the Divorce Act, 1869; S. 8 of the Indian Naval Armament Act, VII of 1923; and Ss. 268 and 295 of the Indian Succession Act XXXIX of 1925.

('89) 13 Bom 520 (524): 16 Ind App 156 (P C). (Execution of order in Insolvency—Procedure of C. P. C. applies.)

('93) AIR 1933 All 135 (137): 55 All 243. (Divorce Act, S. 49: C. P. C. applies.)

('14) AIR 1914 Bom 211 (213): 38 Bom 125. (Divorce Act—C. P. C.—Applicability of.)

('87) 12 Bom 237 (241). (Code applies to proceedings on the Admiralty side of the High Court.)

('84) 8 Bom 511 (522, 525). (Execution of decision in insolvency—C. P. C. applicable.)

('13) 19 Ind Cas 435 (435): 40 Cal 685. (Appeal to P. C. in Insolvency case—Procedure in Ss. 109 and 110 applies.)

('05) 1 Cal L Jour 557 (564). (Section 4 no bar to suit for declaration that plaintiff's title is not affected by order under S. 94 of the Chota Nagpur Landlord and Tenant Act, 1 of 1859.)

('01) 28 Cal 532 (537). (Suit for recovery of rent under the Bengal Rent Act X of 1859—Second appeal lies under the Code.)

(1900) 27 Cal 860 (889). (Costs in salvage actions are given as per rules framed under C. P. C.)

('95) 22 Cal 511 (516, 517). (Where no provision is found in either C. P. C. or in the Admiralty Rules, practice in England is to be followed.)

('90) 17 Cal 66 (82). (Appeals in Admiralty or Vice-Admiralty cases are governed by the C. P. C. and not by R. 35 of the Vice-Admiralty Rules.)

('90) 17 Cal 337 (340). (Code applies to proceedings on the Admiralty side of the High Court.)

('79) 4 Cal 91 (95). (S. 66 of Burma Courts Act and Ss. 6 and 4, C. P. Code (1877) do not debar a debtor in jail from applying for being adjudged insolvent under S. 344, C. P. Code.)

('70) 4 Beng L R (O J) 51 (52). (S. 7, Divorce Act, applies not to points of procedure.)

('15) AIR 1915 Lah 201 (206): 1915 Pun Re No. 63. (Suit under Companies Act, VII of 1913—O. S. R. 6 applies and defendant can plead set-off.)

('02) 26 Mad 518 (520). (Madras Rent Recovery Act, VIII of 1865—Order of remand in proceedings under, is a decree and is therefore appealable under the Code.)

[See also ('14) AIR 1914 Bom 30 (31): 38 Bom 340. (S. 5 of Bombay Regulation XIII of 1830 providing for special appeal in certain cases but not providing any procedure therefor—Procedure under S. 100, C. P. C. must be applied.)]

S. ('84) 9 Bom 241 (244). (Caveator refusing to answer a question—S. 177 of the old Code not to be applied and proof of will dispensed with.)

9. ('03) 31 Cal 357 (363, 364).

10. ('27) AIR 1927 All 413 (414): 49 All 669.

('96) 20 Bom 193 (143).

('19) AIR 1919 Mad 883 (884).

('03) 26 Mad 544 (552): 30 Ind App 220 (P C). (Approving 17 Bom 662.)

11. (1900) 24 Bom 407 (410, 413, 414). (Suit for share of income received in British India for property situated beyond British India, the title to property not being in dispute.)

12. ('32) AIR 1932 Lah 401 (407).

Note 3

1. (1901) 1901 AC 297 (305), *Smith v. Callandar*. (1892) 3 Ch D 402 (421), *Lauri v. Renad*.

('32) AIR 1932 All 614 (616): 54 All 482. (Bundelkhand Land Alienation Act—Amending Act cannot have retrospective operation so as to revive suits terminated before it was passed.)

takes away or affects vested rights, imposes a new disability or confers a new right, must be *presumed* not to have a retrospective operation.² Enactments dealing with

('30) AIR 1930 All 706 (709) : 52 All 886.
(Agra Pre-emption Act, 1922.)
(36) AIR 1936 Bom 37 (40) : 60 Bom 125.
(Courts lean against interpreting statute with retrospective effect.)
(29) AIR 1929 Bom 262 (264) : 53 Bom 573.
(77) 2 Bom 148 (158) (F B).
(36) AIR 1936 Cal 593 (616).
(36) AIR 1936 Cal 339 (340).
(31) AIR 1931 Cal 321 (322) : 58 Cal 817.
(Bengal Tenancy Act—Retrospective operation extends only to the extent the language permits and not beyond that.)
(31) AIR 1931 Cal 25 (26) : 57 Cal 796.
(19) AIR 1919 Cal 210 (211).
(16) AIR 1916 Cal 446 (449) : 43 Cal 973.
(A statute is not retrospective simply because a part of the requisites for the action is drawn from a time antecedent to the passing of the law.)
(88) 15 Cal 376 (382).
(31) AIR 1931 Lah 145 (151, 152). (Presumption is applied with strictness.)
(28) AIR 1928 Lah 627 (631) : 10 Lah 165 (F B). (Some sections retrospective—Act silent as to other sections—Particular section must be examined to see if it is retrospective.)
(14) AIR 1914 Lah 345 (346) : 1914 Pun Re No. 86.
(1900) 1900 Pun L R No. 18, p. 63 (66) (F B).
(1876) 1 Ch D 48 (50), In re Suche & Co.
(38) AIR 1938 Mad 779 (780).
(34) AIR 1934 Mad 138 (139) : 57 Mad 718.
(32) AIR 1932 Mad 734 (736) : 56 Mad 169. (T. P. Act.)
(31) AIR 1931 Mad 83 (85, 91) : 54 Mad 627. (Madras Local Boards Act.)
(21) AIR 1921 Mad 126 (128).
(17) AIR 1917 Mad 937 (939) : 40 Mad 34. (Penal statute has no retrospective operation.)
(13) 20 Ind Cas 689 (691, 692) (Mad).
(31) AIR 1931 Nag 138 (140). (T. P. Act.)
(31) AIR 1931 Nag 60 (63) : 27 Nag L R 24. (T. P. Act.)
(29) AIR 1929 Nag 41 (41) : 24 Nag L R 85. (O. P. Land Rev. Act.)
(22) AIR 1922 Nag 227 (228) : 18 Nag L R 85.
(36) AIR 1936 Oudh 102 (104).
(30) AIR 1930 Pat 61 (62). (Legal Practitioners Act.)
(36) AIR 1936 Pesh 125 (127).
(34) AIR 1934 Pesh 30 (31). (Legislature may by express provision give a retrospective effect to any legislation but the general principle of construction of statutes is that in the absence of such provision there will be no retrospective effect.)
(36) AIR 1936 Rang 152 (156) : 14 Rang 494.
(32) AIR 1932 Rang 197 (198) : 10 Rang 465. (T. P. Act—Certain sections expressed to be not retrospective does not mean that others are retrospective.)

(29) AIR 1929 Rang 278 (279) : 7 Rang 355. (Penal statute has no retrospective operation.)
(10) 5 Ind Cas 980 (981) : 5 Low Bur Rul 148.
(32) AIR 1932 Sind 71 (72) : 26 Sind L R 204. (Provincial Insolvency Act.)
(1903) 1903 App Cas 355 (363), Commissioner of Public Works v. Legan.
[See ('33) AIR 1933 All 20 (21) : 54 All 1092. (Court-Fees (Amending) Act is not retrospective.)
(28) AIR 1928 P C 128 (130). (S. 17 of the Sydney Corporation Act.)
(87) 14 Cal 553 (556). (Although on general principles change in the law affecting the rights of parties does not ordinarily govern pending suits, yet where Legislature makes provision to the contrary, the Courts are bound to carry out the law.)]
[See also ('28) AIR 1928 Mad 1173 (1174). (Declaratory Act—Usual presumption against retrospective effect does not apply.)
(31) AIR 1931 All 317 (317) : 53 All 524. (Amending Act is not retrospective.)]
2. ('31) AIR 1931 Cal 92 (93) : 58 Cal 167.
(04) 26 All 119 (130) : 7 Oudh Cas 254 (P C). (Right of succession cannot be divested by later statutes.)
(14) AIR 1914 P C 66 (67) : 36 All 350 (P C). (It could not revive a barred right.)
(35) AIR 1935 All 706 (710) : 58 All 63 (F B).
(12) 16 Ind Cas 1002 (1008) : 36 Bom 617. (Vested rights under decrees cannot be affected.)
(10) 34 Bom 260 (266). (Change in law cannot annul a decree already obtained.)
(36) AIR 1936 Cal 386 (387).
(36) 164 Ind Cas 873 (876) (Cal).
(24) AIR 1924 Cal 240 (243) : 50 Cal 667.
(22) AIR 1922 Cal 491 (492).
(23) AIR 1923 Cal 85 (90) : 50 Cal 115.
(20) AIR 1920 Cal 435 (437) : 47 Cal 1108.
(14) AIR 1914 Cal 806 (810) : 41 Cal 1125 (F B).
(11) 9 Ind Cas 805 (806) (Cal). (Rights barred under old Act are not revived by new Act.)
(86) 12 Cal 583 (586) (F B).
(28) AIR 1928 Lah 627 (631) : 10 Lah 165 (F B).
(38) AIR 1938 Mad 688 (700).
(36) AIR 1936 Mad 18 (19).
(28) AIR 1928 Mad 1194 (1194). (Change in law cannot make execution order already passed illegal.)
(18) AIR 1918 Mad 162 (163). (Right to treat decree as final is a vested right.)
(16) AIR 1916 Mad 607 (608) : 18 Ind Cas 64 (66) : 38 Mad 101.
(15) AIR 1915 Mad 1022 (1024) : 39 Mad 84.
(04) 27 Mad 538 (539). ((1898) 2 Q B 547, Referred to.)
(71) 6 Mad H O R 122 (126).
(25) AIR 1925 Nag 377 (377). (Decree already passed cannot be invalidated by subsequent Act.)

procedure, however, are an exception to this rule and are always retrospective in the sense that their provisions will apply to proceedings already commenced at the time of their enactment.³ The reason is that no one can have a vested right in forms of procedure.⁴ But where some of the provisions of the enactment of procedure

('25) AIR 1925 Nag 249 (250).

('22) AIR 1922 Nag 227 (228).

('21) AIR 1921 Nag 170 (170).

('16) AIR 1916 Nag 22 (23): 13 Nag L R 165.

('21) AIR 1921 Oudh 121 (122): 24 Oudh Cas 157. (Bye-laws and rules framed under enactments.)

('28) AIR 1928 Pat 109 (110).

('21) AIR 1921 Pat 185 (186).

('19) AIR 1919 Pat 202 (202): 4 Pat L Jour 411.

('17) AIR 1917 Pat 171 (173).

('32) AIR 1932 Sind 71 (72): 26 Sind L R 204.

(1876) 1 Ch D 48 (50), *In re Suche & Co.* (New right of action conferred—Followed in AIR 1921 Pat 185.)

3. ('89) 11 All 408 (412) (F B.)

('81) AIR 1931 All 685 (689): 54 All 299 (F B). (No vested right in choice of forum and limitation — Limitation Act a mere matter of procedure and operates retrospectively.)

('86) AIR 1936 All 3 (5): 58 All 495.

('85) AIR 1935 All 706 (716): 58 All 63 (F B).

('84) AIR 1934 All 253 (255).

('88) AIR 1933 All 846 (849): 56 All 142.

('32) AIR 1932 All 30 (31). (Agra Tenancy Act, 1926.)

('81) AIR 1931 All 735 (736). (Rule as to appropriate forum for a suit is not a substantive right and is of procedure.)

('81) AIR 1931 All 489 (490): 53 All 687 (F B). (S. 276 of the Succession Act is only of procedure.)

('30) AIR 1930 All 706 (709): 52 All 886. (New law, mere law of procedure—Retrospective.)

('30) AIR 1930 All 561 (567). (Do.)

('27) AIR 1927 All 657 (659): 50 All 202.

('26) AIR 1926 All 667 (668).

('10) 7 Ind Cas 11 (14) (All). (Case law discussed.)

('29) AIR 1929 Bom 262 (264): 53 Bom 453.

('97) 21 Bom 822 (826).

('95) 19 Bom 204 (206).

('94) 18 Bom 429 (432).

('90) 14 Bom 516 (525).

('84) 8 Bom 511 (523, 524).

('33) AIR 1933 Cal 435 (437): 60 Cal 1037 (S B). (Bengal Tenancy Act (as amended by Act 4 of 1928), S. 48 (c)—Not retrospective.)

('30) AIR 1930 Cal 422 (423): 57 Cal 148. (Procedural law—New enactment applies to pending cases.)

('30) AIR 1930 Cal 34 (36): 56 Cal 1117. (Limitation is mere procedural law and operates retrospectively.)

('24) AIR 1924 Cal 933 (984).

('16) AIR 1916 Cal 861 (863). (Provisions of S. 3 of Bengal Tenancy Amendment Act (1 of 1907) not given retrospective operation.)

('13) 19 Ind Cas 793 (798, 800) (Cal). (No vested rights in enactments relating to mere procedure.)

('08) 12 Cal W N 987 (989).

('86) 12 Cal 583 (586, 587) (F B).

('36) AIR 1936 Lah 562 (563).

('29) AIR 1929 Lah 761 (762). (Provincial Insolvency Act.)

('10) 8 Ind Cas 999 (1039): 1910 Pun Re No. 97.

('38) AIR 1938 Mad 688 (695).

('36) AIR 1936 Mad 18 (19).

('29) AIR 1929 Mad 881 (882): 53 Mad 119. (Evidence Act, S. 68.)

('24) AIR 1924 Mad 657 (657): 47 Mad 384. (Criminal Procedure Code.)

('21) AIR 1921 Mad 650 (651). (Rules of limitation.)

('18) AIR 1918 Mad 919 (920).

('04) 27 Mad 538 (539).

('29) AIR 1929 Nag 282 (283). (Change in forum of suit only operates retrospectively.)

('27) AIR 1927 Nag 127 (128): 23 Nag L R 50.

('24) AIR 1924 Nag 24 (25, 26). (Remedial rights and rights of action—Not affected retrospectively.)

('11) 11 Ind Cas 912 (913): 7 Nag L R 125.

('33) AIR 1933 Oudh 274 (275): 8 Luck 504. (Procedural Law—New enactment applies to pending cases.)

('10) 6 Ind Cas 1015 (1016): 13 Oudh Cas 152.

('26) AIR 1926 Pat 561 (563). (Rights of action not affected.)

('21) AIR 1921 Pat 185 (186).

('38) AIR 1938 Rang 130 (134): 1938 Rang L R 176 (F B). (Statutes effecting changes in procedure are retrospective.)

('10) 5 Ind Cas 980 (980): 5 Low Bur Rul 148. (Right of appeal — Not a mere procedure.)

('12) 13 Ind Cas 264 (266): 5 Sind L R 184.

(Declaratory enactments are also retrospective.)

(1878) 3 App Cas 582 (601), *Gardner v. Lucas*, (Ref. to in 22 Cal 364.)

(1876) 1 Ch D 48 (50), *In re Suche and Co.*

[See ('30) AIR 1930 Lah 1004 (1008): 12 Lah 172. (A change in procedure cannot affect a decided matter.)

('33) AIR 1933 Oudh 38 (39). (Limitation is not always a law of procedure.)]

4. ('09) 4 Ind Cas 492 (493) (All).

('10) 7 Ind Cas 11 (14) (All).

('11) 9 Ind Cas 800 (801) (All).

('84) 6 All 262 (268). (30 L J Ex 40: 3 Ch D 69 and L R 4 Ch D 752, App.)

('30) AIR 1930 Cal 422 (423): 57 Cal 148.

('14) AIR 1914 Oudh 125 (126).

do affect vested rights, whether substantive⁵ or remedial,⁶ the rule against retrospective operation of statute will apply⁷ unless there is an indication to the contrary in the Act.⁸

Such indications can be found in the following circumstances :—

(1) When the commencement of the Act is *postponed* to a particular day, the object of the *postponement* is to enable persons to enforce their rights, if any, before the new Act, negating such rights, comes into force.⁹

(2) When the language of the enactment implies it.

Both these circumstances exist in the case of the Civil Procedure Code. Though passed in 1908 it is made to come into force from 1st January, 1909. Again, Section 154 implies that *except in the case of a right of appeal*, the Code applies retrospectively so as to affect all other rights and matters dealt with by it,¹⁰ and to all cases pending or about to be instituted at the time it came into force.¹¹

See also the undermentioned cases.¹²

5. Such as rights of appeal or under contract.

6. Such as right of appeal or of reference.
(See cases in foot-note 7.)

7. ('10) 5 Ind Cas 102 (105) (Mad).

('30) AIR 1930 Nag 213 (215): 26 Nag L R 195.

('27) AIR 1927 P C 242 (244): 9 Lah 284: 54 Ind App 421 (P C). (Provisions which deprive orders of their finality are those which touch existing rights.)

('31) AIR 1931 All 635 (649): 54 All 299 (F B). (Limitation Act is not pure procedural law—Rights vested under old Act cannot be divested under the new Act.)

('30) AIR 1930 All 706 (709): 52 All 886.

('29) AIR 1929 All 756 (756). (Agra Tenancy Act—Provision regarding appeal not retrospective.)

('28) AIR 1928 All 437 (438): 50 All 965 (F B). (Rights of appeal not taken away by the repealing Act.)

('09) 3 Ind Cas 497 (498) (All). (Liability under the old Code to pay purchase-money in pre-emption suit is not a matter of procedure.)

('29) AIR 1929 Bom 262 (264): 53 Bom 453.

('33) AIR 1933 Cal 435 (437): 60 Cal 1037 (S B).

('31) AIR 1931 Cal 100 (101). (Amendment affecting right of appeal not retrospective.)

('31) AIR 1931 Cal 92 (93): 58 Cal 167.

('28) AIR 1928 Cal 640 (644): 56 Cal 512 (F B). (Letters Patent Amendment restricting appeal is not retrospective.)

('06) 33 Cal 789 (801).

('79) 3 Cal L Rep 437 (438). (Right of second appeal.)

('64) 1864 Suth W R (Gap) C R 35 (36).

("Pending," meaning.)

('28) AIR 1928 Lah 627 (631): 10 Lah 165 (F B).

('15) AIR 1915 Lah 171 (173): 1915 Pun Re No. 30. (Right of appeal.)

('12) 15 Ind Cas 725 (727): 1913 Pun Re No. 1. (Right of appeal is not a matter of procedure.)

('31) AIR 1931 Mad 83 (85, 93): 54 Mad 627. (Declaratory Act is ordinarily retrospective.)

('29) AIR 1929 Mad 381 (382): 52 Mad 361 (S B). (Vested right of Letters Patent Appeal cannot be taken away.)

('18) AIR 1918 Mad 548 (549, 550). (The right of appeal cannot be taken away.)

('16) AIR 1916 Mad 1035 (1036). (Do.)

('16) AIR 1916 Mad 607 (608): 18 Ind Cas 64 (66): 38 Mad 101. (Rule applies to remedial rights also.)

('11) 12 Ind Cas 553 (553) (Mad). (Benefit of order obtained under old Code.)

('24) AIR 1924 Nag 24 (25). (Rule regarding vested rights applies to remedial rights.)

('23) AIR 1923 Nag 227 (228): 19 Nag L R 110.

('33) AIR 1933 Oudh 38 (40). (Limitation Act is not pure procedural law—Rights vested under old Act cannot be divested under new Act.)

('24) AIR 1924 Pat 183 (184).

('27) AIR 1927 Sind 270 (271): 21 Sind L R 195.

('30) AIR 1930 Oudh 148 (153): 5 Luck 552 (F B). (Per Wazir Hasan, J.).

[See also ('31) AIR 1931 Cal 321 (322): 58 Cal 817.

('32) AIR 1932 Cal 207 (208, 209).]

8. See also Section 154 of the Code.

('79) 3 Bom 161 (166). (Under Code of 1877.)

('79) 4 Cal 825 (828).

9. ('16) AIR 1916 Lah 146 (148): 1916 Pun Re No. 88.

('22) AIR 1922 Mad 417 (418, 419).

10. ('13) 19 Ind Cas 391 (392): 40 Cal 704.

('12) 16 Ind Cas 834 (834) (Lah). (Right of appeal not affected.)

('30) AIR 1930 Cal 422 (423): 57 Cal 148. (Rules as regards suits will apply to pending suits.)

11. ('11) 9 Ind

12. ('35) AIR 1:
rule is well

4. Code, if and when exhaustive. — The Code is exhaustive on all matters *specifically dealt with by it*. The law in such matters must be ascertained only with reference to its provisions and a judge cannot disregard or go outside the letter of the enactment according to its true construction.¹

But the absence of any provision on any particular matter does not mean that there is no such power.² It is a rule of construction of every statute like the Civil Procedure Code, that the Court ought not to act on the principle that every procedure is to be taken as *prohibited* unless it is expressly provided for, but should proceed on the converse principle that every procedure is to be understood as *permissible* till it is shown to be prohibited by law.³

The Code is thus not *exhaustive* of *all* forms of procedure necessary to be used in the administration of justice.⁴ For instance where a Court had a power before the Code was passed and the same *is not taken away* by the Code, the power remains.⁵

5. Inherent powers. — See Section 151.

6. Judicial discretion. — The Code in many of the Sections leaves certain matters to the *discretion*¹ of the Court. The discretion, in such cases, must not be exercised in an arbitrary, vague or fanciful manner, but on *judicial principles*.^{1a}

7. Interpretation of statutes — General. — It is a cardinal rule of construction of statutes in general that the intention of an enactment should be gathered from the *language* employed by it,¹ and that where words used are *clear and unambiguous*,

an Act during the currency of a suit does not affect pending actions and the rights of the parties are governed by the Act as it existed at the time when the suit was started.)

('36) AIR 1936 Cal 173 (176). (The ordinary law is that rights of parties with regard to suit should be determined upon law as it stands at date of institution of suit.)

('36) AIR 1936 Cal 593 (618). (Do.)

('35) AIR 1935 Cal 541 (543); 62 Cal 492. (Do.)

Note 4

1. ('02) 29 Cal 707 (715) : 29 Ind App 196 (P O).

('09) 4 Ind Cas 442 (445) (Cal).

('01) 23 All 167 (173).

('26) AIR 1926 Cal 568 (574).

('13) 20 Ind Cas 815 (816) (Cal).

('09) 1 Ind Cas 829 (832) : 36 Cal 354.

('08) 35 Cal 353 (359).

('06) 33 Cal 927 (931).

('26) AIR 1926 Lah 670 (671).

('35) AIR 1935 Pesh 176 (176).

2. ('09) 1 Ind Cas 677 (681) (Cal).

('10) 6 Ind Cas 95 (97) (Cal).

('95) 17 All 29 (31).

('93) 15 All 84 (95) (F B).

('84) 8 Bom 380 (387). (High Court has power to punish for contempt summarily.)

('09) 1 Ind Cas 913 (917) : 36 Cal 193.

('06) 33 Cal 1094 (1098).

('06) 33 Cal 927 (931).

('06) 3 Cal L Jour 29 (31, 35).

('20) AIR 1920 Lah 304 (304) : 1 Lah 339.

3. ('82) 5 All 163 (172) (F B).

('25) AIR 1925 Mad 42 (44) : 48 Mad 494.

('89) 11 All 267 (287) (F B).

('10) 5 Ind Cas 532 (534) : 37 Cal 399.

[See ('31) AIR 1931 All 162 (173) : 53 All 239 (F B). (Presidency Towns Insolvency Act, S. 52 (2) (b).)]

4. ('17) AIR 1917 Pat 495 (497).

('06) 33 Cal 927 (932).

('17) AIR 1917 Pat 375 (377).

5. ('80) 5 Cal 819 (820).

('07) 34 Cal 97 (99).

('86) 13 Cal 189 (191).

Note 6

1. ('31) AIR 1931 Rang 194 (198) : 9 Rang 281 (F B). ("Judicial discretion" means that in certain proved or admitted circumstances the Court has been given the power to act or not to act in a particular way and such discretion must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself.)

1a. ('79) 5 Cal 259 (265).

('24) AIR 1924 Bom 1 (18) : 48 Bom 87.

Note 7

1. ('28) AIR 1928 P C 2 (4) : 7 Pat 221 : 55 Ind App 18 (P O).

('20) AIR 1920 P C 181 (185) (P C).

('20) AIR 1920 P C 56 (59) : 43 Mad 550 : 47 Ind App 33 (P O).

('18) AIR 1918 P C 352 (354) (P C). (Court is not concerned with the policy of the Act—Novelty of language is no ground for disregarding plain words of enactment.)

it is the duty of the Court to give effect to them according to their *plain meaning*, neither adding to nor subtracting from them.² The ordinary and grammatical sense

- (‘33) AIR 1933 All 513 (516) : 55 All 654. (Court bound to give effect to language of statute and cannot give effect to draftsman’s views.)
- (‘24) AIR 1924 All 792 (793) : 47 All 13.
- (‘37) AIR 1937 Bom 1 (7) : I L R (1937) Bom 183 (F B). (Object of Legislature to be gathered from four corners of the Act).
- (‘26) AIR 1926 Bom 57 (59) : 50 Bom 34.
- (‘23) AIR 1923 Bom 321(351):47 Bom 843(FB)
- (‘30) AIR 1930 Cal 770 (773) : 58 Cal 521.
- (‘37) AIR 1937 Lah 38 (40) : 18 Lah 1 (F B).
- (‘36) AIR 1936 Lah 698 (699).
- (‘25) AIR 1925 Lah 436 (437).
- (‘24) AIR 1924 Lah 513(514) : 5 Lah 147 (FB).
- (‘20) AIR 1920 Mad 640 (642) : 43 Mad 94 (FB). (Affirmative language may be construed as having a negative implication if it is a necessary and reasonable one.)
- (‘36) AIR 1936 Nag 55 (58).
- (‘15) AIR 1915 Nag 10 (12) : 12 Nag L R 51. (Maxwell’s *Interpretation of Statutes*, 5th edition, p. 537, Rel. on.)
- (‘15) AIR 1915 Nag 2 (5, 6) : 11 Nag L R 76. (Intention of the Legislature does not mean a speculative opinion as to what it would have probably meant.)
- (‘26) AIR 1926 Oudh 2 (4, 8) : 29 Oudh Cas 51.
- (‘22) AIR 1922 Oudh 289 (291, 292) : 25 Oudh Cas 319.
- (‘22) AIR 1922 Oudh 236(246):25 Oudh Cas189.
- (‘38) AIR 1938 Pat 94 (95).
- (‘36) AIR 1936 Pat 282 (284) : 15 Pat 36.
- (‘21) AIR 1921 Pat 193 (198) : 6 Pat L Jour 373 (F B). (“No suit shall lie” means no suit shall lie even on ground of fraud.)
- (‘36) AIR 1936 Pesh 20 (23).
- (‘38) AIR 1938 Sind 9 (10) : 32 Sind L R 129. (A Section of a statute must be construed literally unless (1) the Section itself is repugnant to the general purpose of the Act, and (2) there is some other Section which cuts down its meaning.)
- (‘28) AIR 1928 Sind 1(9):22 Sind L R 157(FB).
2. (‘28) AIR 1928 All 241 (246) : 50 All 569.
- (‘29) AIR 1929 All 625 (641) : 52 All 11 (FB).
- (‘35) AIR 1935 P C 89 (91) : 62 Cal 983 : 62 Ind App 129 (P C).
- (‘21) AIR 1921 P C 240 (242) (P C). (Reasonableness of the provision is only material when the statute is not clear.)
- (‘35) AIR 1935 All 723 (725) : 58 All 191 (F B). (Every word must be given its full meaning and effect.)
- (‘35) AIR 1935 All 636 (637). (Courts have to administer law as they find it.)
- (‘35) AIR 1935 All 378 (379) : 57 All 737. (Words should be interpreted in ordinary sense except when used specially or technically.)
- (‘33) AIR 1933 All 321 (322) : 55 All 463.
- (‘30) AIR 1930 All 49 (53) (F B).
- (‘25) AIR 1925 All 610 (612): 48 All 175 (FB). (Words not to be found in a section may be supplied by necessary implication if the context so requires it.)
- (‘17) AIR 1917 All 295 (296). (Court cannot read into statute words not found there.)
- (‘10) 5 Ind Cas 503 (509, 510) (All). (Court must not be swayed by what was understood to be the law in a particular locality or by a section of a community.)
- (‘91) 13 All 432 (457). (Each Act must be construed on its own wording and in accordance with its own context.)
- (‘90) 12 All 129 (141) (F B). (Practice of the Court cannot be used to nullify express enactment.)
- (‘39) AIR 1939 Bom 61 (63) : I L R (1939) Bom 104.
- (‘38) AIR 1938 Bom 218 (221) : I L R (1938) Bom 280. (Unless Legislature has omitted to express something which it intended.)
- (‘34) AIR 1934 Bom 62 (63) : 58 Bom 361. (Courts have to construe an Act as they find it.)
- (‘33) AIR 1933 Bom 91 (92): 58 Bom 505. (Do.)
- (‘29) AIR 1929 Bom 100 (106) : 53 Bom 251.
- (‘21) AIR 1921 Bom 374 (374, 375) : 45 Bom 672. (Plain meaning not to be controlled by considerations of convenience.)
- (‘10) 7 Ind Cas 935 (936) : 34 Bom 593. (Words must be construed in the popular sense unless the law has attached a technical sense to it.)
- (‘36) AIR 1936 Cal 593 (620).
- (‘36) AIR 1936 Cal 339 (340).
- (‘33) AIR 1933 Cal 919 (922) : 60 Cal 1181.
- (‘30) AIR 1930 Cal 577 (578) : 58 Cal 407.
- (‘29) AIR 1929 Cal 617 (630) (S B). (Words plain and clear—Court should not raise any doubts as to what they mean.)
- (‘29) AIR 1929 Cal 141 (143).
- (‘25) AIR 1925 Cal 1067 (1068). (“And” and “or” are sometimes interchangeable.)
- (‘21) AIR 1921 Cal 397 (399): 48 Cal 556 (FB). (Reference to pre-existing law not permissible unless provisions are doubtful.)
- (‘17) AIR 1917 Cal 392 (394).
- (‘96) 23 Cal 563 (572) : 23 Ind App 18 (P C).
- (‘81) 7 Cal 127 (132).
- (‘39) AIR 1939 Lah 237 (238).
- (‘38) AIR 1938 Lah 251 (252) : I L R (1938) Lah 236.
- (‘38) AIR 1938 Lah 158(159):I L R(1938)Lah 332. (It is not for Judges, where words are clear, to attempt to get round a statute.)
- (‘35) AIR 1935 Lah 742(746): 16 Lah 937 (FB).
- (‘35) AIR 1935 Lah 423 (424).
- (‘35) AIR 1935 Lah 364 (367) : 16 Lah 667.
- (‘85) AIR 1935 Lah 150 (153) : 16 Lah 204. (Court cannot speculate on the real intention of the framers of the Act.)

of the words is to be adhered to, unless it would lead to repugnance with the rest of the statute. Even if the result of the construction were absurd, that is no reason to depart from clear and unequivocal language capable of only one meaning.^{2a} In other words, the interpretation should not, where the language is clear, be influenced by

('34) AIR 1984 Lah 115 (115) : 1934 Cr C 290 (290). (Primary meaning of a word must be considered unless there is anything to show that that was not the meaning of the Legislature.)

('31) AIR 1931 Lah 399 (400) : 12 Lah 658. (Statutes to be construed in their ordinary sense unless there is any clear indication to the contrary.)

('29) AIR 1929 Lah 607 (608) : 11 Lah 24.

('28) AIR 1928 Lah 337 (340) : 9 Lah 689. (Courts cannot supply omissions in an Act.)

('26) AIR 1926 Lah 447 (449) : 7 Lah 507. (Command to a body to make rules—Whether directory or mandatory depends on scope and object.)

('26) AIR 1926 Lah 357 (359) : 7 Lah 348.

('23) AIR 1923 Lah 655 (656) : 4 Lah 323.

('12) 17 Ind Cas 979 (983) : 1912 Pun Re No. 5 (Rev.)

('34) AIR 1984 Mad 162 (168) : 57 Mad 378.

('33) AIR 1933 Mad 120 (122). (Words to qualify the general language of the section should not be added.)

('32) AIR 1932 Mad 612(619):55 Mad 883(FB).

('32) AIR 1932 Mad 19 (20) : 54 Mad 852.

('31) AIR 1931 Mad 779 (781).

('30) AIR 1930 Mad 954 (955).

('29) AIR 1929 Mad 236 (237) : 52 Mad 432. (Words of statute should not be departed from on the ground that something was omitted to be enacted.)

('25) AIR 1925 Mad 723 (724) : 48 Mad 454. (Instrument defined by Act—Understanding of common people not to be considered: *obiter*.)

('25) AIR 1925 Mad 449 (451) : 48 Mad 559. (Construction clear—Reasons cannot be gone into.)

('18) AIR 1918 Mad 1026 (1030) : 40 Mad 594 (F B). ("And" may be read as "or" to carry out obvious intention of the Legislature.)

('15) AIR 1915 Mad 63 (66) : 38 Mad 1144. (Words must be construed in their primary sense.)

('14) AIR 1914 Mad 502 (504) : 16 Ind Cas 947 (949, 950) : 37 Mad 113. (Court cannot introduce exception to a Section which is universal in terms.)

('09) 4 Ind Cas 1115 (1116)(Mad). (Court cannot introduce and enforce equities to modify express provisions of the statute law.)

('39) AIR 1939 Nag 44 (45) : I L R(1939)Nag 143.

('38) AIR 1938 Nag 433 (434). (Language of Section clear—Court should not indulge in surmises.)

('36) AIR 1936 Nag 269 (269): I L R (1937) Nag 161.

('34) AIR 1934 Nag 67 (69): 30 Nag L R 155.

('33) AIR 1933 Nag 193 (199) : 29 Nag L R 278 (F B).

('30) AIR 1930 Nag 73 (76, 77).

('14) AIR 1914 Nag 62 (63) : 10 Nag L R 42. (Though it has the effect of divesting a vested right.)

('36) AIR 1936 Oudh 32 (40): 11 Luck 611(FB).

('35) AIR 1935 Oudh 489 (490) : 11 Luck 320.

('35) AIR 1935 Oudh 437 (439) : 11 Luck 376.

('33) AIR 1933 Oudh 528 (529) : 9 Luck 406. (Courts must take the law as it stands and it is not their function to legislate.)

('32) AIR 1932 Oudh 314 (316) : 7 Luck 26.

('32) AIR 1932 Oudh 308 (310) : 8 Luck 156.

('26) AIR 1926 Oudh 101 (111). (Clear words cannot be destroyed on the ground of equity or unreasonableness.)

('35) AIR 1935 Pat 237 (241). (Act or part of Act cannot be ignored or treated as being meaningless; it must be construed as having some operative value.)

('33) AIR 1933 Pat 508 (512).

('32) AIR 1932 Pat 293 (295) : 12 Pat 46.

('30) AIR 1930 Pat 395 (402) : 9 Pat 314.

('22) AIR 1922 Pat 435 (436): 2 Pat 94 (FB).

('33) AIR 1933 Pesh 3 (5).

('36) AIR 1936 Rang 393 (395) : 14 Rang 529. (If the words can be given a meaning, they must be given that meaning and cannot be regarded as purely superfluous verbiage.)

('35) AIR 1935 Rang 123 (125).

('35) AIR 1935 Rang 53 (53) : 12 Rang 625.

('33) AIR 1933 Rang 363 (371) : 12 Rang 64.

('28) AIR 1928 Rang 326 (327) : 6 Rang 533.

('36) AIR 1936 Sind 108 (112) : 29 Sind L R 382. (Words can be added only where it is necessary to do so to give effect to the intention of Legislature to be ascertained from careful consideration of entire statute.)

('32) AIR 1932 Sind 107 (110).

('30) AIR 1930 Sind 287 (293):25 Sind L R 142.

('29) AIR 1929 Sind 235 (237).

('29) AIR 1929 Sind 209 (209).

('25) AIR 1925 Sind 49 (51) : 18 Sind L R 19 (F B). (Rule having the force of law—Courts should abide by it.)

('23) AIR 1923 Sind 5 (9) : 16 Sind L R 112 (F B). (Words must be assumed to be used in their popular meaning unless they have acquired a technical meaning.)

('18) AIR 1918 Sind 38 (39) : 12 Sind L R 20. (Do.)

[See also ('36) AIR 1936 Pesh 160 (162).]

2a. ('33) AIR 1933 Mad 207 (210, 211): 56 Mad 177.

extraneous considerations, such as the previous state of the law,³ or hardship,⁴ or the policy or the intention of the law,⁵ or the reference to or the analogy of other enactments,⁶ or the terms of the enactment being against general principles of law or equity,⁷ or that the giving effect to the words leads to absurdity or inconvenience or injustice,⁹

3. ('28) AIR 1928 P C 16 (18) : 55 Cal 519 : 55 Ind App 96 (P C).
 ('32) AIR 1932 Bom 163 (172) : 56 Bom 101.
 ('28) AIR 1928 P C 2 (4) : 7 Pat 221 : 55 Ind App 18 (P C).
 ('36) AIR 1936 All 222 (237) : 58 All 413 (SB).
 ('36) AIR 1936 Cal 593 (608).
 ('36) AIR 1936 Cal 145 (146).
 ('29) AIR 1929 Cal 497 (503) : 56 Cal 367.
 ('21) AIR 1921 Cal 397 (399) : 48 Cal 556 (FB).
 ('35) AIR 1935 Mad 628 (634).
 ('32) AIR 1932 Mad 8 (13) : 55 Mad 151.
 ('36) AIR 1936 Nag 55 (60).
 ('32) AIR 1932 Oudh 303 (310) : 8 Luck 156.
 ('30) AIR 1930 Oudh 148 (159) : 5 Luck 552 (FB).
 ('36) AIR 1936 Rang 105 (106) : 14 Rang 146.
 ('35) AIR 1935 Sind 62 (64) : 28 Sind L R 366.
4. ('17) AIR 1917 Cal 841 (843) : 43 Cal 95.
 ('29) AIR 1929 Lah 593 (594) : 10 Lah 596 (FB).
 ('32) AIR 1932 All 494 (498) : 54 All 954 (FB).
 ('02) 24 All 532 (537) (F B).
 ('90) 12 All 129 (137, 138) (F B).
 ('34) AIR 1934 Cal 862 (863) : 61 Cal 1047.
 ('33) AIR 1933 Cal 124 (126) : 60 Cal 571.
 ('27) AIR 1927 Cal 474 (476).
 ('19) AIR 1919 Cal 819 (822) : 46 Cal 199.
 ('37) AIR 1937 Lah 507 (510) : 1 L R (1937) Lah 171.
 ('13) 19 Ind Cas 239 (240) : 1913 Pun Re No. 79.
 ('37) AIR 1937 Mad 667 (670) : 1 L R (1937) Mad 841.
 ('19) AIR 1919 Mad 972 (979) : 40 Mad 1040 (FB).
 ('12) 18 Ind Cas 234 (236) : 5 Sind L R 190.
 ('11) 9 Ind Cas 720 (721) : 4 Sind L R 214.
5. ('24) AIR 1924 Lah 513 (514) : 5 Lah 147 (FB).
 (Wisdom or policy.)
 ('32) AIR 1932 Pat 293 (295) : 12 Pat 46 (SB).
 (Object of Legislature is immaterial unless it is stated to be guiding principle in interpretation.)
 ('36) AIR 1936 All 222 (238) : 58 All 413 (SB).
 ('25) AIR 1925 Bom 505 (508). (Wisdom or policy.)
 ('68) 5 Bom H C R (OC) 55 (58). (Intention.)
 ('34) AIR 1934 Cal 537 (540). (Do.)
 ('67) 8 Suth WR 3 (12) : 11 Moo Ind App 75 (PC).
 ('38) AIR 1938 Mad 263 (264). (Courts cannot avoid giving effect to plain meaning merely because the Legislature did not contemplate such a case when it drew up the Act in question.)
 ('35) AIR 1936 Mad 628 (634). (Intention.)
 ('34) AIR 1934 Mad 126 (129) : 57 Mad 362. (Do.)
 ('16) AIR 1916 Mad 1 (2) : 38 Mad 419 (FB). (Policy.)
 ('33) AIR 1933 Pesh 3 (5).
 ('33) AIR 1933 Pesh 69 (70). (Intention.)
 ('28) AIR 1928 Rang 326 (327) : 6 Rang 593. (Policy.)
 ('16) AIR 1916 Sind 17 (19) : 9 Sind L R 126. (Intention.)
6. ('12) 13 Ind Cas 244 (249) : 5 Sind L R 155.
 ('11) 12 Ind Cas 646 (646, 647) : 5 Sind L R 54. (Intention.)
6. ('24) AIR 1924 Cal 405 (408) : 51 Cal 62.
 ('34) AIR 1934 Mad 75 (79) : 57 Mad 472. (Terms of Indian statute clear and unambiguous—Corresponding English law cannot be referred to.)
 ('32) AIR 1932 P C 138 (140) : 59 Cal 1343 : 59 Ind App 206 (P C).
 ('31) AIR 1931 Bom 50 (53) : 50 Bom 110.
 ('25) AIR 1925 Cal 116 (138).
 ('24) AIR 1924 Cal 881 (884).
 ('33) AIR 1933 Mad 791 (793). (Statutes which are frequently repealed, re-enacted or amended should not be construed by reference to language of similar legislation elsewhere.)
 ('38) AIR 1938 Nag 292 (294).
 ('35) AIR 1935 Nag 90 (101). (Court should examine language of the Act itself, without any reference to English law.)
 ('33) AIR 1933 Rang 275 (277). (Provisions of an Act of one Provincial Legislature form a very poor guide to the construction of the provisions of the Act of another Provincial Legislature.)
 [See ('87) 11 Bom 727 (732).]
7. ('23) AIR 1923 P C 211 (216) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283 (P C). (Considerations of facility and practical importance are out of place.)
 (1900) 23 All 152 (156, 157) : 27 Ind App 209 (PC).
 ('32) AIR 1932 P C 165 (167) : 60 Cal 1 : 59 Ind App 283 (P C).
 ('31) AIR 1931 All 380 (381) : 53 All 580.
 ('31) AIR 1931 All 277 (291) : 53 All 334 (FB).
 ('19) AIR 1919 Cal 989 (991) : 46 Ind Cas 428 (431).
 ('10) 8 Ind Cas 364 (365) : 34 Mad 543.
 ('35) AIR 1935 Sind 145 (175) : 28 Sind L R 397.
 ('29) AIR 1929 Sind 225 (226) : 24 Sind L R 167. (Enactment being against equity.)
 ('13) 19 Ind Cas 838 (840) : 6 Sind L R 250.
 [See also ('23) AIR 1923 Lah 529 (530). (Avoiding anomaly is no proper ground.)]
8. ('21) AIR 1921 P C 240 (242) (P C).
 ('31) AIR 1931 Cal 688 (690) : 58 Cal 510.
 ('32) AIR 1932 All 491 (498) : 54 All 954 (FB).
 ('31) AIR 1931 All 162 (173) : 53 All 239.
 ('29) AIR 1929 All 650 (854).
 ('10) 32 All 427 (440) (F B).
 ('34) AIR 1934 Bom 74 (78) : 58 Bom 152. (Argument *ab inconvenienti* has always to be received with great caution.)
 ('29) AIR 1929 Cal 141 (143). (Enactment to be interpreted as per the plain meaning of its words uninfluenced by considerations of justice.)
 ('31) AIR 1931 Lah 87 (92) : 12 Lah 129 (FB).
 ('10) 7 Ind Cas 754 (757) : 34 Mad 1.
 ('32) AIR 1932 Nag 105 (106) : 28 Nag L R

or that the law is different elsewhere.^{8a} Nor can the advantage of liberal construction be balanced against the advantages of literal construction.^{8b}

The Court's function is, in fact, to say not what the Legislature meant or ought to have meant but what it has said that it meant.⁹ It is always dangerous to paraphrase an enactment even if badly worded^{9a} and no modification of the language to meet the intention can be made unless it is impossible to resist the conviction that the Legislature could not possibly have intended what its words signify and that the modifications thus to be made are mere corrections of careless language and really give the true meaning.¹⁰ Where, however, the language of the enactment is not itself precise or is ambiguous or of doubtful import, or the question arises as to what extent changes in the pre-existing law have been effected by any particular amendment, recourse may be had to extraneous considerations.¹¹ Thus, the provisions of the other statutes which are in *pari materia*,¹² or the previous state of the

98. (It is not the function of the Court to make the law reasonable.)

('37) AIR 1937 Pat 131 (132). (Court cannot refuse to comply with the provisions of a statute on the ground that inconvenience would be caused by so doing.)

('29) AIR 1929 Pat 731 (732) : 8 Pat 906. (Statute enacted for purposes of revenue should not be examined as to its reasonableness in all eventualities.)

('33) AIR 1933 Pesh 3 (5).

('35) AIR 1935 Sind 145 (175) : 28 Sind L R 397. (Courts are not concerned with desirability, utility or reasonableness of enactment.)

('28) AIR 1928 Sind 1 (11) : 22 Sind L R 157 (FB).

(1892) 1 Q B 273 (290), *Queen v. Judge of City London Court*.

[See ('28) AIR 1928 Sind 149 (158) : 22 Sind L R 349 (F B). (Ordinary meaning to be modified to avoid absurdity, repugnance or inconsistency.)]

('21) AIR 1921 Cal 397 (399) : 48 Cal 556 (F B).]

8a. ('32) AIR 1932 Mad 21 (21).

('37) AIR 1937 Lah 507 (510) : 1 L R (1937) Lah 171. (Cannot be influenced by English law on the subject.)

8b. ('29) AIR 1929 Oudh 526 (526) : 5 Luck 440.

9. (1900) 27 Cal 724 (755).

('32) AIR 1932 All 110 (111) : 54 All 1.

('30) AIR 1930 P C 120 (126).

('35) 62 Cal 133 (142, 144).

('24) AIR 1924 Cal 881 (882). (To read into a statute words which are not there is objectionable.)

('39) AIR 1939 Lah 70 (72) (F B). (Where the words of a statute are plain and clear and admit of but one meaning, it is not open to the Courts to speculate as to the intention of the Legislature.)

('36) AIR 1936 Lah 298 (299).

('33) AIR 1933 Lah 492 (493) : 14 Lah 389. (Court cannot construe a statute according to its own notions of what ought to have been enacted.)

('30) AIR 1930 Lah 781 (786) : 12 Lah 26.

('24) AIR 1924 Lah 65 (67) : 4 Lah 367.

('33) AIR 1933 Pesh 69 (70).

('33) AIR 1933 Pesh 3 (5).

('30) AIR 1930 Oudh 274 (275) : 5 Luck 12 (FB).

('30) AIR 1930 Oudh 20 (28).

('36) AIR 1936 Rang 63 (64). (Straining language of statute is dangerous.)

('30) AIR 1930 Sind 287 (293) : 25 Sind L R 142. (Court has to interpret and not make law.)

(1895) 1895 App Cas 202 (216), *Brophy v. Attorney-General*.

9a. ('91) 18 Cal 23 (30) : 17 Ind App 122 (P C).

10. ('30) AIR 1930 Cal 767 (769, 770).

11. ('28) AIR 1928 P C 16 (18) : 55 Ind App 96 : 55 Cal 519 (P C). (Substantial changes in law pleaded — Pre-existing law should be looked to.)

('20) AIR 1920 P C 181 (184, 185) (P C).

('24) AIR 1924 All 328 (335, 336) : 46 All 489 (F B). (Comparison with old law is permitted in case of doubt.)

('99) 21 All 391 (396, 403) (F B).

('20) AIR 1920 Bom 121 (127) : 44 Bom 986.

(The Judge may infer that no change in the law is intended unless the contrary inference is necessary to be drawn owing to expediency or convenience.)

('04) 6 Bom L R 131 (209, 210) : 27 Bom 189.

(Where language is doubtful, the practice of the Court and administrative convenience may be looked to.)

('36) AIR 1936 Cal 593 (620).

('28) AIR 1928 Cal 828 (830).

('25) AIR 1925 Cal 34 (41) : 52 Cal 1.

('24) AIR 1924 Cal 257 (272) (F B). (Historical survey is permissible only if there is a reasonable doubt.)

('22) AIR 1922 Mad 491 (492).

('31) AIR 1931 Oudh 22 (24) : 5 Luck 116.

('30) AIR 1930 Sind 287 (293) : 25 Sind L R 142.

[See ('36) AIR 1936 Cal 64 (65). (There are occasions when expressions used by Legislature in subsequent enactments or amendments of law can be used for the purpose of interpreting earlier enactment and in giving effect to intention of Legislature, express, or implied, so far as the particular provisions of the law are concerned.)

('30) AIR 1930 P C 120 (121, 122).]

12. ('99) 22 Mad 494 (502).

law,¹³ or the scope and intention of the Act,¹⁴ may be considered. It is not, however, permissible to construe the provisions of one statute in the light of judicial decisions on a provision of another statute not in *pari materia* with the statute in question.^{14a} In cases of reasonable doubt as to the expression contained in a penal provision, the benefit of doubt must be given to the subject.^{14b}

Subject to the broad principles mentioned above, the following general rules of interpretation of statutes should also be borne in mind in construing the Sections of the Code :—

1. Where an Act, such as the Code, is divided into Sections and Rules, the Sections must be taken to lay down *general principles* and the Rules as providing the machinery or the means of *applying* them.¹⁵

1a. Where the language of an enactment is difficult and ambiguous, the Court may, for its assistance in its construction, refer to rules made under the provisions of the Act, especially where such rules are, by the statute authorising them,

- (‘25) AIR 1925 Pat 1 (8) : 3 Pat 371 (F B).
(e. g. the Limitation Act and the Civil Procedure Code.)
- (‘10) 7 Ind Cas 196 (198) : 32 All 351 : 37 Ind App 124 (P C). (Oudh Laws Act and Oudh Land Revenue Act.)
- (‘32) AIR 1932 Oudh 210 (216) : 7 Luck 601 (F B).
(‘31) AIR 1931 Pat 241 (246) : 10 Pat 670 (F B). (Per Jwala Prasad, J.)
(‘31) AIR 1931 Sind 44 (46) : 25 Sind L R 310. (Presidency Towns Insolvency Act—English ruling on Bankruptcy Act should be followed in interpreting the Act when provisions and wording are same.)
[See also (‘29) AIR 1929 Cal 33 (36) : 56 Cal 280].
13. (‘28) AIR 1928 P C 16 (18) : 55 Cal 519 : 55 Ind App 96 (P C).
(‘24) AIR 1924 Cal 257 (272) (F B).
(‘24) AIR 1924 All 328 (335) : 46 All 489 (F B).
(‘36) 40 Cal W N 1034 (1035).
(‘21) AIR 1921 Cal 397 (399) : 48 Cal 556 (F B).
(‘36) AIR 1936 Rang 17 (19) : 13 Rang 385.
14. (‘24) AIR 1924 All 328 (336) : 46 All 489 (F B).
(Where a Section of an Act is capable of two interpretations.)
(‘34) AIR 1934 All 388 (389) : 56 All 781. (Language of statute leading to absurdity and hardship—Object and intention may be considered.)
(‘99) 21 All 391 (396, 397).
(‘34) AIR 1934 Bom 213 (214). (Wording open to two possible constructions—That which appears to be real object of Act should be taken.)
(‘34) AIR 1934 Cal 325 (326) : 60 Cal 1470. (The more literal construction of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent from the statute and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effectuated.)
(‘84) 10 Cal 166 (184, 192, 193) (F B).
(‘18) AIR 1918 Pat 398 (407) : 3 Pat L Jour 1 (F B).
(‘14) AIR 1914 Low Bur 15 (19) : 7 Low Bur
- Rul 306.
(‘14) 25 Ind Cas 594 (595) (Oudh).
- 14a. (‘32) AIR 1932 All 293 (307) : 54 All 646 (F B).
(‘36) AIR 1936 All 239 (251) : 58 All 505. (Stamp Act and Registration Act are not in *pari materia*.)
(‘36) AIR 1936 Cal 593 (617). (Applicability of decision to different statute—Authority is of little value.)
(‘36) AIR 1936 Lah 301 (303). (It is always more or less dangerous, when discussing authorities on a particular provision of law to cite cases upon entirely different provisions of law by way of mere analogy.)
[See (‘35) AIR 1935 P C 143 (146) : 14 Pat 552 (P C). (Income-Tax Act of one country not to be construed in the light of decisions on income-tax legislation of another country.)]
[See also (‘36) AIR 1936 Nag 278 (279) : 1 L R (1937) Nag 108. (Tendency on the part of the Subordinate Courts of the Central Provinces to take recourse to the decisions of the Allahabad High Court in matters specifically provided for by any local enactments of the C. P. deprecated.)]
- 14b. (‘32) AIR 1932 Nag 174 (176) : 28 Nag L R 302.
(‘30) AIR 1930 All 265 (267) : 52 All 568 (F B). (Principle is applicable to fiscal statutes as well.)
(‘39) AIR 1939 Lah 81 (85) (F B).
(‘30) 1930 Mad W N 249 (280).
(‘36) AIR 1936 Nag 55 (62).
[See (‘31) AIR 1931 Sind 146 (149) : 25 Sind L R 230.]
[See also (‘31) AIR 1931 Mad 177 (179) : 54 Mad 75.]
15. (‘17) AIR 1917 Cal 657 (658) : 43 Cal 148. (Sections create jurisdiction, while rules indicate the mode in which they are to be exercised.)
(‘14) AIR 1914 Cal 163 (164) : 41 Cal 108. (Rules restrict sections.)
(‘17) AIR 1917 Cal 44 (46) : 44 Cal 929 (F B). (View that rules restrict Sections is dissented from at page 47 by Mookorjee, J.)

directed to be read as part of the Act.^{15a}

2. Where two constructions are possible, a Section should be construed so as to avoid *inconsistency* of meaning,¹⁶ or the making of a word, clause or sentence either superfluous or insignificant.¹⁷ It may be noted that a Section which is clear in itself will be affected by previous or succeeding Sections, only when those Sections are capable of an interpretation which is repugnant to or startling in juxtaposition with the Section in question.^{17a} In other words, the statute should be examined as a self-contained unit, the different Sections being considered simultaneously in view of each other.¹⁸ It follows from this that where two remedies or two procedures are provided

[See ('34) AIR 1934 Sind 110 (111). (The rules framed under an Act shall be consistent with the Act. Courts cannot put a forced or unnatural construction upon the language of the Act in order to bring it into conformity with a rule.)]

15a. ('37) AIR 1937 Mad 481 (483) : I L R (1937) Mad 1023.

16. ('28) AIR 1928 Lah 609 (613) : 9 Lah 701 (F B).

('32) AIR 1932 Bom 427 (428) : 56 Bom 264.

('24) AIR 1924 Bom 219 (225, 226) : 48 Bom 214 (F B).

('33) AIR 1933 Cal 443 (445) : 60 Cal 1008.

('32) AIR 1932 Cal 753 (757) : 60 Cal 364.

('32) AIR 1932 Cal 699 (700, 701) : 60 Cal 233.

('09) 1 Ind Cas 447 (449) : 36 Cal 115.

('31) AIR 1931 Lah 353 (359) : 12 Lah 604.

('31) AIR 1931 Lah 476 (479) : 12 Lah 635.

('32) AIR 1932 Mad 336 (342) : 55 Mad 671.

('29) AIR 1929 Mad 43 (44) : 52 Mad 337.

('14) AIR 1914 Mad 258 (260) : 37 Mad 119.

('33) AIR 1933 Nag 193 (197) : 29 Nag L R 278 (F B).

('16) AIR 1916 Oudh 79 (81).

('13) 19 Ind Cas 347 (347, 348) : 16 Oudh Cas 5.

('35) AIR 1935 Pesh 69 (71).

('28) AIR 1928 Sind 149 (159).

('27) AIR 1927 Sind 173 (173).

[See ('35) AIR 1935 Lah 492 (498) : 16 Lah 280. (Words having more than one meaning—Context should be seen.)]

17. ('09) 4 Ind Cas 801 (802) : 5 Nag L R 189.

('30) AIR 1930 Sind 265 (279) : 24 Sind L R 277 (F B).

('26) AIR 1926 All 653 (656). (Construction of two contiguous Sections.)

('25) AIR 1925 Cal 1 (3) : 52 Cal 275 (F B).

('18) AIR 1918 Mad 921 (923).

('38) AIR 1938 Nag 180 (181). (Law must be interpreted in a way which will not render one of its provisions entirely nugatory.)

('34) AIR 1934 Oudh 145 (148).

('32) AIR 1932 Oudh 63 (64, 65) : 7 Luck 350.

('36) AIR 1936 Sind 175 (178) : 29 Sind L R 410.

17a. ('32) AIR 1932 Mad 391 (395) : 55 Mad 903 (F B).

[See ('35) AIR 1935 Oudh 427 (428, 429) : 11 Luck 289. (Certain words not found in the statute held as "understood" in order to avoid inconsistency between two provisions of the Section.)]

18. ('14) AIR 1914 Low Bur 15 (19) : 7 Low Bur Rul 306.

('32) AIR 1932 Cal 699 (700) : 60 Cal 233.

('32) AIR 1932 P C 168 (171) : 56 Bom 313 : 59 Ind App 258 (PC). (Terms of a composite enactment not to be considered separately.)

('20) AIR 1920 P C 181 (184, 185) (PC).

('31) AIR 1931 All 49 (50) : 53 All 233. (Effect must be given to every part of the statute.)

('32) AIR 1932 Bom 427 (428) : 56 Bom 264.

('32) AIR 1932 Bom 210 (211).

('09) 1 Ind Cas 280 (281) (Bom).

('36) AIR 1936 Cal 506 (512) : I L R (1937) 1 Cal 25 (F B). (Construction, though not strictly grammatical, must be consistent to the Act in all its parts.)

('33) AIR 1933 Cal 283 (283, 284) : 60 Cal 289.

(Scope and significance of any passage in an Act may be found out also on comparison of the same with other parts of the same statute.)

('16) AIR 1916 Cal 136 (143) : 43 Cal 790.

('96) 23 Cal 738 (751, 752) (F B). (Bank of England v. Vagliano, L R (1891) A C 107, Relied on.)

('37) AIR 1937 Lah 912 (912).

('14) AIR 1914 Lah 511 (512) : 1915 Pun Re No. 20. (Construction is to be made of all the parts together and not of one part only by itself.)

('33) AIR 1933 Nag 193 (197, 199, 200) : 29 Nag L R 278 (F B).

('11) 12 Ind Cas 364 (368) : 7 Nag L R 186.

('11) 12 Ind Cas 357 (358) : 7 Nag L R 180.

('35) AIR 1935 Oudh 313 (315) : 11 Luck 116.

(Various provisions should be construed so as to make them consistent.)

('35) AIR 1935 Pat 492 (494). (Construction should be harmonious.)

('35) AIR 1935 Pat 342 (345) : 14 Pat 785 (SB). (Other parts of Act throwing light on intention of Legislature can be considered when interpreting any provision.)

('38) AIR 1938 Sind 1 (5) : 32 Sind L R 185 (F B). (It is a well-recognised canon of construction that the more literal construction ought not to prevail if it is opposed to the intentions of the Legislature as apparent from the statute and if the words are sufficiently flexible to admit of some other construction by which the intention will be better appreciated.)

[See ('35) AIR 1935 All 946 (952) : 58 All 261 (F B). (Per Thom J.)]

('35) AIR 1935 Bom 402 (403) : 60 Bom 55 (F B). (It may sometimes be necessary to

for, one must not be taken as operating in derogation of the other.¹⁰

3. Everything is to be taken as permissible unless there is some prohibition against it.²⁰ In the case of consolidating statutes like the Civil Procedure Code, the *statute itself* must be consulted in order to find the authority or the prohibition.²¹

4. Where the statute is not clear, reasonable construction should be adopted.²² A construction which leads to an absurd result,²³ or unjust consequences entailing hardship,^{23a} or produces injustice,²¹ or defeats the object of the Act itself²⁵ should, if possible, be avoided.

5. Words operating in derogation of the rights of the subject should be strictly construed.²⁶

do violence to the language used in a particular part of the statute in order to give effect to the enactment as a whole.)

('36) AIR 1936 Cal 593 (619).]

[See also ('36) AIR 1936 Nag 55 (59). (The best and the least dangerous method of interpreting any enactment is to take the words used in it as a guide to the discovery of the intention of the Legislature.)]

19. ('86) 8 All 354 (361).

('76) 25 Suth W R 304 (305); 2 Cal 114 (116).

('22) AIR 1922 P C 17 (19) : 44 All 185 : 49 Ind App 60 (PC).

('33) AIR 1933 All 230 (230) : 55 All 241.

('27) AIR 1927 All 346 (348).

('27) AIR 1927 Mad 602 (602, 603) : 50 Mad 845.

('26) AIR 1926 Nag 491 (492). (Evidence Act, S. 115, cannot override substantive law such as Contract Act, S. 11.)

20. ('89) 11 All 267 (287) (FB). (Per Mahmood, J.).

('25) AIR 1925 Mad 42 (44) : 48 Mad 491.

('82) 5 All 163 (172) (FB). (Per Mahmood, J.; Followed in 5 Ind Cas 532 : 37 Cal 399.)

('36) AIR 1936 Nag 55 (61). (Law is always subject to evasion in the sense that there is no obligation not to do what the Legislature has not really prohibited and it is not evading an Act to keep outside it.)

[See ('35) AIR 1935 Mad 755 (761). (The general principle that where an Act confers jurisdiction, it impliedly also grants the power of doing all such acts or employing such means as are essentially necessary to its execution cannot override the more particular provisions of the Act which define the powers.)]

21. ('89) 11 All 267 (288) (FB).

22. ('21) AIR 1921 P C 240 (242) (PC).

('32) AIR 1932 Cal 236 (240) : 59 Cal 40.

('31) AIR 1931 P C 24 (26) (PC).

('36) AIR 1936 All 576 (578) : 58 All 1064 (FB).

(Two interpretations possible—Interpretation most consistent with reason, commonsense and convenience prevails.)

('29) AIR 1929 All 750 (750) : 51 All 996.

('28) AIR 1928 All 207 (210) : 50 All 625 (FB).

('27) AIR 1927 All 50 (51) : 49 All 240.

('88) 10 All 223 (234) (FB).

('19) AIR 1919 Cal 551 (571) : 45 Cal 343 (FB).

(Intention of the statute must be gathered from the language used in the particular statute.)

('81) 7 Cal 127 (130, 132). (But where the terms of an Act are clear and plain, it is the duty of the Court to expound it as it stands.)

('39) AIR 1939 Lah 81 (85) (FB).

('36) AIR 1936 Pat 393 (394) : 15 Pat 394.

('26) AIR 1926 Sind 1 (3) : 20 Sind L R 34 (FB).

(The law does not favour legal and strained intendments, when over-minute precision may confound legal certainty.)

23. ('28) AIR 1928 Mad 571 (577).

('32) AIR 1932 Cal 699 (700, 701) : 60 Cal 233.

('21) AIR 1921 Cal 397 (399) : 48 Cal 556 (FB).

('31) AIR 1931 Lah 353 (359) : 12 Lah 604.

('28) AIR 1928 Mad 746 (755).

('38) AIR 1938 Nag 91 (92).

('33) AIR 1933 Sind 151 (154) : 27 Sind L R 121 (FB).

('28) AIR 1928 Sind 149 (153) : 22 Sind L R 349 (FB).

('26) AIR 1926 Sind 81 (83) : 20 Sind L R 238.

(Two constructions possible—One leading to absurdity to be rejected.)

23a. ('31) AIR 1931 Pat 285 (291) : 11 Pat 112.

('34) AIR 1934 All 626 (639) (FB).

24. ('26) AIR 1926 All 617 (622) : 49 All 8 (FB).

('38) AIR 1938 Bom 484 (488) : 1 L R (1939) Bom 53 (FB).

('89) AIR 1939 Bom 358 (361) : 57 Bom 616.

('31) AIR 1931 Lah 353 (359) : 12 Lah 604.

('35) AIR 1935 Nag 168 (170) : 31 Nag L R 386.

25. ('31) AIR 1931 All 727 (732) : 54 All 154.

('11) 10 Ind Cas 787 (789) (Low Bur).

('26) AIR 1926 All 617 (622) : 49 All 8 (FB).

('26) AIR 1926 Cal 927 (934) : 53 Cal 492.

('12) 17 Ind Cas 370 (370) : 8 Nag L R 147.

('32) AIR 1932 Oudh 210 (211) : 7 Luck 601 (FB).

('09) 4 Ind Cas 145 (154) : 12 Oudh Cas 323.

('33) AIR 1933 Rang 68 (69, 70) : 11 Rang 182.

('39) AIR 1939 Sind 151 (154) : 27 Sind L R 121 (FB).

(Words nullifying a statute can be ignored).

('25) AIR 1925 Sind 90 (93) : 17 Sind L R 279.

(1881) 6 App Cas 114 (122), Caledonian Railway Co. v. N. B. Railway Co.

26. ('28) AIR 1928 Rang 87 (94) : 5 Rang 722.

('86) 8 All 354 (361) (F B).

('34) AIR 1934 P C 36 (40) (P C).

('28) AIR 1928 P C 287 (290) (P O). (Person aggrieved is entitled to compensation unless expressly deprived.)

('21) AIR 1921 P C 224 (227) (P O). (Intention to alienate private rights without compensa-

6. General words must be given the broadest possible effect unless there is some specific reason to the contrary.²⁷ But general words and phrases, however comprehensive and wide they may be in their literal sense, must be usually construed as limited to the actual objects of the Act and not as altering the law beyond.^{27a} Specific words of importance like "mortgage" should be given their appropriate meaning.^{27b}

7. A *general* provision must yield to a *special* provision providing for particular cases.²⁹ If the Legislature makes a special Act dealing with a particular case and later makes a general Act which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless, unless it is clear that in making the general Act the Legislature intended to abrogate the special Act, the provisions of the general Act do not override the special.^{29a} As a matter of fact a repeal of the special Act by the general Act by implication will not be admitted if the two can be read together.^{29b} The same rule applies to two special Acts.^{29c} But

tion should not be imputed to the Legislature, unless expressed in clear terms.)

('27) AIR 1927 All 599 (600). (Penal statute must be strictly construed.)

('18) 95 All 24 (26).

('31) AIR 1931 Bom 505 (506) : 55 Bom 461.

('25) AIR 1925 Bom 458 (462).

('90) 14 Bom 331 (352). (Law must not be strained against individuals.)

('89) AIR 1938 Cal 280 (282) : 60 Cal 742.

('31) AIR 1931 Cal 642 (643) : 59 Cal 19.

('29) AIR 1929 Cal 133 (134).

('25) AIR 1925 Cal 116 (139).

('87) 14 Cal 67 (87) (F B).

('32) AIR 1932 Lah 597 (599).

('31) AIR 1931 Lah 476 (479) : 12 Lah 685. (In case of doubts or ambiguity, the construction must be in favour of the personal liberty of the subject.)

('31) AIR 1931 Lah 79 (80) : 12 Lah 275.

('30) AIR 1930 Lah 1034 (1036) : 12 Lah 367.

('24) AIR 1924 Lah 418 (419).

('16) AIR 1916 Lah 177 (179) : 1916 Pun Re No. 48. (Provisions in bar of suit such as Section 11.)

('32) 1932 Mad W N 922 (929).

('31) AIR 1931 Mad 729 (736).

('25) AIR 1925 Nag 190 (192). (Statutes dealing with vested rights should be strictly construed.)

('30) AIR 1930 Oudh 434 (439).

('32) AIR 1932 Pat 281 (284). (Penal Section must be strictly construed.)

('33) AIR 1933 Rang 68 (69) : 11 Rang 182.

('27) AIR 1927 Rang 306 (310) : 5 Rang 483.

('20) AIR 1920 Low Bur 79 (81) : 10 Low Bur 203.

('20) AIR 1920 Upp Bur 1 (1) : 3 Upp Bur 212.

('18) AIR 1918 Upp Bur 3 (3) : 3 Upp Bur 79.

[See also ('32) AIR 1932 Mad 724 (727) : 56 Mad 134.

('34) AIR 1934 Sind 46 (51) : 28 Sind L R 174. (It is a well-settled rule of construction that the Court will not hold that a penalty has been incurred unless the language of the clause which is said to impose it, is so clear that the case must necessarily be within it.

And where a proviso to a Section is open to a double construction, one which inflicts a penalty and the other which does not, the latter construction should prevail.)

('32) AIR 1932 Mad 593 (599) : 56 Mad 40.]

27. ('86) 8 All 354 (360, 361).

('68) 9 Suth W R 402 (406).

('11) 35 Bom 412 (417). (Definition clauses—When to be used.)

('16) AIR 1916 Pat 133 (134) : 2 Pat L Jour 91 (F B). (Do.)

27a. ('29) AIR 1929 Nag 246 (249) : 25 Nag L R 19.

27b. ('29) AIR 1929 All 174 (176).

28. ('21) AIR 1921 Bom 374 (374, 375) : 45 Bom 672.

('32) AIR 1932 Oudh 163 (164). (Special Act prevails over general Act.)

('28) AIR 1928 All 536 (537).

('25) AIR 1925 All 230 (232) : 47 All 268.

('38) AIR 1938 Bom 372 (374).

('34) AIR 1934 Bom 162 (163).

('35) AIR 1935 Cal 281 (282).

('24) AIR 1924 Cal 668 (676) : 51 Cal 504.

('26) AIR 1926 Lah 88 (89) : 7 Lah 84.

('21) AIR 1921 Lah 280 (282).

('10) 8 Ind Cas 1158 (1159) : 1910 Pun Re No. 103.

('32) AIR 1932 Mad 605 (608) : 56 Mad 212.

('22) AIR 1922 Mad 143 (144) : 45 Mad 81.

('16) AIR 1916 Mad 438 (439) : 39 Mad 576.

('36) AIR 1936 Nag 180 (180) : I L R (1936) Nag 5.

('31) AIR 1931 Nag 47 (48). (A general Article does not govern a case when there is a special Article covering it in the Limitation Act.)

('32) AIR 1932 Oudh 193 (195) : 8 Luck 1 (F B).

('30) AIR 1930 Pat 301 (304) : 9 Pat 747.

('34) AIR 1934 Pesh 37 (37).

('30) AIR 1930 Rang 37 (38) : 7 Rang 581.

('28) AIR 1928 Rang 249 (251) : 6 Rang 474.

28a. ('31) AIR 1931 Mad 152 (156) : 54 Mad 364.

('36) AIR 1936 All 239 (250) : 58 All 505.

('32) AIR 1932 P C 252 (254) (P C).

('29) AIR 1929 Nag 17 (21) : 24 Nag L R 158 (F B).

28b. ('30) AIR 1930 Pat 301 (304) : 9 Pat 747.

28c. ('30) AIR 1930 Mad 963 (968) : 54 Mad 92.

('30) AIR 1930 Bom 554 (563) : 54 Bom 902.

such special provision must be applied only to those cases to which it is confined by the Legislature.²⁹ Thus, a special Act of the Legislature as the Sale of Goods Act cannot possibly, except in the branch of the law to which it relates, overrule a statute of the nature of the General Clauses Act.^{29a} Again, when on the same subject two incompatible provisions are in force, one general and the other particular, the particular provision must be taken to be an exception to the general one.^{29b}

8. Where there are general words following particular and specific words in a Section, the general words must be confined to things of the same kind (*ejusdem generis*) as those specified.³⁰ The applicability of this rule, however, will not arise if the class of cases intended to be provided for by the Section is clear from the language of the Section.³¹

9. Where this Code has adopted part of the language of the old Code, the interpretation put upon such language by the Courts must be taken to have been accepted by the Legislature.³² When legislation follows a continuous practice and repeats the very words on which that practice was founded, it may be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning.^{32a}

10. Provisions ousting the jurisdiction of the Courts,³³ and those conferring

29. ('15) AIR 1915 Mad 781 (784) : 21 Ind Cas 532 (534) : 38 Mad 738.
 ('17) AIR 1917 Mad 951 (954) : 39 Mad 981.
 ('29) AIR 1929 Oudh 389 (392) : 4 Luck 539 (FB).
 29a. See ('29) AIR 1929 Nag 246 (249) : 25 Nag L R 19. (General statute cannot be impliedly repealed by local or special statute.)
 29b. ('33) AIR 1933 All 241 (244) : 55 All 432 (FB).
 30. ('28) AIR 1928 P C 16 (18) : 55 Cal 519 : 55 Ind App 96 (P C).
 ('32) AIR 1932 Lah 239 (241) : 13 Lah 528.
 ('39) AIR 1939 Nag 186 (189) : I L R (1939) Nag 250 (F B).
 ('19) AIR 1919 Pat 541 (542) : 4 Pat L Jour 561.
 [But see ('25) AIR 1925 Cal 116 (135).
 (Prima facie to be taken in general sense.)]
 31. ('20) AIR 1920 Mad 413 (413) : 43 Mad 65.
 ('32) AIR 1932 Lah 239 (241) : 13 Lah 528.
 32. ('27) AIR 1927 All 369 (371) : 50 All 130 (FB).
 ('30) AIR 1930 All 69 (71) : 52 All 363 (FB).
 ('31) AIR 1931 All 489 (490) : 53 All 687 (FB).
 ('31) AIR 1931 All 294 (299) : 53 All 612 (FB).
 ('29) AIR 1929 All 845 (846) : 52 All 88.
 ('29) AIR 1929 All 625 (630) : 52 All 11 (FB).
 ('38) AIR 1938 Bom 484 (488) : I L R (1939) Bom 53 (F B).
 ('10) 5 Ind Cas 457 (462) (Bom).
 ('31) AIR 1931 Cal 560 (562, 563) : 58 Cal 761.
 ('29) AIR 1929 Cal 566 (567) : 57 Cal 381.
 ('11) 8 Ind Cas 1061 (1064) : 38 Cal 188.
 ('30) AIR 1930 Lah 764 (767) : 11 Lah 481 (FB).
 ('33) AIR 1933 Sind 179 (181, 182) : 27 Sind L R 230. (This rule applies with greater force when the provisions of an English statute have been reproduced by the Indian Legislature.)
 ('31) AIR 1931 Sind 44 (46) : 25 Sind L R 310.
 32a. ('33) AIR 1933 Mad 489 (490) : 56 Mad 837 (SB).
 ('34) AIR 1934 Rang 27 (29) : 11 Rang 521 (S B).
 33. ('28) AIR 1928 Pat 615 (626) : 8 Pat 122.
 ('30) AIR 1930 All 225 (230) : 52 All 619 (FB).
 ('31) AIR 1931 All 706 (707) : 53 All 799.
 ('28) AIR 1928 All 511 (513).
 ('88) 10 All 396 (398).
 ('29) AIR 1929 Bom 471 (473) : 53 Bom 819.
 ('05) 29 Bom 480 (490).
 ('89) 4 Bom 624 (628).
 ('75) 1 Bom 531 (533).
 ('67) 8 Suth W R 428 (436) (F B).
 ('39) AIR 1939 Lah 237 (238, 239). (Provision of the law which trenches on the usual jurisdiction of a Civil Court must be very strictly construed.)
 ('38) AIR 1938 Lah 14 (15).
 ('35) AIR 1935 Lah 613 (615). (The onus lies on the party who seeks to oust the jurisdiction.)
 ('30) AIR 1930 Lah 781 (786) : 12 Lah 26.
 ('36) AIR 1936 Mad 574 (575) : 59 Mad 895.
 ('36) AIR 1936 Mad 522 (523).
 ('32) AIR 1932 Mad 724 (729) : 56 Mad 134.
 ('31) AIR 1931 Mad 801 (803) : 54 Mad 1011.
 ('13) 19 Ind Cas 68 (75) (Mad).
 ('38) AIR 1938 Nag 80 (82) : I L R (1938) Nag 268.
 ('26) AIR 1926 Nag 212 (214).
 ('17) AIR 1917 Nag 25 (26).
 ('13) 19 Ind Cas 759 (763) : 9 Nag L R 54.
 ('12) 16 Ind Cas 449 (451) : 8 Nag L R 107 (112).
 ('35) AIR 1935 Oudh 96 (106). (Statutes affecting jurisdiction of Civil Courts are to be construed as far as possible so as not to transfer suits from the ordinary Civil Courts to executive officers.)
 ('33) AIR 1933 Pat 52 (56).
 ('19) AIR 1919 Pat 71 (73).
 ('27) AIR 1927 Sind 173 (175).
 [See also ('31) AIR 1931 Mad 61 (64). (Rules of High Court affecting jurisdiction of High Court should be clear.)]

jurisdiction on special bodies or persons or Courts,³⁴ should be strictly construed. The grant of a special jurisdiction does not carry with it the power to act outside such jurisdiction.^{34a}

11. In the absence of any context indicating a contrary intention, the Legislature must be taken to attach the same meaning to the same words used in different parts of the statute³⁵ or in subsequent statutes in a similar connexion.³⁶ But, if sufficient reasons exist, a word can be construed in one part of an Act in a sense different from that it bears in another part.^{36a} Where an expression is *defined* in an Act, it must be given the same meaning throughout the Act,^{36b} unless there is some provision which makes it clear that for certain purposes, the expression must be given a different meaning.^{36c} But, definitions are of limited scope being framed only for the purpose of the Act in which they occur, unless specially extended.^{36d}

12. All rules of law are founded on the assumption that the constituted tribunals are fairly competent and have power to carry out the provisions of the Acts.³⁷ They should, therefore, be construed so as to further and not so as to restrict the purposes of the Act.³⁸ Where jurisdiction is given to a Court to make a particular order, the Legislature must be deemed to have granted also the power to enforce such order.^{38a}

13. Where a statute creates a right and provides a remedy, that remedy and *no other* is available.³⁹ This rule, however, does not apply where the right exists *independently* of the statute.⁴⁰ Where, again, a statute gives power to any person

34. ('09) 6 Ind Cas 857 (857) : 3 Sind L R 221.
(Provisions conferring jurisdiction on arbitrators.)

('31) AIR 1931 Nag 48 (50).

('12) 17 Ind Cas 342 (343) (Mad).

('30) AIR 1930 Nag 205 (206).

('33) AIR 1933 Oudh 100 (102) : 8 Luck 295.

('32) AIR 1932 Rang 123 (127) : 10 Rang 412 (F.B.) (Conditions precedent for vesting jurisdiction not fulfilled — Proceedings before the special tribunal are null and void.)

('23) AIR 1923 Rang 238 (239). (Succession Certificate Act.)

[See also ('32) AIR 1932 Mad 90 (95) : 55 Mad 298.]

34a. ('30) AIR 1930 Nag 205 (206).

('33) AIR 1933 Nag 193 (196) : 29 Nag L R 278 (F B).

35. ('11) 11 Ind Cas 614 (614) : 35 Bom 401.

('30) AIR 1930 All 669 (673).

('36) AIR 1936 All 495 (503) : 58 All 949 (F.B.).
(Interpretation of the same word used in the same Section.)

('35) AIR 1935 All 444 (445) : 57 All 745. (Same word used in the Section and its proviso — Different constructions may be placed.)

('32) AIR 1932 Bom 71 (77) (F.B.).

('26) AIR 1926 Bom 497 (500) : 50 Bom 566 (F.B.).

('10) 5 Ind Cas 610 (610) : 34 Bom 239.

('09) 3 Ind Cas 750 (751) : 33 Bom 452. (Applicability of the rule to Hindu law texts.)

('36) AIR 1936 Cal 331 (333).

('37) A I R 1937 Mad 385 (390) : I L R (1937) Mad 616 (F B).

('36) AIR 1936 Mad 42 (46) : 59 Mad 107.

('38) AIR 1938 Nag 59 (61) : ILR(1937)Nag 469.

('37) AIR 1937 Nag 17 (22) : I L R (1937) Nag

315 (F B).

('35) AIR 1935 Nag 20 (22).

('31) AIR 1931 Nag 177 (178) : 27 Nag L R 270.

('14) AIR 1914 Nag 58 (60) : 10 Nag L R 28.

('36) AIR 1936 Sind 108 (112) : 29 Sind L R 882.

(Interpretation of the same word in a clause of a Section.)

('10) 7 Ind Cas 595 (598) : 4 Sind L R 26.

36. ('19) AIR 1919 P C 142 (142, 143) (P C).

('20) AIR 1920 Pat 349 (350).

36a. ('37) AIR 1937 Mad 385 (390) : I L R (1937) Mad 616 (F B).

36b. ('38) AIR 1938 All 613 (615) : I L R 1938 All 957.

('37) AIR 1937 Pat 531 (532).

36c. ('38) AIR 1938 All 613 (615) : I L R 1938 All 957.

36d. ('93) 15 All 141 (143).

('25) AIR 1925 Lah 415 (416) : 6 Lah 276.

37. ('22) AIR 1922 Cal 118 (120) : 47 Cal 354.

38. ('21) AIR 1921 Cal 85 (86) : 48 Cal 378.

38a. ('33) AIR 1933 Mad 689 (689) : 57 Mad 35.

('33) AIR 1933 Mad 748 (750) : 57 Mad 237.

39. ('24) AIR 1924 Mad 521 (522).

('28) AIR 1928 Mad 641 (647).

('33) AIR 1933 All 358 (363) : 55 All 406.

('18) AIR 1918 Cal 850 (856) : 44 Cal 804 & 816. (Case law discussed.)

('30) 1930 Mad W N 651 (652).

('33) AIR 1933 Nag 193 (195) : 29 Nag L R 278 (F B).

('21) AIR 1921 Nag 60 (64).

('17) AIR 1917 Nag 149 (151) : 13 Nag L R 210.

('09) 4 Ind Cas 795 (795) : 5 Nag L R 176.

40. ('17) AIR 1917 Lah 75 (78) : 1917 Pun Re No. 22.

[See also ('33) AIR 1933 Nag 193 (196) : 29 Nag L R 278 (F B).

for a public purpose from which an individual may receive an injury, and where the mode of redress for such injury is also specified in the statute, the jurisdiction of the ordinary Courts will be ousted.^{40a}

13a. Where a statute confers a right on a party in general terms, the cutting down of those rights by a rule would make the rule repugnant to the Act.^{40b} But such rules must be supported unless they are manifestly unreasonable or unfair.^{40c} If a new rule is in conflict with the previous existing rule, the new rule must by implication be deemed to have annulled or altered that rule.^{40d}

14. A change in the language of the present Code from that of the old Code may be presumed to indicate a change of intention on the part of the Legislature.⁴¹ In regard to the matters dealt with by the change only the new provisions should be looked to.^{41a} But it is also a recognised presumption that the Legislature does not intend to make any alteration beyond what it expressly declares,⁴² and where the language used is doubtful no change will be deemed to have been made.⁴³ Any change in the language of the statute would be presumed to have been made by the Legislature with the knowledge of the course of decisions previous to the change.^{43a}

15. Where a question arises as to whether any particular provision is mandatory or directory, the general test is the relation which the provision has to the general object intended to be secured by the Act.⁴⁴ Another test has also been applied and that is to see whether a party may waive the benefit of the particular provision.⁴⁵ In deciding the question, the Court should take into account the possibility of justice suffering from a too rigid application of the rule.⁴⁶

16. Words in singular should be read as including the plural unless there is anything in the text to the contrary.⁴⁷

16a. In following decided cases in regard to the interpretation placed by them upon words in a statute, the danger of diverting attention from what has been enacted to what has been judicially said about the enactment must be avoided.^{47a}

17. Forms given in the Schedule do not control the clear words of the Code itself.⁴⁸

18. Where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act which is not expressly made applicable to the subsequent Act can be deemed to be incorporated in it, at all events, if it is possible for the subsequent Act to function effectively without the addition, nor can the repeal of the first statute affect the second.^{48a}

19. Provisions of Acts passed by the same Legislature, when apparently

(‘31) AIR 1931 Mad 88 (87) : 54 Mad 627].

40a. (‘28) AIR 1928 Lah 562 (565) : 10 Lah 338.

(‘31) AIR 1931 Mad 574 (575) : 54 Mad 928.

40b. (‘28) AIR 1928 Mad 1182 (1186) : 52 Mad 92 (F B).

40c. (‘33) AIR 1933 Cal 243 (245) : 60 Cal 689.

40d. (‘31) AIR 1931 All 567 (567) : 54 All 263 (F B).

41. (‘14) AIR 1914 Sind 11 (12) : 8 Sind L R 215.

41a. (‘32) AIR 1932 All 188 (190) : 54 All 416.

42. (‘13) 20 Ind Cas 572 (574) : 7 Sind L R 31.

(‘30) AIR 1930 Sind 265 (279) : 24 Sind L R 277 (F B).

(‘35) AIR 1935 Sind 73 (76).

(‘18) AIR 1918 Sind 22 (23) : 11 Sind L R 128.

43. (‘18) AIR 1918 Mad 1100 (1102).

(‘30) AIR 1930 All 193 (197) : 52 All 501 (F B).

(‘33) AIR 1933 Oudh 274 (275) : 8 Luck 504.

(‘31) AIR 1931 Pat 1 (3).

43a. (‘30) AIR 1930 All 225 (240) : 52 All 619 (F B).

44. (‘24) AIR 1924 Cal 889 (889) : 52 Cal 159.

(‘30) AIR 1930 Mad 278 (283) : 52 Mad 648.

45. (‘10) 5 Ind Cas 390 (395) (Cal).

(‘29) AIR 1929 Cal 433 (435) : 56 Cal 252.

46. (‘15) AIR 1915 Mad 920 (921) : 39 Mad 485.

(‘31) AIR 1931 Lah 15 (16).

47. (‘25) AIR 1925 Rang 94 (95) : 2 Rang 579.

47a. (‘32) AIR 1932 P C 36 (40) (P C).

48. (‘18) AIR 1918 Cal 631 (632).

(‘32) AIR 1932 Mad 523 (524) : 55 Mad 982.

48a. (‘31) AIR 1931 P C 149 (152) : 58 Ind App 259 : 59 Cal 55 (P C).

inconsistent, should so far as possible be reconciled with each other^{49b} by reading one as a qualification to the other. If that is not possible the latter Act should prevail.⁴⁹

20. A repealing Section should not be interpreted with reference to the reading of the repealed Section.⁵⁰ The effect of repeal of a statute, in the absence of saving clauses, is that it has to be considered as if the statute so repealed has never existed.^{50a}

21. A repealing Act does not affect any legal proceedings in respect of rights acquired before the repeal.⁵¹ When an Act is in force on the date of a transaction, a subsequent repealment of the Act does not affect the merits, rights or liabilities of the parties on the date of the transaction.^{51a}

22. It is not proper to use one Act for the purpose of interpreting another Act.⁵²

23. In interpreting foreign statutes, Courts should not be guided by outside opinion however eminent such opinion may be.⁵³

24. Technical language must have technical meaning attached to it, unless the contrary manifestly appears.⁵⁴

25. Special Acts must be strictly construed.⁵⁵

26. Where the terms of a statute are not imperative, the use of general powers conferred by that statute should be in strict conformity with private rights.⁵⁶

27. In enactments which confer powers upon public authorities, the language of permission may not preclude the existence of a duty.⁵⁷

28. The words in an Act are used correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken the burden of establishing their proposition lies heavily and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred.⁵⁸

29. While it is possible that there might be an overlapping of powers conferred on different persons, by a statute, yet, at least where the matter admits of doubt, the construction against overlapping of powers should be adopted ordinarily.⁵⁹

30. In construing a statute one should endeavour to give it a meaning, in all cases of ambiguity, which will make it consonant to rather than in disagreement with other Acts.⁶⁰

48b ('31) AIR 1931 Sind 124 (126) : 25 Sind L R 222.

('29) AIR 1929 Bom 274 (275) : 53 Bom 627.

('28) AIR 1928 Lah 609 (614) : 9 Lah 701 (FB).

49. (1934) L J K B 364 (367) : (1934) 1 K B 590, *Ellen Street Estates Ltd. v. Minister of Health*.

('31) AIR 1931 Sind 124 (126) : 25 Sind L R 222.

50. ('32) AIR 1932 P C 92 (94) : 59 Ind App 112 : 55 Mad 443 (P C).

50a. ('34) AIR 1934 Cal 80 (82) : 60 Cal 1438.

51. ('33) AIR 1933 Mad 57 (58).

51a. ('33) AIR 1933 Bom 262 (265).

52. ('32) AIR 1932 Mad 343 (345).

('34) AIR 1934 All 681 (683). (The meaning of an expression in a statute need not be restricted because the same expression has been used in a restricted sense in other enactments.)

('35) AIR 1935 Mad 600 (601). (Word having certain meaning in one Act should not be given same meaning found in different context in different Act.)

53. ('30) AIR 1930 Mad 146 (146).

54. ('33) AIR 1933 Cal 467 (468) : 60 Cal 379.

('37) AIR 1937 Lah 178 (179) : I L R (1937) Lah 415. (The word 'pensions' has been employed in the Code in its etymological sense.)

55. ('30) AIR 1930 Lah 333 (334).

56. ('31) AIR 1931 Rang 95 (96).

57. ('30) AIR 1930 Rang 297 (300) : 8 Rang 333 (FB).

58. ('33) AIR 1933 P C 216 (217) (P C).

('34) AIR 1934 Pat 304 (305).

59. ('35) AIR 1935 Lah 742 (753) : 16 Lah 937 (FB).

60. ('39) AIR 1939 Nag 50 (52) : I L R (1939) Nag 558 (F B).

8. Reference to pre-existing state of the law. — It follows from the principles set forth in Note 2 above, that where the language of a statute is *plain and clear* it cannot be qualified or neutralised by indications of intention gathered from the previous state of law.¹ In the leading case of *Bank of England v. Vagliano Bros.*,² Lord Herschell observed as follows:—

"I think the proper course is, in the first instance, to examine the language of the statute uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

But where the language is not clear or the statute has made no provision for any particular case, the previous legislation may be referred to for the purpose of ascertaining the object and intention of the Legislature.³

9. Reference to proceedings of the Legislature. — In the case of *The Administrator-General v. Prem Lal Mullick*,¹ their Lordships of the Privy Council have laid down definitely that it is not competent to refer to the proceedings of the Legislature as legitimate *aids* to the construction of the statute.² This is in con-

Note 8

1. ('95) 22 Cal 788 (798) : 22 Ind App 107 (P C). (Reversing 21 Cal 782.)
 - ('82) AIR 1932 Mad 8 (13) : 55 Mad 151.
 - ('20) AIR 1920 P C 140 (142) (P C). (Mere omission in later statute of negative provision in earlier one cannot by itself effect substantive affirmation.)
 - ('28) AIR 1928 P C 2 (4) : 7 Pat 221 : 55 Ind App 18 (P C).
 - (1891) 1891 App Cas 107 (120), *Bank of England v. Vagliano*.
 - ('82) AIR 1932 All 434 (435) : 54 All 616.
 - ('80) AIR 1930 All 837 (839) : 52 All 748.
 - ('10) 6 Ind Cas 101 (106) (All). (*Karamat Husain, J.*) (Per *contra* Knox, J. at p. 104.)
 - ('17) AIR 1917 Bom 268 (270).
 - ('85) 62 Cal 612 (627). (English law not to be considered.)
 - ('86) AIR 1936 Cal 593 (608).
 - ('21) AIR 1921 Cal 397 (399) : 48 Cal 556 (F B).
 - ('24) AIR 1924 Cal 424 (425).
 - ('29) AIR 1929 Cal 497 (503) : 56 Cal 367.
 - ('01) 28 Cal 517 (528).
 - ('96) 23 Cal 568 (572) : 23 Ind App 18 (P C).
 - ('80) 5 Cal 300 (308).
 - ('25) AIR 1925 Mad 589 (590) : 48 Mad 488.
 - ('17) AIR 1917 Oudh 316 (319) : 20 O. C. 104.
 - ('34) AIR 1934 Pat 555 (556).
 - ('20) AIR 1920 Low Bur 138 (139) : 10 Low Bur Rul 326.
 - ('35) AIR 1935 Sind 62(64) : 28 Sind L R 366.
 - [See ('30) AIR 1930 Oudh 148 (159) : 5 Luck 552 (F B).]
 - [See also ('22) AIR 1922 Nag 207 (208). (Alteration of provisions in new Act — Reference to new Act cannot be of any help in interpreting old Act.)]
 2. (1891) 1891 App Cas 107 (144, 145).
- See also the following cases where the principle of the above observation is accepted :*
- ('28) AIR 1928 P C 16 (18) : 55 Ind App 96 : 55 Cal 519 (P C).

- ('28) AIR 1928 P C 2 (4) : 7 Pat 221 : 55 Ind App 18 (P C).
- ('29) AIR 1929 Cal 497 (503) : 56 Cal 367.
- ('25) AIR 1925 Cal 34 (41) : 52 Cal 1.
- ('24) AIR 1924 Cal 257 (272, 273) (F B). (Case law referred to.)
- ('21) AIR 1921 Cal 1 (6) : 48 Cal 388 (S B). (Case law referred to.)
- ('90) 17 Cal 590 (599, 602) : 17 Ind App 40 (P C).
- ('28) AIR 1928 Lah 361 (368) : 10 Lah 106 (F B).
- ('97) 20 Mad 97 (104).
- ('92) AIR 1932 Oudh 71 (72) : 7 Luck 300.
- ('18) AIR 1918 Pat 633 (635). (But the Court is certainly entitled to see the course of Legislation.)
- ('16) AIR 1916 Pat 18 (20) (Do.)
3. ('84) 8 Bom 313 (321) (F B). (Case not provided for in the consolidating statute.)
- ('33) AIR (1933) Pat 435 (437, 438) : 12 Pat 665 (S B). (In case of ambiguity previous state of law may be consulted.)
- ('32) AIR 1932 All 434 (435) : 54 All 616.
- ('24) AIR 1924 All 328 (335) : 46 All 489 (F B).
- ('03) 26 All 144 (147).
- ('84) 6 All 509 (530, 531, 540) (F B).
- ('31) AIR 1931 Cal 140 (143) : 58 Cal 290.
- ('30) AIR 1930 Sind 265 (279) : 24 Sind L R 277 (F B).

Note 9

1. ('95) 22 Cal 788 (798, 799) : 22 Ind App 107 (P C).
2. ('18) AIR 1918 Mad 381 (382) : 43 Ind Cas 173 (174). (The language of the enactment in *Prem Lal's* case was plain and clear.)
- ('14) AIR 1914 Mad 174 (176) : 38 Mad 997. (Interpretation of the plain words of the Act in the light of expressions of the views of Government before its enactment is not advisable.)
- ('20) AIR 1920 P C 56 (59) : 43 Mad 550 : 47 Ind App 33 (P C). (Statement made on the introduction of the measure or its discussion cannot be looked at as affording any guidance as to the meaning of the words.)

consideration of the preamble or the headings prefixed to the Sections.¹ In cases of ambiguity of the language of the enactment, however, they may be usefully referred to for the purpose of finding out the object and intention of the enactment.² In the undermentioned case³ the High Court of Madras cited with approval the view expressed in *Eastern Counties etc. Railway Companies v. Francis Marriage*⁴ that headings are not to be treated as if they were marginal notes or were introduced merely for the purpose of classifying the enactments, that they constitute an important part of the Act itself and that they may be read, not only as explaining the Sections that immediately follow them, as a preamble to a statute may be looked to, but as affording a better key to the construction of the Sections which follow than might be afforded by a mere preamble.

11. Marginal notes to Sections. — It is now settled that marginal notes to Sections *do not form part of the statute* itself and cannot be referred to for explaining

('92) 19 Cal 554 (567, 569) (F B).

('31) AIR 1931 Cal 633 (634).

('28) AIR 1928 Lah 337 (340) : 9 Lah 689.

('18) AIR 1918 Mad 381 (382).

('11) 12 Ind Cas 799 (801) : 7 Nag L R 165.

('19) AIR 1919 Sind 80 (80) : 13 Sind L R 23 (F B). (But they may be referred to to ascertain the object of the statute where there is ambiguity.)

[See also ('30) AIR 1930 All 225 (238) : 52 All 619 (F B).]

Note 10

1. ('36) AIR 1936 All 507 (511) : 58 All 1041 (F B). (Where the language of the Section is clear, a preamble cannot control its provisions.)
- ('26) AIR 1926 Cal 638 (639). (Also schedules.)
- ('19) AIR 1919 P C 52 (53) : 43 Mad 529 : 46 Ind App 302 (P C). (Section beyond preamble governs preamble.)
- ('26) AIR 1926 All 312 (316). (The headings themselves have no operative effect.)
- ('25) AIR 1925 All 787 (789) : 47 All 756. (Headings to be ignored.)
- ('18) AIR 1918 All 264 (264).
- ('35) AIR 1935 Cal 304 (305) : 62 Cal 666.
- ('32) AIR 1932 Cal 346 (348) : 59 Cal 528.
- ('27) AIR 1927 Cal 763 (765) : 55 Cal 67. (Preamble cannot control if meaning is clear.)
- ('19) AIR 1919 Cal 551 (560) : 45 Cal 343 (F B).
- ('13) 21 Ind Cas 538 (540) (Cal).
- ('10) 6 Ind Cas 259 (261) (Cal).
- ('30) 122 Ind Cas 226 (227) (Lah). (Preamble cannot control if meaning is clear.)
- ('38) AIR 1938 Mad 441 (445) : I L R (1938) Mad 841 (F B).
- ('33) AIR 1933 Mad 120 (122). (Preamble cannot control if meaning is clear.)
- ('25) AIR 1925 Mad 609 (612) : 48 Mad 395. (Headings to be ignored if Section is clear.)
- ('26) AIR 1926 Mad 381 (382).
- ('38) AIR 1938 Nag 298 (300). (Where the enacting part is clear, the preamble cannot operate to restrict that meaning.)
- ('16) AIR 1916 Nag 67 (70) : 13 Nag L R 181.

('35) AIR 1935 Pesh 69 (72). (Preamble is not exhaustive.)

('35) AIR 1935 Rang 460 (463) : 13 Rang 156.

[See however ('32) AIR 1932 Oudh 152 (153) : 7 Luck 648 (F B).]

[But see ('18) AIR 1918 Pat 398 (408, 409) : 3 Pat L Jour 1 (F B).]

2. ('36) AIR 1936 All 507 (511) : 58 All 1041 (F B). (Preamble.)
- ('10) 5 Ind Cas 862 (862) : 34 Bom 316. (Headings of Chapter.)
- ('27) AIR 1927 All 593 (596) : 49 All 908. (Headings and preamble are unlike marginal headings which have no force for the purpose of interpretation and may be used as a "key to open the minds of the makers of the Act.")
- ('33) AIR 1933 Bom 417 (420) : 57 Bom 537 (F B).
- ('33) AIR 1933 Bom 51 (57, 58) : 57 Bom 346.
- ('38) AIR 1938 Cal 211 (214) : I L R (1938) 1 Cal 626. (Preamble.)
- ('36) AIR 1936 Cal 593 (620). (Do.)
- ('34) AIR 1934 Cal 741 (742) : 62 Cal 125.
- ('19) AIR 1919 Cal 551 (560) : 45 Cal 343 (F B). (Preamble.)
- ('17) AIR 1917 Cal 715 (716) : 44 Cal 267. (Headings to the Chapter.)
- ('17) AIR 1917 Cal 681 (685).
- ('10) 6 Ind Cas 259 (261) (Cal). (Preamble can be referred in case of an ambiguity — In this case it was not referred to as the Section was clear.)
- ('31) AIR 1931 Lah 706 (707) : 14 Lah 203. (Do.)
- ('34) AIR 1934 Mad 138 (138, 139) : 57 Mad 718.
- ('31) AIR 1931 Mad 629 (630, 631) : 54 Mad 845.
- ('18) AIR 1918 Mad 381 (382). (Preamble.)
- ('38) AIR 1938 Nag 298 (300). (Preamble can be referred in case of an ambiguity — In this case it was not referred to as the enacting part was clear.)
- ('35) AIR 1935 Pesh 69 (72) (Do.)
3. ('38) AIR 1938 Mad 449 (454) : I L R (1938) Mad 1063.
4. (1860) 9 H L C 32 (41) : 8 W R (Eng) 748.

(1) An illustration only exemplifies the Section and cannot be taken to restrict or modify the sense of the Section.³

(2) Where the illustration is in conflict with the main Section, the illustration must give way to the Section.⁴ But it would require a very special case to warrant its rejection on the ground of its assumed repugnance to the Section itself.⁵

13. Punctuation marks.—Before the year 1849, the English Acts of Parliament were not punctuated by any stops and the then accepted rule of interpretation was that such marks could not be relied upon in construing Acts of Parliament.¹ In *Maharani of Burdwan v. Krishna Kamini Dasi*,² which was a case under the Bengal Regulation of 1819, their Lordships of the Privy Council held that “it is an error to rely on punctuation in construing Acts of the Legislature.”

Since the constitution of the regular Legislatures in India, however, the practice has been to insert stops in Bills before the Legislatures and to retain them in the authentic copies of the Acts signed by the Governor-General and published in the Gazette of India.³ In these circumstances, it was held by the High Court of Bombay⁴ that punctuation marks may be considered as aids to the interpretation of the statute *where the language thereof might otherwise be doubtful*. The High Court of Madras took the view that the marks were part of the statute and should be considered as such.⁵ On the other hand, it was held by the High Courts of Allahabad⁶ and Calcutta⁷ following the case of the *Maharani of Burdwan* that punctuation marks could not be taken into consideration in construing the statute.

The question came again before the Privy Council in *Lewis Pugh v. Ashutosh Sen*,⁸ a case under Articles 48 and 49 of the Indian Limitation Act and it was held that a Court was *bound to read those Articles without the commas inserted in the print*. This view as to the use of punctuation marks has now been followed by the High Courts of Allahabad⁹ and Bombay.¹⁰ In the undermentioned case,¹¹ however, the High Court of Calcutta has held that where it is not contended that the punctuation is wrongly placed, there is no reason why the punctuation should not be taken as a

with its language.)

(‘16) AIR 1916 Cal 693 (705). (Illustrations have no force of law but are useful to explain intention of Legislature.)

(‘18) AIR 1918 Mad 1012 (1015).

(‘25) AIR 1925 Oudh 24 (26, 27).

(‘18) AIR 1918 Low Bur 97 (99).

(‘16) AIR 1916 Low Bur 114 (116): 8 Low Bur Rul 306 (FB). (Illustrations cannot be taken as laying down substantive law and they merely go to show the intention of the framers of the Act.)

(‘35) AIR 1935 Sind 145 (157): 28 Sind L R 397. (Illustrations are intended only to assist in construing language of Act—Words of Act and not illustration should be looked into.)

3. (‘38) AIR 1938 P C 67 (70): 65 Ind App 66: 32 Sind L R 374: I L R (1938) 2 Cal 72 (PC).

(‘25) AIR 1925 All 220 (221).

(‘17) AIR 1917 Bom 268 (270).

(‘21) AIR 1921 Cal 1 (4): 48 Cal 388 (S B).

(‘81) 7 Cal 132 (135).

(‘05) 20 Mad 481 (483).

(‘29) AIR 1929 Pat 164 (167): 8 Pat 153.

(‘35) AIR 1935 Rang 420 (422).

4. (‘24) AIR 1924 All 748 (749).

(‘30) AIR 1930 Rang 173 (174): 8 Rang 320.

(Illustration in conflict with the Section was

treated as a bad statement of law.)

(‘33) AIR 1933 Bom 313 (314).

(‘15) AIR 1915 Lah 16 (50). (The illustration in the case was contrary to the Section.)

(‘30) 1930 Mad W N 638 (648).

5. (‘16) AIR 1916 P C 242 (244): 43 Ind App 256 (PC).

Note 13

1. See (‘15) AIR 1915 Bom 50 (52, 53): 39 Bom 182.

2. (‘87) 14 Cal 365 (372).

(‘31) AIR 1931 All 154 (156): 53 All 374. (Following 14 Cal 365 and A I R 1929 P C 69. Practice of Indian Legislature ignored.)

[See also (‘29) AIR 1929 P C 69 (71): 8 Pat 516: 56 Ind App 93 (P C).]

3. (‘15) AIR 1915 Bom 50 (53): 39 Bom 182.

4. (‘15) AIR 1915 Bom 50 (53): 39 Bom 182.

5. (‘24) AIR 1924 Mad 455 (456).

6. (1900) 22 All 270 (277).

7. (‘19) AIR 1919 Cal 551 (563): 45 Cal 343 (FB).

8. (‘29) AIR 1929 P C 69 (71): 56 Ind App 93: 8 Pat 516 (P C).

9. (‘31) AIR 1931 All 154 (156, 157): 53 All 374. (Following A I R 1929 P C 69.)

(‘33) AIR 1933 All 521 (522): 55 All 700.

10. (‘37) AIR 1937 Bom 39 (41): I L R (1937) Bom 763.

11. (‘36) 163 Ind Cas 573 (575) (Cal).

good guide for the purpose for which it is there, namely, to understand the sense of the passage.

14. Proviso. — A proviso is subordinate to the main enactment¹ to which it is appended either to allay unfounded fears,² or as a condition precedent to the enforcement of the operative clause,³ or for explaining what particular matters are not within the meaning of the enactment, or for providing exceptions and qualifications for the enactment.⁴

A proviso should be taken together with the language of the previous portion of the enactment⁵ and construed in the ordinary manner.⁶ As a general rule it must be taken to govern the main proposition of law which *immediately precedes* such proviso, unless the language of the statute shows a different intention.⁷

But in no case can a proviso *extend* or *enlarge* the operative effect of the substantive portion, unless there is an ambiguity therein.⁸ Likewise, exceptions should not be enlarged in their scope more than what their words properly justify.⁹

15. Judicial precedents. — Judicial precedents constitute an important guide to the proper interpretation of statutes. It is a general principle of construction of statutes that the Courts should follow existing rulings so as not to upset or disturb existing and *settled* practice,¹ unless such practice is *clearly contrary* to an express enactment or is inconsistent with it.² This rule is based in the case of statutes

Note 14

1. ('18) AIR 1918 Mad 1210 (1230): 39 Mad 1085 (S B).
2. ('10) 6 Ind Cas 410 (412): 37 Cal 697. (Following West Derby Union v. Metropolitan Life Assurance Society, 1897 App Cas 647.)
3. ('18) AIR 1918 Mad 1266 (1278): 39 Mad 1164 (S B).
4. ('18) AIR 1918 Mad 1210 (1280): 39 Mad 1085 (SB).
(‘38) AIR 1938 Oudh 491 (500).
5. ('14) AIR 1914 P C 140 (144): 42 Cal 116: 41 Ind App 197 (P C).
6. ('19) AIR 1919 P C 81 (38): 43 Mad 146: 46 Ind App 176 (P C).
7. ('84) 6 All 509 (581, 540) (F B).
(‘10) 6 Ind Cas 410 (412): 37 Cal 697. (Two constructions possible — Proviso may be taken as a guide to choose one of the two.)
8. ('26) AIR 1926 Cal 927 (932): 53 Cal 492.
(‘32) AIR 1932 Mad 46 (52).
(‘30) AIR 1930 Cal 38 (40): 57 Cal 162.
9. ('32) AIR 1932 Mad 120 (123).
(‘30) AIR 1930 Mad 124 (125): 53 Mad 702 (SB).
(Proviso should not by implication withdraw what the main provisions have given.)

Note 15

1. ('03) 31 Cal 511 (519).
(‘94) 18 Bom 136 (140).
(‘24) AIR 1924 P C 50 (55): 51 Ind App 129: 46 All 95 (P C). (Particular plea not being raised in a series of cases — Irresistible conclusion is that the plea was felt to be bad.)
- (‘16) AIR 1916 P C 182 (184): 44 Cal 759: 44 Ind App 65 (P C).
- (‘33) AIR 1933 All 634 (638): 55 All 743. (Principle of *stare decisis* to be adhered to.)

- (‘32) AIR 1932 All 617 (620): 55 All 24 (F B).
(‘96) 18 All 403 (409).
- (‘33) AIR 1933 Bom 120 (120). (If any alteration is to be made it should be by the Legislature.)
- (‘30) AIR 1930 Bom 213 (214). (Principle of *stare decisis* to be adhered to.)
- (‘24) AIR 1924 Cal 473 (475): 51 Cal 331.
- (‘10) 5 Ind Cas 309 (310) (Cal).
- (‘03) 30 Cal 999 (1003).
- (‘80) 18 Cal 189 (191).
- (‘11) 12 Ind Cas 1007 (1008): 36 Mad 380. (Madras Sudder Court's rulings are good authorities.)
- (‘31) AIR 1931 Pat 285 (291): 11 Pat 112.
- (‘31) AIR 1931 Pat 241 (251): 10 Pat 670 (FB).
[See ('33) AIR 1933 All 298 (299).]
2. ('16) AIR 1916 P C 182 (184): 44 Cal 759: 44 Ind App 65 (P C).
(‘29) AIR 1929 Mad 53 (57): 52 Mad 105 (FB).
(‘15) AIR 1915 P C 127 (130) (P C).
(‘32) AIR 1932 All 617 (620): 55 All 24 (F B).
(‘22) AIR 1922 All 467 (469): 45 All 115 (FB).
(‘32) AIR 1932 Bom 180 (181): 56 Bom 200.
(‘28) AIR 1928 Bom 123 (125, 126): 52 Bom 459.
(‘20) AIR 1920 Bom 419 (422): 44 Bom 555.
(‘17) AIR 1917 Bom 254 (257, 258): 41 Bom 588 (F B). (*Stare decisis*.)
(‘84) 8 Bom 313 (316, 317).
(‘29) AIR 1929 Cal 822 (824).
(‘17) AIR 1917 Cal 527 (529).
(‘27) AIR 1927 Mad 1043 (1051): 51 Mad 46 (FB).
(‘10) 5 Ind Cas 727 (728) (Mad).
(‘25) AIR 1925 Rang 340 (344): 3 Rang 549 (FB).
(‘09) 4 Ind Cas 289 (291): 5 Low Bur Rul 94.
(‘30) AIR 1930 Sind 287 (293): 25 Sind L R 142. (Course of decisions founded upon an erroneous interpretation of statutes can be reviewed.)

The only use of the authorities or decided cases is the establishment of some principle of law which the Judge can follow in deciding the case before him.¹⁰ There can be no precedent on questions of fact and matters of discretion.¹¹ Nor can the *dicta* of Judges, however eminent, be cited as establishing authoritatively propositions of law unless such *dicta* form the integral part of the train of reasoning directed to the real question decided.¹² It should also be noted that in relying on decided cases in regard to the interpretation of the words of any statute, the danger of the terms of the statute being unduly extended by such reliance, the diversion of attention from what has been enacted to what has been judicially said about the enactment is to be avoided.^{12a}

Subject to the principles mentioned above, the following rules may be remembered :—

(1) All Courts in India are bound by the decisions of the Privy Council.¹³ A considered decision of the Privy Council cannot be ignored as being *obiter*.¹⁴

In the case of different views among the High Courts on any point of law, the view of the Privy Council, even if *obiter*, is to be accepted.¹⁵

(2) A single Judge of the High Court is bound by the decision of a Bench of two or more Judges¹⁶ and a Bench of two or more Judges is itself bound by the

10. ('15) AIR 1915 All 360 (362) : 37 All 496.
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(25) AIR 1925 All 658 (660). (Authorities only useful so far as they lay down the law but are not safe guides on questions of fact.)
(19) AIR 1919 Bom 40 (41). (Decision arising from the application of a rule to a set of facts is no authority for its application to another set of facts.)
(29) AIR 1929 Cal 641 (642) : 56 Cal 575.
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[See also ('15) AIR 1915 P C 139 (142) (PC). (The plainer a proposition, the more difficult it is to find a decision actually in point.)]
11. ('26) AIR 1926 Rang 109 (110) : 4 Rang 18.
(28) AIR 1928 Pat 316 (317) : 7 Pat 275.
(28) AIR 1928 Oudh 430 (435).
12. ('22) AIR 1922 Nag 1 (7) : 19 Nag L R 81 (F B).
(32) AIR 1932 Bom 122 (124) : 56 Bom 242 (F B).
(25) AIR 1925 All 230 (232) : 47 All 263.
(13) 20 Ind Cas 280 (281) (Lah).
(29) AIR 1929 Pat 392 (395) : 8 Pat 471. (It will be an abuse of precedents to apply isolated *dicta* to cases entirely different on facts.)
[See ('35) AIR 1935 All 247 (250) : 57 All 357. (Though entitled to great weight *obiter dicta* of Full Bench are not binding.)]
[But see ('33) AIR 1933 Lah 159 (160). (*Obiter dicta* containing reasoning.)]
- 12a. ('32) AIR 1932 P C 36 (40) (PC).
13. ('25) AIR 1925 P C 272 (279) : 47 All 883 : 28 Oudh Cas 352 : 52 Ind App 393 (P C).
(31) AIR 1931 Rang 113 (116) : 9 Rang 217 (F B). (High Court to follow Privy Council decision loyally.)
- (15) AIR 1915 All 360 (364) : 37 All 496.
(28) AIR 1928 Bom 130 (133) : 52 Bom 385.
(27) AIR 1927 Bom 157 (158) : 51 Bom 231.
(32) AIR 1932 Cal 436 (438).
(36) AIR 1936 Lah 183 (186). (Judge is bound to follow Privy Council ruling—He cannot follow ruling of his own High Court in preference to Privy Council ruling even though High Court ruling is given subsequent to Privy Council ruling.)
(27) AIR 1927 Mad 261 (263).
(15) AIR 1915 Mad 833 (835) : 38 Mad 941. (Even if the decision is not given in an appeal from an Indian Tribunal.)
(29) AIR 1929 Nag 98 (105) : 25 Nag L R 144 (F B).
(26) AIR 1926 Nag 49 (50). (Privy Council decision in laying down a principle only declares what is and has always been the law.)
14. ('25) AIR 1925 Oudh 94 (95) : 27 Oudh Cas 161.
(32) AIR 1932 Cal 170 (171).
(35) AIR 1935 Cal 419 (442) : 63 Cal 217 (F B). (Privy Council *Obiter Dictum* is entitled to highest respect in precedents.)
(16) AIR 1916 Cal 693 (696). (Even general remarks are binding.)
(15) AIR 1915 Mad 203 (209) : 37 Mad 22. (Decision on mixed question of law and fact carries great weight.)
(29) AIR 1929 Nag 211 (212) : 26 Nag L R 39.
(21) AIR 1921 Low Bur 37 (41) : 11 Low Bur Rul 163. (Considered dictum of Privy Council though *obiter* must be allowed great weight.)
[See ('31) AIR 1931 All 162 (172) : 53 All 239 (F B). (Long course of decisions should not be departed from on the basis of an *obiter dictum* of the Privy Council.)]
15. ('26) AIR 1926 Nag 154 (155).
16. ('25) AIR 1925 Mad 441 (442).
(33) AIR 1933 Pat 38 (39) : 11 Pat 697. (Even if contrary to his view.)

decisions of the Full Bench of the same Court until they are overruled by the Privy Council or by another Full Bench.¹⁷ Similarly, a decision of a Bench of Judges is also binding on other Division Benches of the same Court.^{17a} As to whether, when a Bench differs from the decision of a Full Bench, it has got the power to refer the Full Bench decision to a fuller Bench itself or to refer the matter to the Chief Justice who is to consider if a fuller Bench should consider the question, see the under-mentioned case.^{17b}

(3) Subordinate Courts¹⁸ are bound to follow the rulings of the High Court to which they are subordinate, and, in the absence of such rulings, they should follow the rulings, if any, of the other High Courts.¹⁹ If there are two decisions of a High

- (‘36) AIR 1936 All 555 (556). (Single Judge can entertain doubt but must follow Full Bench ruling.)
- (‘32) AIR 1932 All 188 (189) : 54 All 416.
- (‘29) AIR 1929 Cal 572 (574). (Single Judge if he cannot follow the decision of a Bench should send it before a Bench and not decide it himself.)
- (‘32) AIR 1932 Mad 693 (694).
- (‘91) 14 Mad 186 (191).
- (‘34) AIR 1934 Sind 95 (95).
- [See (‘33) AIR 1933 Pat 81 (83) : 12 Pat 188. (Obiter dictum of Division Bench must be treated with respect.)]
- [See however (‘83) 9 Cal 604 (607). (Decision of Appellate Bench though not binding yet should receive respectful consideration by a single Judge on original side.)]
- (‘29) AIR 1929 All 896 (896). (Obvious error in a Bench decision.)]
- [But see (‘24) AIR 1924 Cal 733 (738) : 51 Cal 588. (Judge on original side not bound by Division Bench on appellate side.)]
17. (‘07) 34 Cal 735 (741).
- (‘32) AIR 1932 All 293 (303) : 54 All 646 (FB).
- (‘27) AIR 1927 All 244 (244).
- (‘67) 7 Suth W R 277 (278).
- (‘21) AIR 1921 Oudh 217 (219) : 24 Oudh Cas 361. (Considered dictum of Full Bench should not be ignored as being obiter.)
- [See (‘18) AIR 1918 Cal 952 (957) : 45 Cal 259.]
- [See however (‘32) AIR 1932 All 149 (150) : 54 All 89. (Decisions of Board of Revenue not binding on High Court.)]
- 17a. (‘34) AIR 1934 Pat 173 (174) : 13 Pat 303.
- (‘34) AIR 1934 Mad 392 (394) : 57 Mad 808.
- (‘34) AIR 1934 Pat 85 (86).
- (‘35) AIR 1935 Rang 370 (375) : 13 Rang 570 (FB).
- [See however (‘28) AIR 1928 Bom 130 (133) : 52 Bom 385. (Practice of Bombay High Court is that no Bench has power to bind all other Benches as to the practice to be adopted in cases coming before them.)]
- 17b. (‘32) AIR 1932 Mad 612 (614 & 647) : 55 Mad 883 (F B).
18. See S. 3 for definition of Subordinate Courts.
19. (‘15) AIR 1915 P C 15 (17) : 37 All 359 : 42 Ind App 155 (P C).
- (‘31) AIR 1931 Rang 89 (89) : 8 Rang 460. (Subordinate Judicial Officers in Rangoon should follow Burma rulings in preference to Indian rulings.)
- (‘30) AIR 1930 All 573 (575).
- (‘29) AIR 1929 All 134 (138).
- (‘26) AIR 1926 All 346 (349, 350) : 48 All 432.
- (‘23) AIR 1923 All 392 (393) : 45 All 425 (FB).
- (‘23) AIR 1923 All 231 (231).
- (‘36) AIR 1936 Bom 59 (59) : 60 Bom 311 (F B). (Lower Court is bound to follow High Court’s ruling until it is overruled.)
- (‘92) 17 Bom 555 (558).
- (‘90) 15 Bom 419 (422).
- (‘98) 25 Cal 488 (491).
- (‘84) 10 Cal 82 (84).
- (‘78) 3 Cal 696 (701).
- (‘36) AIR 1936 Lah 612 (615). (Courts in Punjab should as far as possible follow case-law in Punjab when it is uniform and based on sound legal principles.)
- (‘30) AIR 1930 Lah 1051 (1052).
- (‘11) 12 Ind Cas 442 (443) : 1911 Pun Re No. 3 (Rev). (Revenue Courts must follow rulings of Financial Commissioners—But it is open to High Court to distinguish it or over-rule it.)
- (‘31) AIR 1931 Mad 71 (72). (Subordinate Court not entitled to compare the soundness of the views of the High Court to which it is subordinate with the views of other High Courts.)
- (‘30) AIR 1930 Mad 869 (870).
- (‘25) AIR 1925 Mad 261 (262) : 48 Mad 693.
- (‘20) AIR 1920 Mad 652 (652).
- (‘16) AIR 1916 Mad 747 (749). (Opinion of the majority of the Full Bench and not of the dissenting Judge is to be followed.)
- (‘29) AIR 1929 Nag 156 (158) : 25 Nag L R 85.
- (‘18) AIR 1918 Nag 237 (238). (Subordinate Judges can assist themselves on question of law by study of the rulings of all the High Courts.)
- (‘19) AIR 1919 Pat 293 (296) : 4 Pat L Jour 565.
- (‘32) AIR 1932 Pat 346 (347) : 11 Pat 616. (Subordinate Courts should follow a single judge’s decision of their own Court in preference to Bench decision of another High Court.)
- (‘34) AIR 1934 Pat 173 (174) : 13 Pat 303.
- (‘15) AIR 1915 Low Bur 94 (95).
- [See also (‘16) AIR 1916 Mad 421 (422). Subordinate Court bound by finding of higher Court in another case.)
- (‘15) AIR 1915 Mad 613 (613).]

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(31) AIR 1931 Rang 113 (116) : 9 Rang 217 (F.B.). (High Court to follow Privy Council decision loyally.)
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(32) AIR 1932 Cal 436 (438).
(35) AIR 1935 All 247 (250) : 57 All 357 (F.B.). (Privy Council decision entitled to great weight.)
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16. ('25) AIR 1925 Mad 833 (835) : 38 Mad 144 (F.B.).
(33) AIR 1933 Pat 304 (310) : 7 Pat 520. (Even if contrary to his view.)

Courts in India to ignore the enacted law and follow the English law, simply because in certain cases the enforcement of such statute law might create hardship.^{1a}

They may, however, be referred to with advantage as affording analogies in the following cases:—

(1) Where an Indian statute has been passed in the *same terms* and on the *same lines* as those of an English statute and the latter has been authoritatively construed by English decisions.²

- (‘33) AIR 1933 All 366 (368) : 55 All 496. (Companies Act, 1913—English decisions are not binding.)
- (‘27) AIR 1927 All 246 (251) : 49 All 353. (Indian Statute—Reference to English cases likely to lead to misunderstanding.)
- (‘23) AIR 1923 Bom 321 (350) : 47 Bom 843 (F B). (English judgments are in no better position than the opinion of eminent jurists.)
- (‘15) AIR 1915 Bom 22 (23) : 39 Bom 472. (Express words of Indian statute cannot be overridden by English rules.)
- (‘24) AIR 1924 Cal 864 (867) : 51 Cal 745.
- (‘24) AIR 1924 Cal 405 (408) : 51 Cal 62. (Questions of practice in India are to be determined according to principles laid down in the Courts in India.)
- (‘09) 1 Ind Cas 829 (831) : 36 Cal 354. (English authorities not useful in dealing with codified law in India.)
- (1900) 28 Cal 171 (175).
- (‘24) AIR 1924 Lah 513 (522, 524) : 5 Lah 147 (F B). (Law of the land to be obeyed in preference to laws of other countries.)
- (‘27) AIR 1927 Mad 938 (990) : 50 Mad 961. (American decisions.)
- (‘26) AIR 1926 Mad 357 (358). (Indian statute clear—Reference to English cases is of no use.)
- (‘20) AIR 1920 Mad 427 (432) : 42 Mad 821 (F B). (Following American decisions deprecated.)
- (‘18) AIR 1918 Mad 700 (701). (English law to be followed only if in conformity with justice, equity and good conscience.)
- (‘13) 19 Ind Cas 12 (16) : 36 Mad 544 (F B). (English cases are no precedents but may be referred to as explanatory of Indian statutes which are usually based on those decisions.)
- (‘97) 20 Mad 97 (103). (English case can be referred to if law is same.)
- (‘29) AIR 1929 Rang 71 (72) : 6 Rang 771. (English cases not necessarily good guide in mortgage suits.)
- (‘27) AIR 1927 Rang 183 (186) : 5 Rang 212. (A I R 1918 P C 11, Referred to.)
- (‘27) AIR 1927 Sind 130 (131) : 23 Sind L R 137 (F B). (Especially in partnership suits English cases are not good guide.)
- [See (‘95) 18 Mad 88 (91). (English law referred to.)]
- 1a. (‘31) AIR 1931 All 183 (185) : 53 All 114 (F B).
- (‘32) AIR 1932 All 18 (22) : 53 All 642.
- (‘32) AIR 1932 P C 207 (211) : 7 Luck 442 : 59 Ind App 376 (P C).
- (‘31) AIR 1931 P C 79 (82) : 58 Cal 1235 : 58 Ind App 91 (P C).
- (‘37) AIR 1937 All 502 (503).
- (‘33) AIR 1933 All 70 (71) : 54 All 1041.
- (‘32) AIR 1932 Bom 291 (294) : 56 Bom 324. (At the most English case may assist by way of analogy.)
- (‘32) AIR 1932 Cal 63 (63) : 58 Cal 1293.
- (‘31) AIR 1931 Cal 463 (466).
- (‘34) AIR 1934 Lah 840 (841) : 16 Lah 51. (Indian Courts are not bound by Common Law prevailing in England and should interpret the word used in a statute in its current meaning.)
- (‘31) AIR 1931 Lah 746 (748) : 13 Lah 233.
- (‘30) AIR 1930 Lah 364 (369) : 11 Lah 375.
- (‘29) AIR 1929 Lah 344 (354) : 10 Lah 283 (F B).
- (‘35) AIR 1935 Mad 528 (532) : 58 Mad 642 (F B). (When terms of Section are clear, English law should not be applied.)
- (‘32) AIR 1932 Mad 516 (518) : 55 Mad 758.
- (‘38) AIR 1938 Nag 540 (543) : 1 L R 1938 Nag 174.
- (‘32) AIR 1932 Oudh 145 (147) : 6 Luck 435. (In India the Courts have to construe not the English law but Indian Codes.)
- (‘32) AIR 1932 Oudh 1 (4) : 7 Luck 270. (English authorities not helpful to decide questions regarding acknowledgment in Limitation Act.)
- (‘32) AIR 1932 Rang 185 (187) : 10 Rang 403.
- (‘31) AIR 1931 Rang 235 (243) : 9 Rang 404 (S B).
- [See (‘33) AIR 1933 P C 145 (147) : 60 Cal 1029 : 60 Ind App 196 (P C). (Application of decisions on Imperial Income-tax Code is misleading.)]
- [See also (‘31) AIR 1931 P C 165 (170) : 54 Mad 691 : 58 Ind App 239 (P C).]
2. (‘85) 7 All 44 (50, 51).
- (‘75) 2 Ind App 169 (181) (P C).
- (‘33) AIR 1933 All 789 (793) : 55 All 912 (F B).
- (‘34) AIR 1934 Bom 28 (30) : 58 Bom 128.
- (‘18) AIR 1918 Cal 467 (470) : 45 Cal 138.
- (‘31) AIR 1931 Lah 756 (757).
- (‘15) AIR 1915 Lah 405 (406) : 1915 Pun Re No. 54. (Companies Act.)
- (‘31) AIR 1931 Mad 729 (738).
- (‘30) AIR 1930 Mad 609 (615) : 53 Mad 449.
- (‘21) AIR 1921 Mad 524 (527) : 44 Mad 718.
- (‘17) AIR 1917 Mad 525 (532) : 39 Mad 250.
- (‘13) 18 Ind Cas 997 (1001) (Mad).
- (‘33) AIR 1933 Pat 461 (463) : 13 Pat 78.
- (‘38) AIR 1933 Pat 196 (199) : 12 Pat 216.
- (‘30) AIR 1930 Rang 47 (48) : 7 Rang 514.
- (‘32) AIR 1932 Sind 50 (51) : 25 Sind L R 521.
- (‘31) AIR 1931 Sind 70 (71) : 25 Sind L R 381.
- (‘31) AIR 1931 Sind 44 (46) : 25 Sind L R 310.
- [See also (‘32) AIR 1932 Bom 344 (350) : 57 Bom 623.
- (‘21) AIR 1921 Lah 134 (135) : 2 Lah 239.

(2) Where an English or American decision is based upon *general legal principles* recognised by the laws of all civilised countries.³ But it must be applied with reference to Indian conditions,⁴ and where the law of this country is different from that of England or America, English or American decisions should be quoted with the very greatest care.^{4a}

(3) Where the point is a novel one and there is no precedent in India dealing with it.⁵

(4) Where the Indian Act makes express reference to the Court in England and to the principles and rules on which such Court acts.^{5a}

See also the undermentioned case.⁶

17. "Laws relating to the procedure of the Courts of Civil Judicature."—These words mean all the laws in operation *at the time* of the passing of the Code.¹

The words "Courts of Civil Judicature" mean all Courts which try suits and proceedings of a civil nature.² Where an Act allows suits or applications to be filed in a Civil Court relating to matters arising under it, the procedure to be followed in such suit or application will be governed by the provisions of the Code.³

18. Revenue Courts.—A Revenue Court means a Court having jurisdiction under any special or local law to entertain suits or proceedings for the rent, revenue or the profits of the land used for agricultural purposes. It does not include a Court having jurisdiction *under this Code* to try such suits.¹

(1879) 5 App Cas 342 (344, 345), Trimble v. Hill. (Referred to in 23 Bom 191.)]

3. ('22) AIR 1922 Pat 104 (106) : 1 Pat 371.

(Principles of justice, equity and good conscience for instance should be identical with corresponding relevant rules of the common law of England.)

('74) 22 Suth WR 279(281):1 Ind App 364(PC).

('83) 7 Bom 341 (359) (FB).

('20) AIR 1920 Nag 144 (145). (e. g. Rules of justice, equity and good conscience.)

('20) AIR 1920 Pat 705 (707). (Except as rules of justice, equity and good conscience rules of Common Law in England do not apply to mofussil towns in India.)

(1848) Tay Rep 283 (283), Malcolm v. Smith.

[See ('36) AIR 1936 Rang 141 (142). (Decision of Court of law as opposed to Court of equity and which is inequitable should not be followed in India.)

('89) 16 Cal 677 (682) : 16 Ind App 44 (PC).]

[See also ('35) AIR 1935 Cal 33 (34) : 61 Cal 986. (Principles of equity as applied in Courts of England should be applied in absence of law in India laying down different procedure.)

(1880) 5 C P D 295 (303), Scaramanga v. Stamp.]

4. ('28) AIR 1928 Mad 23 (23).

('32) AIR 1932 Mad 445 (452) : 55 Mad 727.

('24) AIR 1924 Cal 240 (242) : 50 Cal 667.

('30) AIR 1930 Lah 920 (926) : 11 Lah 564.

[See also ('32) AIR 1932 Rang 27 (34, 49) : 10 Rang 1.]

4a. ('33) AIR 1933 Mad 293 (296) : 56 Mad 546.

('12) 16 Ind Cas 601 (606) (Mad). (Great care to be taken in applying to India English

rules with regard to equitable rights.)

5. ('35) AIR 1935 Cal 33 (34) : 61 Cal 986. (Principles of equity as applied in Courts of England should be applied in absence of law laying down different procedure.)

5a. ('31) AIR 1931 P C 234(239) : 54 Mad 774 : 58 Ind App 350 (PC).

('94) 19 Bom 293 (296). (English rules applied where no provision for payment of wife's costs is found in the Divorce Act or in the Code.)

('82) 6 Bom 416 (419). (Absence of provisions in Divorce Act and the Code—English rules applied.)

('02) 29 Cal 619 (620). (English rules applied when no provision for payment of wife's costs is found in the Divorce Act or in the Code.)

('79) 4 Cal 260 (269, 281). (Do.)

6. ('36) AIR 1936 Lah 337 (338) : 16 Lah 651. (It may be permissible to refer to the principles of English law, if there is any ambiguity in the language used by the statute, and to adopt the interpretation which is in conformity with those principles.)

Note 17

1. ('78) 2 All 74 (90). ("Laws relating to Civil Procedure" includes General Clauses Act I of 1868.)

2. See Section 9 *infra*.

3. ('37) AIR 1937 Mad 653 (653) : I L R 1938 Mad 216.

Note 18

1. See Section 5 *infra*.

This does not mean that the Revenue Courts are therefore not Courts of Civil Judicature. The matters tried by them relate to *civil rights* and the Courts trying them are thus *Civil Courts*.² The Code is, therefore, applicable to the procedure of those Courts except where its operation is negated by the special or local law governing such suits.³

Even where the *trial* of the suit is specially provided for by the special or local law, the procedure prescribed by the Code will apply where an *appeal* is taken to a Civil Court from the decree of the Revenue Court, or such decree is transferred for *execution* to the Civil Court.⁴

19. Mamlatdar's Courts.—These are also Civil Courts but established under a special law with a special form of procedure prescribed for suits contemplated therein.¹ As in the case of Revenue Courts, the Code will not apply where such special provision has been made.² In fact the Code generally has been held to be *inconsistent* with the nature of the special Act and therefore not applicable.³ The High Court, however, has exercised revisional jurisdiction over the Mamlatdar's Courts under Section 115.⁴

PRELIMINARY.

Short title, commencement and extent.

1. [S. 1.] (1) This Act may be cited as THE CODE OF CIVIL PROCEDURE, 1908.

(2) It shall come into force on the first day of January, 1909.

(3) This section and sections 155 to 158 extend to the whole of British India: the rest of the Code extends to the whole of British India, except the Scheduled Districts.

2. ('83) 9 Cal 295 (301, 303) : 9 Ind App 174 (PC).

('09) 1 Ind Cas 993 (934) : 36 Cal 252.

('08) 26 Mad 518 (520).

('35) AIR 1935 Nag 125 (125) : 31 Nag L R 246.

[N B:—The observation in ('24) AIR 1924 Pat 104 (106) : 3 Pat 67, that a Revenue Court is not a Civil Court is, it is submitted, not correct.]

3. ('97) 19 All 510 (511).

('83) 5 All 406 (413, 418) (FB).

(1900) 22 All 182 (189) (S. 285 of 1882 Code applicable as between Revenue Courts and not between a Revenue Court and Civil Court.)

('92) 14 All 347 (347).

('91) 1891 All W N 47 (48).

('84) 6 All 170 (171). (N W P Rent Act 1881—Civil P. C. relating to awards not applicable.)

('13) 20 Ind Cas 420 (421) : 40 Cal 518. (Revenue Courts are subject to revisional jurisdiction of High Court.)

('11) 11 Ind Cas 207 (210) : 38 Cal 832. (Cases discussed.)

('08) 35 Cal 799 (802, 805).

(1900) 27 Cal 508 (511, 514) (FB).

('98) 2 Cal W N 127 (127). (S. 310-A of the old Code is excluded by Act X of 1859.)

('94) 21 Cal 514 (518). (Code excluded by provisions of Act X of 1859.)

('93) 21 Cal 428 (430). (Apparently the application of the Code was held impliedly excluded).

('85) 12 Cal 50 (51).

('83) 9 Cal 295 (303) : 9 Ind App 174 (PC).

(1900) 10 Mad L Jour 398 (399). (Case under Act VIII of 1865.)

('97) 21 Mad 236 (237). (S. 43 of 1882 Code not applicable.)

('18) AIR 1918 Oudh 217 (220) : 21 Oudh Cas 220.

[See also S. 135 of the Oudh Rent Act XXII of 1886.]

4. ('01) 28 Cal 532 (537).

Note 19

1. ('93) 17 Bom 645 (647).

2. See Section 4, *infra*.

3. ('88) 13 Bom 552 (553, 554).

('12) 16 Ind Cas 675 (676) : 6 Sind L R 67.

('92) 17 Bom 645 (647).

4. ('96) 21 Bom 775 (776).

('99) 23 Bom 761 (764, 767, 768). (Application under S. 622 of the old Code.)

(1900) 25 Bom 395 (406, 408) (FB). (S. 622 of the old Code applied.)

('94) 18 Bom 449 (452). (Mamlatdar's Courts are subject to the revisional jurisdiction of the High Court.)

Synopsis

1. "British India."
2. "Scheduled Districts."

1. "British India."—The term "British India" is not defined in the Code and therefore the definition thereof in the General Clauses Act, X. of 1897 will apply.¹ Under Section 3 clause 7 of that Act, "British India" has been defined as follows: "British India" shall mean, as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India, and as respects any period after that date means all territories for the time being comprised within the Governor's Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar."

Aden² and British Burma³ were governed by His Majesty through Governors or other officers subordinate to the Governor-General of India and were thus within "British India." As regards Aden, it has now been provided by the Government of India Act, 1935 (25 & 26, Geo.V., ch. 42), Section 94, (which came into force on 1st April 1937^{4a}) that Aden ceases to be a part of India. By virtue of Section 46 sub-section 2 of the said Act, Burma has ceased to be part of British India from 1st April 1937.^{4b} But, by virtue of Section 466 of the Government of India Act of 1935, the law previously in force in Burma will continue to be in force there until altered or repealed or amended by the Legislature or other competent authority.

"Scheduled Districts"⁵ were within British India.

The following classes of territories do not fall within the scope of the definition of "British India":

(1) Native States in India.⁶

(2) Lands ceded by the Native Princes to the British Government for limited purposes,⁶ e. g. civil stations and cantonment areas,⁷ and land over which jurisdiction has been ceded for the purposes of Railway Administration.⁸ Thus, the cantonments of Wadhwan,⁹ Secunderabad¹⁰ and the Rajkot Civil Station¹¹ are not included in

Section I—Note 1

1. See S. 3 of the General Clauses Act, X of 1897.

2. See also Aden Laws Regulation of 1891, S. 2.

3. (86) 18 Cal 221 (228).

4a. Government of India (Adaptation of Acts of Parliament) Order, 1937.

4b. Government of India (Adaptation of Acts of Parliament) Order, 1937.

5. See Note 2, *infra*.

6. (88) 1888 Pun Re No. 191, page 499. (Reversed by P. C. in 22 Cal 222 on another point.)

(99) 29 Cal 400 (401, 402). (The Tributary Mahals of Orissa such as Mayoorbhunj do not form part of British India.)

(100) 38 Cal 219 (238) : 38 Ind App 1 (P. C.). (Kathiawar States are not included in British India, but even a non-British subject suing in the Political Agent's Court which is a British Indian Court can appeal to the High Court.)

6. (12) 17 Ind Cas 534 (535, 536) : 37 Bom 152. (Land ceded for civil stations in Native States are not ceded in full sovereignty.)

(10) 6 Ind Cas 429 (429) : 6 Nag L R 49. (Berar is held under a sort of mortgage as security for the fulfilment of certain engagements under the treaty of 21st May 1858, with the Nizam. The Code extended to it by Notification No. 949 — I. B. of 26th March 1909.)

(25) AIR 1925 Mad 1100 (1101). (Agency Tracts of Vizag.)

7. (12) 17 Ind Cas 534 (535, 536) : 37 Bom 152.

8. (97) 25 Cal 20 (31) : 24 Ind App 137 : 1897 Pun Re No. 6 (P. C.).

9. (18) 37 Bom 152 (156). (Dissenting from 9 Bom 244.)

10. (94) 21 Cal 177 (179).

11. (86) 10 Bom 186 (188).

"British India." Where *full sovereignty* has been ceded, or a new territory acquired, the territory of course will thereby form part of "British India."¹²

Singapore is not within "British India."¹³

2. "Scheduled Districts."—For reasons of State several parts of British India were never brought within or were, from time to time, removed from the operation of the general Acts and Regulations and the jurisdiction of the ordinary Courts of Judicature.¹ These parts were known as the Scheduled Districts as all such parts were given in a schedule to the Scheduled Districts Act, XIV of 1874.

By Sections 5 and 5A of that Act, however, the Local Government, with the sanction of the Governor-General in Council, had power to extend to any such District, any enactment in force in British India with such modifications and limitations as it thinks fit. The Civil Procedure Code, 1882, was under that Section extended to various Scheduled Districts by notification. The Code of 1908 was extended to several parts of the Scheduled Districts² under notifications after the passing of the Code.

12. ('95) 19 Bom 680 (686). (But the law of conquered countries continues until the Crown or Legislature changes it.)

13. See Straits Settlements Act, 1866, S. 1.

Note 2

1. ('95) 17 All 483 (484). (General Acts do not apply unless the Legislature has expressly made them applicable to such districts.)

('19) AIR 1919 P C 150 (152) : 42 Mad 813 : 46 Ind App 151 (P C). (Property in Scheduled Districts—Order by British Indian Court for sale under mortgage decree is without jurisdiction.)

('14) AIR 1914 P C 140 (144) : 42 Cal 116 : 41 Ind App 197 (P C). (Code is made applicable to Sonthal Parganas with modification.) ('69) 1 N W P H C R 280 (284).

('07) 34 Cal 576 (581). (Family domains of Maharaja of Benares—C. P. Code applies.) (1900) 4 Cal W N 287 (288). (Code has been made applicable to Jalpaiguri which includes Bhutan Duars.)

('91) 18 Cal 133 (138). (Do.)

('88) 15 Cal 365 (370). (Decrees obtained in Scheduled District not executable in British India, unless Civil Procedure Code has been extended to it under S. 5 of the Scheduled Districts Act.)

('84) 10 Cal 761 (764). (Do.)

('79) 4 Cal 222 (228). (Do.)

2. The following is the list of the Scheduled Districts to which the Code or a provision thereof has been extended by notifications:—

The Act has been extended by notification under Ss. 5 and 5A of the Scheduled Districts Act, 1874 (XIV of 1874), to the following Scheduled Districts:—

(1) The districts of Jalpaiguri, Cachar (excluding the North Cachar Hill), Sylhet, Goalpara (including the Eastern Duars), Kamrup, Darrang, Nowgong (excluding the Mikir Hill Tracts), Sibsagar (excluding the Mikir Hill Tracts) and Lakhimpur (excluding the Dibrugar Frontier Tracts). *Gazette of*

India, 1909, Pt. I, p. 5, *Gazette of India*, 1914, Pt. I, p. 1690.

(2) Upper Burma (except the Shan States). *Gazette of India*, 1909, Pt. I, p. 5.

(3) The Province of Sindh. *Bombay Government Gazette Extraordinary*, 1909, Pt. I, *Gazette of India*, 1909, Pt. I, p. 32.

(4) The district of Darjeeling and the districts of Hazaribagh, Ranchi, Palamau and Manbhum in Chota Nagpur. *Calcutta Gazette*, 1909, Pt. I, p. 25, *Gazette of India*, 1909, Pt. I, p. 33.

(5) The province of Kumaun and Garwal and the Tarai Parganas with modifications, *United Provinces Gazette*, 1909, Pt. I, p. 3. *Gazette of India*, 1909, Pt. I, p. 31.

(6) The Pargana of Janswar Bawar in Dehra Dun and the scheduled portion of the Mirzapur district. *United Provinces Gazette*, 1909, Pt. I, p. 4. *Gazette of India* 1909, Pt. I, p. 32.

(7) Coorg. *Gazette of India*, 1909, Pt. I, p. 32.

(8) Scheduled districts in the Punjab. *Gazette of India*, 1909, Pt. I, p. 33.

(9) The districts of Peshawar, Hazara, Kohat, Bannu, Dera Ismail Khan composing the North-West Frontier Province. *Gazette of India*, 1909, Pt. II, p. 80.

(10) Sections 36 to 43 to all the scheduled districts in Madras. *Gazette of India*, 1909, Pt. I, p. 152.

(11) To the scheduled districts of the Central Provinces, except so much, as is already in force, and so much, as authorizes the attachment and sale of immovable property in execution of a decree, not being a decree directing the sale of such property. *Gazette of India*, 1909, Pt. I, p. 239.

(12) To Ajmer-Merwara, except Sections 1 and 155 to 158. *Gazette of India*, 1909, Pt. II, p. 480.

The Scheduled Districts Act of 1874 has now ceased to be of effect.³ But, by virtue of Section 92 of the Government of India Act, no Act of the Federal Legislature or Provincial Legislature shall apply to an excluded area or a partially excluded area, unless the Governor by public notification so directs.

2. [S. 2.] In this Act, unless there is anything repugnant in the subject or context,—

Definitions.

(1) "Code" includes rules :

Distinction between the body of the Code and the "rules." — The chief feature of the present Code is the distinction drawn between what is termed "body of the Code" and "the rules." The body of the Code creates *jurisdiction*¹ and is unalterable except by the Legislature, but the rules which indicate the *mode* in which such jurisdiction is to be *exercised*² can be altered or amended by the High Courts under certain circumstances,³ such alterations or amendments having force or effect within the local limits of the jurisdiction of the High Courts which made them. This division was introduced "to enable variations to be introduced in procedure to meet the requirements of different localities as well as to enable defects to be remedied as they are discovered without resort to the tardy process of legislation."⁴

The body of the Code has, expressed as it is in the most general terms, to be read in conjunction with the more particular provisions of the Rules,⁵ but in case of conflict between them the body of the Code must prevail.⁶ Similarly, the forms in the Schedule cannot control the clear words of the Code.⁷

(13) To Pargana Dhalbhum, the Municipality of Chaibassa, in the Kolhan and the Porahat estate in the district of Singhbhum. *Calcutta Gazette*, 1909, Pt. I, p. 453. *Gazette of India*, 1909, Pt. I, p. 443.

Under Section 3 (3) (a) of the Sonthal Parganas Settlement Regulation (III of 1872), Sections 38 to 42 and 156 and Rules 4 to 9 in O. XXI in the first schedule have been declared to be in force in the Sonthal Parganas and the rest of the Code for the trial of suits referred to in Section 10 of the Sonthal Parganas Justice Regulation, 1898 (V of 1893). *Calcutta Gazette*, 1909, Pt. I, p. 45, and the whole Code in the Angul District under Section 3 of the Angul Laws Regulation, 1913 (III of 1913), B. and O. Code. This Act has been declared to be in force in British Baluchistan under Section 3 of the Baluchistan Laws Regulation, 1913 (II of 1913), Baluchistan Code. Sections 38, 39, 41, 42, 45 and 46, Order IX, Rules 1 and 2, and Order XXI, Rules 1-9 have been declared to be in force in the Arakan Hill District by Regulation I of 1916, Section 2. See Supplement to Burma Code.

This Act has been declared to be in force in the Pargana of Manpur, Regulation II of 1926, Section 2; in Panth Piploda, Regulation I of 1929, Section 2.

3. *Vide* Government of India (Adaptation of Indian Laws) Order of 1937.

Section 2 (1)

1. ('17) AIR 1917 Cal 44 (46) : 44 Cal 929 (F B). (Inherent jurisdiction to remand a case even when case is not covered by S. 107 read with O. 41, R. 23, is saved by S. 151.)
2. ('17) AIR 1917 Cal 44 (46) : 44 Cal 929 (F B). (Power to remand given by S. 107 is controlled by O. 41 R. 23.)
3. ('17) AIR 1917 Cal 657 (658) : 43 Cal 148. (Power of lower Appellate Court to remand under S. 107 (1) (b) is limited to O. 41, R. 23.) [See also Ss. 121 to 131.]
4. See The Report of the Select Committee.
5. ('17) AIR 1917 Cal 657 (658) : 43 Cal 148. (S. 107 is to be read with O. 41, R. 23.) ('14) AIR 1914 Cal 163 (164) : 41 Cal 108. (Rules restrict sections.) ('17) AIR 1917 Cal 44 (46) : 44 Cal 929 (F B). (S. 107 is to be read with O. 41, R. 23.)
6. ('14) AIR 1914 Cal 581 (582). (There was no conflict in this case.) ('26) AIR 1926 Mad 676 (678). (Conflict between S. 149 and O. 7, R. 11—S. 149 prevails.) ('39) AIR 1939 Nag 186 (190) : I L R (1939) Nag 250 (F B).
7. ('18) AIR 1918 Cal 631 (632). (No particular form or forms mentioned in the judgment.)

(2) "decree" means the formal expression⁸ of an adjudication⁴ which, so far as regards the Court expressing it, conclusively determines the rights of the parties⁷ with regard to all or any of the matters in controversy⁶ in the suit⁵ and may be either preliminary¹⁰ or final.¹¹ It shall be deemed to include the rejection of a plaint¹³ and the determination of any question within section 47 or section 144,¹⁴ but shall not include —

(a) any adjudication from which an appeal lies as an appeal from an order,¹⁵ or

(b) any order of dismissal for default.¹⁶

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final¹²:

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Distinction between a decree and an order. 3. Essential elements of a decree. 4. There must be an adjudication. 5. The decision must have been given in a suit. 6. The decision must have been given on the rights of parties with regard to all or any of the matters in controversy in the suit. 7. The decision must conclusively determine the rights of the parties. | <ol style="list-style-type: none"> 8. There must be a formal expression of the adjudication. 9. Classes of decrees. 10. Preliminary decree. 11. Final decree. 12. Decree partly preliminary and partly final. 13. Order rejecting plaint. 14. Determination of a question within Section 47 or Section 144. 15. Decree does not include appealable orders. 16. Decree does not include order of dismissal for default. |
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Other Topics

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| <p>Cases where Code provides for preliminary decree. See Note 10.</p> <p>Decision on preliminary issues. See Note 10, Pt. (5).</p> <p>Decisions under other Acts. See Note 5.</p> <p>Decisions under Arbitration Act. See Note 5, F-N (7).</p> <p>Decisions under Bengal Tenancy Act. See Note 5, F-N (7).</p> <p>Decisions under Companies Act. See Note 5, F-N (7).</p> <p>Decisions under Court-fees Act. See Note 5, F-N (7).</p> <p>Decisions under Divorce Act. See Note 5, F-N (7).</p> <p>Decisions under Indian Trusts Act. See Note 5, F-N (7).</p> <p>Decisions under Land Acquisition Act. See Note 5, F-N (7).</p> | <p>Decisions under Madras Rent Recovery Act. See Note 5, F-N (7).</p> <p>Decisions under Municipal Election Petitions. See Note 5, F-N (7).</p> <p>Decisions under Registration Act. See Note 5, F-N (7).</p> <p>Decisions under Religious Endowments Act. See Note 5, F-N (7) and Pt. (5).</p> <p>Decisions under Succession and Probate Acts. See Note 5, Pt. (1).</p> <p>Decisions under Transfer of Property Act. See Note 5, F-N (1).</p> <p>Dismissal of suit for non-compliance. See Note 6, F-N (10).</p> <p>Distinction between definition of decree in old and new Codes. See Note 1.</p> <p>Execution proceedings. See Note 5, Pts. (10) and (11) and Note 14.</p> |
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Importance of the definition of decree. See Note 2.

Interlocutory order in suits. See Note 6, Pt. (5).

Non-appealable orders. See Note 2.

Order of abatement. See Note 6, F-N (6).

Order of refusal to be made a party. See Note 6, F-N (5).

Order rejecting an application to sue in forma pauperis. See Note 5, Pt. (4).

Order returning plaint or appeal. See Note 13, Pt. (12) and Note 6, F-N (6).

Rejection of appeal. See Note 13.

Withdrawal of suit or appeal. See Note 6, F-N (6).

1. Legislative changes. — A "decree" was defined under Section 2 of the old Code as follows: —

"'Decree' means the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, where such adjudication, so far as regards the Court expressing it, decided the suit or appeal. An order rejecting a plaint, or directing accounts to be taken, or determining any question mentioned or referred to in section 244, but not specified in section 588, is within this definition: An order specified in section 588 is not within this definition."

In the present definition, the language has been re-cast so as to effect some important changes:

- (i) Whereas under the old definition, an adjudication, in order to constitute a decree, must have *decided the suit or appeal*, it is sufficient, under this definition, that it *conclusively determines the rights of the parties* though not deciding the suit itself. This change has been effected in view of the express provision recognizing the distinction between preliminary and final decrees.¹
- (ii) Under the old definition, orders, not *mentioned or referred to* in Section 244 (now Section 47) were not decrees though they were *within* Section 244. Thus, orders against sureties under Section 145, for example, were not decrees. The word "within" has now been substituted for the words "mentioned or referred to in" so as to constitute such orders also decrees.²
- (iii) An order of dismissal for default is expressly excluded from the definition of a decree and the conflict of decisions that had existed on that point has been thus set at rest.³

2. Distinction between a decree and an order. — The importance of the definition of the word "decree" rests on the fact that by reference to it the right of first appeal and second appeal is determined.¹

Section 2 (2) — Note 1

1. See the Report of the Special Committee and the Notes on clauses.

[See ('01) 29 Cal 758 (769) (F B). (The definition under the Code of 1882 was itself a much more comprehensive one than that of the Code of 1877).]

2. See Notes on clauses by the Special Committee.
3. ('98) 15 All 359 (361). (Dismissal of a suit or an appeal for default of appearance is by an order and not by a decree.)
- ('02) 5 Oudh Cas 294 (297). (Dismissal for default of appearance is not a decree.)
- ('87) 9 All 427 (428). (Assuming the dismissal order is under S. 102 of 1882 Code—corresponding to O. 9, R. 8 of the present Code—an appeal is not barred by S. 103 (O. 9, R. 9).)
- ('83) 1883 All W N 171 (171). (Failure to produce evidence—Order of dismissal of suit was held to be one under S. 155 of 1882 Code (O. 15, R. 4) and to be a decree.)

('92) 16 Bom 23 (25). (Order dismissing appeal for default is a decree.)

('04) 8 Cal W N 313 (314). (Order dismissing suit for default of appearance is a decree.)

('03) 30 Cal 660 (664) (F B). (Order dismissing an appeal for default is "decree.")

('01) 29 Cal 60 (62). (Order of dismissal of suit for default of appearance is not a decree.)

('95) 23 Cal 115 (117). (Order dismissing an appeal for default is not a decree.)

('97) 1897 Pun Re No. 60 (F B). (Order of dismissal of suit under S. 102 of 1882 Code is a decree.)

('07) 4 Low Bur Rul 17 (23) (F B). (Plaintiff failing to appear on the day of hearing—Suit dismissed for default—Order of dismissal is not a decree.)

('97-'01) Upp Bur Rul 206. (Order under O. 41 R. 17.)

Note 2

1. See Clause 2 of the Notes on clauses by the Special Committee.

Where an adjudication is a *decree*, then, unless expressly otherwise provided,

- (i) a first appeal *invariably* lies therefrom,² and
- (ii) a *second* appeal (i. e., an appeal from the decision on first appeal) also lies on the grounds mentioned in Section 100.

But where an adjudication is an *order* as defined in Section 2, (14), *infra*,

- (i) no appeal lies therefrom unless it is one of the "appealable orders" specified in Section 104, and
- (ii) no second appeal lies in *any* case.³

It is in view of the distinction abovementioned that it becomes very often necessary to determine whether an adjudication is a "decree" or an "order." In each case the question must be tested, not by reference to general principles but by the *expression* of the Code which must be construed in its plain and obvious sense.⁴ An adjudication must, however, be either a "decree" or an "order"; it cannot be both and cannot be resolved into diverse elements some of which are decrees and some orders.⁵

As the words "formal expression" appear in the definitions, both of 'decree' and 'order' in this Section, the presence or absence of a formal expression cannot be the true criterion of the difference between a decree and an order. The essence of the distinction lies in the nature of the decision — whether it is an adjudication of a particular kind or not — rather than in the manner of its expression.^{5a}

Where an adjudication is spoken of as an "order" in the provisions of the Code, it must, it is conceived, be taken to be only an "order" and not a "decree," though the necessary elements of a decree are also present in such adjudication. Thus it is provided, for example, in O. 1 R. 10 and in O. 9 R. 2 that the Court may *order* that the suit be dismissed. A dismissal of a suit is ordinarily a decree within Section 2 (2), but in view of the fact that the dismissals under O. 1 R. 10 and O. 9 R. 2, are called *orders*, they are not decrees within Section 2 (2).⁶ See also Note 16, *infra*.

As to the meaning of the term "decree" under the *Agra Tenancy Act* (III of 1926), see Section 3 sub-section (14) thereof and the undermentioned cases.⁷

(78) 1 Shome 244.

[See ('31) AIR 1931 Cal 779 (781): (Court of first instance passing order of restitution under S. 151 exercises same jurisdiction which S. 144 gives — Held the order even though made under S. 151, was a decree and hence appealable.)]

2. See S. 96, *infra*.

3. i. e., even in the case of appealable orders, see S. 104, *infra*.

4. ('01) 23 All 152 (156, 157) : 27 Ind App 209 (P C). (In this case it was held that the plaintiff had right to appeal.)

(703) 80 Cal 660 (663, 664) (FB). (Construction leading to injustice should not be placed upon the language of S. 2 (2).)

5. ('15) AIR 1915 P C 116 (117, 118) : 42 Ind App 91 : 42 Cal 914 (PC). (Formal adjudication declaring dissolution of partnership and taking of account is a decree and does not cease to be such because a portion of it might have been passed separately by way of an order.)

5a. ('37) AIR 1937 Pat 349 (350).

6. ('16) AIR 1916 All 326 (326) : 38 All 357. (O. 9, R. 2.)

(83) 9 Cal 627 (628). (Order passed under S. 97 of 1877 Code (O. 9, R. 2).)

(19) AIR 1919 Mad 871 (873) : 42 Mad 219. (Order striking out a defendant and deleting a substantial relief claimed in the suit is a decree.)

(26) AIR 1926 Nag 75 (75). (O. 1, R. 10.)

(10) 8 Ind Cas 409 (409) (Oudh). (An order striking out a defendant as case not having been proved against him is held a decree.)

7. ('34) AIR 1934 All 100 (100). (Adjudication upon rights not necessary — Enough if suit is finally disposed of.)

(38) AIR 1938 All 124 (125). (The definition of a 'decree' given in S. 2, Cl. (2) of the C. P. Code, does not apply to the *Agra Tenancy Act*. Under the *Agra Tenancy Act*, a 'decree' as defined in S. 3, Cl. (14) means any order which so far as the Revenue Court is concerned, finally disposes of a suit; so it does not include the determination of any question within S. 47, C. P. Code.)

(36) AIR 1936 All 451 (451).

3. Essential elements of a decree. — In order that a decision of a Court may be a "decree," there must be the following essential elements¹ :

(1) There must be an *adjudication*.

(2) The adjudication must have been given in a *suit*.

(3) It must have determined the *rights* of the *parties* with regard to all or any of the *matters in controversy* in the suit.

(4) Such determination must be a *conclusive* determination.

(5) There must be a *formal expression* of the adjudication. The definition in this Section must be taken along with the provisions of the Code regarding the *stage* at which a decree may be prepared, and it is not every finding that will amount to a decree even though it may conclusively determine the rights of the parties with regard to some of the matters in controversy in the suit.²

4. There must be an adjudication.—There must be a judicial determination of the matter in dispute. A decision on a mere matter of administration is not a decree. A decree-holder applies for leave to bid at a sale held in execution of his decree. The Court passes an order refusing the application. The order is not appealable, the matter being one of administration.¹ An order assessing the value of properties under O. 21 R. 66 is similarly a matter of administration and is not a decree.² Nor is an order, dismissing an appeal for want of prosecution, a decree, inasmuch as it does not deal judicially with the matter of the suit.³ Where, however, appeal against preliminary decree is withdrawn and dismissed, the order of dismissal is a decree.^{4a}

Where the officer passing a judgment is not a "Court" at all, the judgment or order is not a decree.⁴

5. The decision must have been given in a suit. — The word "suit" has not been defined in the Code. For the purposes of the Code, it means —

(1) Any proceeding under the Code which is instituted by the presentation of a plaint.¹ See Section 26, *infra*.

Note 3

1. ('16) AIR 1916 Lah 245 (246, 247) : 1916 Pun Re No. 128 (F B). (Order of abatement when does and when does not amount to a decree explained.)
2. ('34) AIR 1934 Pat 97 (99). (Directions by the Court with regard to the mode in which the account is to be taken in a redemption suit do not amount to a decree.)

Note 4

1. ('11) 11 Ind Cas 545 (545) : 38 Cal 717 (P O).
2. ('04) 27 Mad 259 (261) (F B). (Proceedings under O. 21 R. 66 are administrative.)
- ('11) 10 Ind Cas 371 (372) (Cal). (Order passed in execution of decree assessing value of property to be sold—Such order does not fall under S. 47 and is not appealable.)
- ('11) 11 Ind Cas 759 (760) (Cal). (No appeal lies against an order coming under O. 21, R. 66, which does not assess any value whatever but merely reproduces the two statements made by the decree-holder and the judgment-debtor.)

('20) AIR 1920 Pat 636 (638). (Order against judgment-debtor passed under O. 21, R. 66, is not a decree.)

3. ('14) AIR 1914 P C 66 (67) : 36 All 350 (P O).
- 3a. ('39) AIR 1939 Mad 442 (446) : 56 Mad 520. (Time for applying for final decree is from order of dismissal of appeal.)
4. ('25) AIR 1925 Bom 241 (241, 242) : 49 Bom 442 (F B). (Talugdari Settlement Officer is not a Court — His order is not a decree. 16 Bom 408, Overruled.)

Note 5

1. ('39) 1939 P C 68 (64) : 54 All 1067 : 60 Ind App 18 (P C).
- ('39) AIR 1939 All 293 (294). (Order by Court declaring certain amounts due by plaintiff in suit under S. 33 (1), U. P. Agriculturists' Relief Act, is a decree.)
- ('39) AIR 1939 Nag 110 (111). (Dismissal of suit under S. 112 (2), Berar Land Revenue Code, is a decree.)

(2) Any proceeding under other Acts which, according to specific provisions therein, should be regarded as a suit under the Code.^{1a} See Sections 295, 299 of the Indian Succession Act, 1925, which provide that proceedings thereunder should be regarded as suits under the Code. See also Para. 20 of Schedule II of the Code; Section 158 of the Bengal Tenancy Act, and also the undermentioned cases.^{1b} See also Note 21 to Section 11 and Note 6 to O. 9-R. 9.

A proceeding therefore which does not commence with a *plaint*² and which is not to be treated as a suit under any other Act, is not a "suit" and a decision given therein is not a "decree."³ Thus, an application for leave to sue in *forma pauperis* is not a suit as the application becomes a suit only *after* the leave is granted. An order passed on such an application is not a decree.⁴ Similarly an order on an

1a. ('04) 8 Cal W N 748 (749). (Application under S. 50, Probate and Administration Act, 1881, read with Ss. 55 and 83, is a suit.)

('95) 17 All 475 (477). (An order granting probate under Ch. V of Act V of 1881 was held to be a decree under S. 2 of Act XIV of 1882.)

('13) 35 All 448 (450). (Order refusing letters of administration treated as decree for appeal.)

('09) 1 Ind Cas 677 (679) (Cal). (An order absolute for sale under S. 89, T. P. Act, is a decree and it is a decision in a suit.)

('02) 29 Cal 651 (653, 654). (Proceedings under S. 89, T. P. Act, are proceedings in continuation of the original suit.)

('94) 21 Cal 539 (541). (Order under S. 86 of the Probate and Administration Act, is for purposes of appeal governed by the Civil Procedure Code.)

('90) 17 Cal 48 (51). (S. 86 of the Probate and Administration Act only allows appeals in cases appealable under the C. P. Code.)

('34) AIR 1934 Mad 103 (107) : 57 Mad 271.

('37) AIR 1937 Nag 4 (5, 6) : 1 L R (1937) Nag 73 : 165 Ind Cas 930 (930). (An order for sale passed on an application made under S. 4 of the Partition Act is a decree by reason of the provisions of S. 8 of that Act.)

[But see ('93) 20 Cal 888 (895). (Probate proceeding is not a suit properly so called though it takes the form of a suit and decision in such proceeding cannot conclude title to the estate.)]

1b. ('98) 25 Cal 146 (153). (Proceedings under S. 103, Ben. Ten. Act are suits.)

('88) AIR 1938 Sind 78 (79) : 27 Sind L R 109. (Award under S. 11, Arbitration Act, has force of a decree from the date it is received in Court.)

('30) AIR 1930 Cal 411 (416). (Decision of Collector in case under S. 20, Regulation II of 1819, has the effect of a decree.)

('81) 7 Cal 684 (687). (Application under S. 37 of Bengal Act VIII of 1869 is a suit under that section.)

('78) 3 Cal 340 (346). (Application by petition under S. 63 of the Administrator Generals Act (II of 1874) is a "suit".)

[But see (1902) 25 Mad 244, (265 269, 283, 288) (F B). (Where it has been held that such an order is one in execution coming within S. 244 of the old Code and

not one in the suit itself.)]

2. ('84) AIR 1934 Mad 103 (106, 107) : 57 Mad 271 (F B). (Dissenting from AIR 1929 Mad 223.)

3. ('99) 22 Mad 256 (258). (Proceeding under S. 244 of C. P. C., 1882, though terminates in a decree is not a suit—*Obiter*.)

('96) 23 Cal 723 (729, 730) (F B). (Proceeding under S. 104 (2) of the Bengal Tenancy Act is not a suit.)

('96) 18 All 101 (103) (F B). (Order rejecting appeal for failure to furnish security for costs under S. 549 (O. 41, R. 10) is not a matter in controversy in the suit.)

('95) 22 Cal 943 (948). ('Suit' should be confined to such proceedings as under that description are directly dealt with in the Code or such as by the operation of the particular Act which regulates them are treated as suits.)

('35) AIR 1935 Mad 373 (377). (A proceeding under S. 44 of the Madras Hindu Religious Endowments Act is not a suit.)

('29) AIR 1929 Mad 480 (480). (Suit commences with presentation of a plaint.)

('90) 13 Mad 248 (249). (Proceeding under Madras Rent Recovery Act VIII of 1865 is not a suit.)

N. B. — Under the Code of 1877 there was no provision corresponding to S. 26 and every proceeding terminating in a decree was held to be a suit. See (1882) 6 Bom 54 (61, 62). This is now obsolete.

('10) 8 Ind Cas 475 (476) : (1910), 1 Upp Bur Rul 28. (Order rejecting or refusing application for permission to sue as pauper is not a decree.)

(1896) P 214 (217), *Moran v. Place*. (In English law until a writ is issued there is no action between the parties.)

[But see ('18) AIR 1918 All 346 (349) : 39 All 626 (632). (Application under S. 22 of the Provincial Insolvency Act held to be suit.)

('84) 1884 Pun Re No. 145.

('29) AIR 1929 Mad 223 (225). (Decision on reference under S. 30, Land Acquisition Act is decree.)]

4. ('99) 21 All 133 (136) (F B). (Until application is granted there is no suit before the Court.)

('17) AIR 1917 Cal 852 (853) (Do.)

('78) 1 All 745 (747) (F B).

('83) 7 Bom 373 (376). (An order rejecting the application is not a decree.)

application for leave to institute a suit under the Religious Endowments Act (XX of 1863),⁵ or an order in a proceeding taken by the Court in the exercise of its inherent powers to punish for contempt of Court,⁶ is not a decree. For other cases of proceedings under the Code and under other Acts which are not "suits," see the undermentioned cases.

- [See also ('10) 8 Ind Cas 475 (476): (1910) 1 Upp. Bur. Rul. 28.]
5. ('07) 34 Cal 584 (585).
 ('91) 18 Cal 382 (384).
 ('92) 19 Cal 275 (285). (Order under S. 18 of Act XX of 1863 granting leave is not a decree.)
 ('74) 21 Suth W R 368 (368). (Order refusing leave is not a decree.)
 ('87) 10 Mad 98 (99).
6. ('05) 27 All 380 (381).
7. ('76) 3 I A 221 (227) : 2 Cal 131 (138). (Registration Act, S. 76— Order refusing registration is in the nature of a "decree" under the O. P. Code, VIII of 1859 but the present section is very different.)
 ('86) 14 I A 160 (166) : 11 Mad 26 (P C). (Order appointing new member to fill up vacancy in committee of trustees under the Religious Endowments Act is not a decree.)
 ('35) AIR 1935 All 147 (148). (Order on application under S. 7 Charitable and Religious Trusts Act, cannot be treated as a decree.)
 ('13) 20 Ind Cas 497 (497) : 35 All 450. (Municipal election petition is not a suit.)
 ('96) 19 All 131 (132). (Trusts Act—Order refusing to remove trustee is not a decree.)
 ('95) 17 All 286 (288). (Order rejecting application that a suit might be declared to have abated.)
 ('95) 17 All 238 (241). (Companies Act, S. 214—Order under, is not a decree.)
 ('90) 12 All 129 (157) (F B). (Decision of taxing officer is not a decree. Ref. under S. 28 of Act No. VII of 1870.)
 ('97) 21 Bom 63 (68). (Award under Deccan Agriculturists' Relief Act is not a decree.)
 ('16) AIR 1916 Cal 221 (222). (Application to set aside a sale is not a suit.)
 ('11) 9 Ind Cas 994 (994) (Cal). (Order under S. 4 of Bengal Regulation, V of 1799, is not a decree.)
 ('04) 8 Cal W N 321 (324). (Order referring matter in a land acquisition case to a civil Court is not a decree.)
 (1900) 4 Cal W N 403 (403, 404). (Order disallowing an application to be made party defendant as assignee of defendant.)
 ('99) 3 Cal W N 344 (345). (Order under S. 174 of the Bengal Tenancy Act is not a decree.)
 ('99) 3 Cal W N 184 (185). (Order under S. 173, Bengal Tenancy Act, is not a decree.)
 ('97) 2 Cal W N 351 (352). (Proceeding under S. 90 of the Bengal Tenancy Act is not a suit.)
 ('97) 1 Cal W N 30 (30). (Order setting aside sale under S. 174, Bengal Tenancy Act, is not a decree.)
 ('96) 23 Cal 723 (729) (F B). (Proceedings under S. 104 (2) of the Bengal Tenancy Act.) ('94) 21 Cal 825 (826). (Order under S. 173 of the Bengal Tenancy Act is not a decree.)
 ('92) 19 Cal 485 (487). (Proceeding under S. 84 of the Bengal Tenancy Act.)
 ('92) 19 Cal 275 (285). (Do.)
 ('91) 18 Cal 500 (504) ("Suit" as used in other Acts may include miscellaneous proceedings also. Thus "suit" in part VII of Bengal Court of Wards Act, IX of 1879 embraces all contentious proceedings. It would not however be a suit within the Code.)
 ('91) 18 Cal 271 (277, 281, 282) (S B). (Proceeding under S. 84 of the Bengal Tenancy Act.)
 ('89) 16 Cal 457 (464). (Suit includes proceedings taken to execute the decree.)
 ('87) 14 Cal 312 (313). (Settlement case under Bengal Tenancy Act, S. 104 (2) is not a suit.)
 ('81) 7 Cal 406 (409). (Proceedings under Land Acquisition Acts are not suits.)
 ('80) 5 Cal 311 (314). (Order for levy of penalty under Stamp Act is not a decree.)
 ('78) 3 Cal 662 (662). (F B). (Act X of 1877. — Decree does not include orders on matters arising in the course of the suit.)
 ('21) 67 Ind Cas 794 (794) (Lah). (Punjab Laws Act—Insolvency proceedings—Order raising attachment is not a decree.)
 ('20) AIR 1920 Lah 51 (53) : 2 Lah L Jour 291 (295) : 1 Lah 187. (Companies Act, S. 150—Payment order is not a decree.)
 ('08) 1908 Pun Re No. 144, p. 665. (Order staying or refusing stay of proceedings on an application under S. 19 of the Arbitration Act is not a decree.)
 ('84) AIR 1934 Mad 103 (110, 112) : 57 Mad 271. (Order made by District Judge under S. 84 (2) of the Madras Hindu Religious Endowments Act II of 1927 is not a decree.)
 ('33) AIR 1933 Mad 695 (696) : 56 Mad 984. (Application under S. 4 (2) of Madras Agency Tracts Interest and Land Transfer Act is not a suit and an order refusing it is not a decree.)
 ('29) AIR 1929 Mad 69 (71). (Proceedings under Ss. 41 to 49 of the Presidency Small Cause Courts Act.)
 ('28) AIR 1928 Mad 416 (418) : 51 Mad 664. (Order permitting withdrawal of a suit is not a decree.)
 (1900) 24 Mad 95 (96). (Order under S. 16 of Madras Regulation III of 1802 is not a decree.)
 ('98) 22 Mad 256 (258). (Proceedings under S. 244 of Act XIV of 1882 is not a suit but only a proceeding in a suit—Obiter.)
 ('90) 13 Mad 248 (249). (Proceeding under S. 27 of the Madras Rent Recovery Act.)
 ('69) 4 Mad H C R 401 (403) (Do.)
 ('35) AIR 1935 Oudh 72 (73). (Order on petition under S. 34, Trusts Act, is not a decree.)

6. The decision must have been given on the rights of the parties with regard to all or any of the matters in controversy in the suit. — Under the old Code, it was enough that an adjudication, in order to be a decree, should have decided the suit or appeal.¹ Accordingly several decisions which had the effect of deciding the suit but which were not strictly between the parties were held to be decrees.² Under the present definition, the adjudication must be one on the rights of the parties with regard to all or any of the matters in controversy in suit.³

The word "rights" in this Section means substantive rights in regard to the subject-matter of the suit.⁴ It does not include the following:

- (13) 18 Ind Cas 122 (124) : 16 Oudh Cas 36. (Municipal election petition is not a suit.)
 - (35) AIR 1935 Pat 515 (518) : 15 Pat 69. (A proceeding before the manager who deals with a claim under the Chota Nagpur Encumbered Estates Act is not a suit, nor the order passed in such proceeding a "decree.")
 - (21) AIR 1921 Pat 401 (402) : 5 Pat L Jour 415. (Application under S. 73 is not a suit and an order thereon is not a decree.)
 - (14) AIR 1914 Sind 122 (123) : 14 Sind L R 123. (Order under Clause 19 of Sch. II of the Code is not a decree.)
- Note 6**
1. ('08) 10 Bom L R 514 (515). (Suit for partition ; 29 Cal 758 (FB) followed.)
 - ('02) 24 All 532 (536) (F B). (Overruling 22 All 380 and 19 All 142 and holding that order disallowing application under S. 372 (O. 22, R. 10) does not decide the suit and is not a decree.)
 - ('66) 10 Moo Ind App. 340 (359) (PC). (Order in mortgage suit to render accounts of receipts from property does not dispose of suit and is therefore an interlocutory order.)
 - ('02) 24 All 342 (346). (Order rejecting application under S. 372 for being substituted as plaintiff is not a decree.)
 - (1900) 4 Cal. W. N. 403 (404). (Application under S. 372 of 1882 Code to be made a party defendant refused—Not a decree.)
 - ('94) 1894 Pun Re No. 43, p. 121. (Decision under the old Code—Orders discharging insolvent from further liability, were held to be decrees.)
 2. ('85) 7 All 914 (916). (Order rejecting application to be admitted as defendant under S. 3, Bengal Minor's Act (XI of 1858) was held to be a decree.)
 - ('86) 10 Bom 220 (223). (Application by third person to add as L.R.)
 3. ('16) AIR 1916 Lah 245 (246, 247) : 1916 Pun Re. No. 128 (F B). (A formal order merely recording an abatement and not adjudicating upon the rights of parties is not a decree.)
 - ('10) 7 Ind Cas 966 (967) (Bom). (Suit for redemption — Plaintiff claimed to be an agriculturist — Determination that he was an agriculturist is a decree.)
 - ('14) AIR 1914 Cal 149 (149) : 20 Ind Cas 72 (73) : 41 Cal 160. (Order accepting security and staying execution is not a decree.)
 - ('11) 10 Ind Cas 371 (371) (Cal). (Order under O. 21, R. 66 does not involve a judicial adjudication.)
 - (37) AIR 1937 Mad 554 (554). (Order under O. 34, R. 12 not a decree where the alleged prior mortgagee was not a party to the suit.)
 - (29) AIR 1929 Mad 223 (225). (Reference under Land Acquisition Act — Decision is one in suit and on rights of parties.)
 - (38) AIR 1938 Nag 233 (234). (Suit by lambardar for recovery of amount of revenue paid by him—Court discharging some defendants from suit — Order of discharge held to be a final adjudication of the most important point of issue and hence a decree within S. 2 (2).)
 4. ('12) 13 Ind Cas 800 (801) : 1911 Pun Re No. 82. (Interlocutory order.)
 - ('12) 16 Ind Cas 904 (906) (Cal). (Adjudication negating a claim for rent is a decree.)
 - (28) AIR 1928 All 234 (235). (Dismissal of suit against some of several defendants is a decree.)
 - ('16) AIR 1916 All 357 (358). (A decree passed under O. 34, R. 6, C. P. C., 1908 is a decree within the meaning of S. 2 (2) of the Code.)
 - ('01) 23 All 152 (156, 157) : 27 Ind App 209 (P C). (Decision determining period for which mesne profits are recoverable.)
 - ('94) 16 All 51 (51, 53). (Decision as to amount of rent payable is a decree.)
 - ('05) 29 Bom 13 (13).
 - (33) AIR 1933 Cal 416 (416). (Order of remand giving directions containing determination of principle on which assessment is to be made is a decree.)
 - (23) AIR 1923 Cal 308 (309). (Order finally declaring that a party is not liable for mesne profits. Relying on 23 All 152 (P C).)
 - ('13) 19 Ind Cas 971 (973) (Cal). (An order under Section 90 of the Transfer of Property Act is a decree.)
 - ('09) 36 Cal 493 (500). (Decision that defendants are not liable to perform contract claimed by plaintiff is a decree.)
 - ('10) 6 Ind Cas 323 (324) (Cal). (Order granting or refusing application for order absolute was conceded to be a decree.)
 - ('92) 19 Cal 463 (468) (F B). (Order declaring specific rights of parties in partition suit, is a decree.)
 - ('86) 12 Cal 173 (176). (Where Appellate Court remands case directing the lower Court to pass a decree in accordance with the award, it is a decision on the merits of the

(3) *Right to costs.* This is not a vested right and an order in respect thereof is not a decree.⁹

Where however the effect of an order is to *dismiss* the suit or appeal itself, it amounts to a denial of the *substantive rights* claimed by the plaintiff against the defendant and may amount to a decree if the other elements are present.¹⁰

9. ('20) AIR 1920 Pat 622 (625); 5 Pat L Jour 472 (F B).
('89) 12 Mad 120 (123).
('98) 21 Mad 421 (422).
[See *contra* ('32) AIR 1932 Bom 378 (385).]
10. ('19) AIR 1919 Mad 871 (872); 42 Mad 219.
(Order striking out name of defendant on the ground that there is no cause of action and dismissing suit against him for want of cause of action.)
('85) 9 Bom 452 (453). (Order dismissing appeal as barred.)
('33) AIR 1933 All 429 (431). (Order on application under O. 34, R. 6.)
('32) AIR 1932 All 614 (616); 54 All 482. (Refusal to grant any relief to plaintiff is a decree.)
('31) AIR 1931 All 333 (336); 53 All 466. (But order striking off defendants on the ground that the plaintiff has not made out a case against them is to be treated as dismissing the case against them and therefore a decree against which an appeal will lie.)
('18) AIR 1918 All 97 (97); 40 All 553. (Order on application under O. 34, R. 6.)
('16) AIR 1916 All 357 (358). (Do.)
('16) AIR 1916 All 34 (35); 38 All 111. (Order of abatement of the suit, passed in this case was held to be a decree.)
('86) 8 All 108 (111) (F B). (Order dismissing plaint on failure to furnish security.)
('11) 11 Ind Cas 986 (986) (Bom). (Dismissal of suit under O. 10, R. 4 (2). The decision was under S. 120 of the old Code. Now the dismissal is only an appealable order.)
('95) 19 Bom 307n (308n). (Dismissal of suit under S. 136 of the old Code. Now it will be an appealable order under the new Code.)
('37) AIR 1937 Cal 732 (735, 739). (Order dismissing appeal as time-barred before it is admitted or registered as a decree.)
('26) AIR 1926 Cal 638 (639). (Dismissal of appeal under O. 41, R. 11.)
('21) AIR 1921 Cal 551, (552). (An order rejecting the application to make the mortgage-decree absolute is a decree.)
('19) AIR 1919 Cal 1052 (1053). (Dismissal of suit for plaintiff's failure to produce evidence.)
('18) AIR 1918 Cal 53 (54). (Quere — Whether an order refusing to admit an appeal presented out of time is a decree.)
('13) 19 Ind Cas 971 (973) (Cal). (Order on application under O. 34, R. 6.)
('13) 19 Ind Cas 931 (932) (Cal). (Dismissal of appeal as barred by time.)
('97) 24 Cal 759 (762) (F B). (Dismissal of appeal under O. 41, R. 11.)
('86) 18 Cal 189 (191). (Decision that plaintiffs are minors and so dismissing suit is a decree.)
('32) AIR 1932 Lah 214 (215). (Order dismissing application for final decree is a decree.)
('28) AIR 1928 Lah 359 (360); 9 Lah 526.
('25) AIR 1925 Lah 456 (457). (Abatement order is a decree.)
('20) AIR 1920 Lah 338 (340); 1 Lah 582. (Do.)
('20) AIR 1920 Lah 8 (9); 1 Lah 493. (Do.)
('16) AIR 1916 Lah 245 (246); 1916 Pun Re No. 146 (F B). (Order of abatement under various circumstances discussed.)
('84) 1884 Pun Re No. 115, Page 324. (Dismissal of suit or appeal for insufficient court-fee.)
('82) 1892 Pun Re No. 158, page 475. (The order of the Court allowing the objection taken to the appeal to the lower Appellate Court that it was barred by limitation was an adjudication upon the question and was therefore a decree.)
('33) AIR 1933 Mad 442 (446); 56 Mad 520. (Withdrawal of appeal from preliminary decree and dismissal of appeal. Order is decree.)
('20) AIR 1920 Mad 580 (581). (Abatement order is a decree.)
('20) AIR 1920 Mad 143 (143). (Decision in appeal that the lower Court had no jurisdiction to decide the case.)
('19) AIR 1919 Mad 709 (709); 42 Mad 52. (Order dismissing application for final decree in mortgage suit.)
('19) AIR 1919 Mad 871 (872); 42 Mad 219 (222). (An order striking off defendants on the ground that the plaintiff has not made out a case against them is to be treated as dismissing the case against them and therefore a decree against which an appeal will lie.)
('17) AIR 1917 Mad 285 (286). (Abatement order is a decree.)
('16) AIR 1916 Mad 1068 (1069). (Do.)
('09) 4 Ind Cas 319 (320); 33 Mad 220. (Order dismissing interpleader suit.)
('95) 18 Mad 496 (497). (Order dismissing the suit on the ground that it had abated amounts to a decree.)
('38) AIR 1938 Nag 322 (323). (Appeal memo stamped after limitation under an extension of time — Dismissal as time-barred is a decree.)
('08) 4 Nag L R 54, (56). (Conditional decree for foreclosure — Refusal to make it absolute is a decree.)
('15) AIR 1915 Oudh 122 (123); 18 Oudh Cas 121. (Order on application under O. 34, R. 6.)
('14) AIR 1914 Oudh 147 (148); 21 Ind Cas 193 (194); 17 Oudh Cas 14. (An order that suit shall stand dismissed on default of certain payment will become a decree on default.)

The word "parties" in this Section, and, indeed, in very many other Sections of the Code, is used to mean parties arrayed on the one side as *plaintiffs* and on the other as *defendants*.¹¹ Thus, an order on an application by a *third person* to be impleaded as the legal representative of a deceased plaintiff in the suit is not an order on the rights of the *parties* and is therefore not a "decree."¹² If however the applicant is already a party to the suit and the effect of the dismissal of the application is to dismiss the suit itself, the decision will be one on the rights of the parties and, as such, a decree.¹³ In interpleader suits, the opposing defendants will be deemed to be parties and the decision of their claims *inter se* will be a decree.¹⁴

The expression "matters in controversy in the suit" refers to the subject-matter of the suit with reference to which some relief is sought.¹⁵ It includes matters, which, though they are common ground, must have been actually decided if any question had arisen and which are the foundation of the whole determination.¹⁶ It also includes matters which, though not arising on the face of the plaint as at first presented, arise at a subsequent stage of the suit and about which the parties are at controversy.¹⁷

7. The decision must conclusively determine the rights of the parties.— The decision must be *conclusive*, so far as regards the Court expressing it is concerned.¹ Where, for instance, a suit is tried partly by one Judge and partly by another and in a preliminary order the first Judge comes to certain findings and directs that after evidence on certain points had been taken the final decree

- (10) 8 Ind Cas 409 (409) (Oudh). (But order striking off defendants on the ground that the plaintiff has not made out a case against them is to be treated as dismissing the case against them and therefore a decree against which an appeal will lie.)
- (31) AIR 1931 Pat 353 (353) : 10 Pat 471. (Abatement order is a decree.)
- (17) AIR 1917 Pat 497 (498). (Suit disposed of on preliminary point—Disposal is a decree.)
- (27) AIR 1927 Rang 148 (148, 149) : 5 Rang 838. (Order refusing adjournment and dismissing suit.)
11. (13) 20 Ind Cas 898 (899) : 16 Oudh Cas 350. (29) AIR 1929 Cal 669 (670). (Minor defendants who are not represented are not parties to the suit.)
12. (24) AIR 1924 Mad 813 (815). (25) AIR 1925 All 431 (432) : 47 All 741. (Order in an application to set aside decree bringing on record legal representative.) (06) 28 All 109 (111). (The appointment of a legal representative is not a determination of any issue which is properly raised in the suit.) (21) AIR 1921 Nag 23 (24) : 17 Nag L R 45. [See also (13) 20 Ind Cas 950 (951) (Mad).] [But see (35) AIR 1935 Lah 47 (48). (16) AIR 1916 Lah 245 (247) : 1916 Pun Re No. 128 (FB). (In this case an order on an application by a third party was held to be a decree. But attention was not directed to the fact that the applicant was a third party. The actual decision is therefore not correct.)]
13. (20) AIR 1920 Mad 424 (425) : 43 Mad 812. (20) AIR 1920 Lah 8 (9) : 1 Lah 493. (Relying on AIR 1916 Lah 245 which on the facts was really wrongly decided. See foot-note 12, *supra*.)
14. (08) 30 All 22 (23). (09) 4 Ind Cas 319 (320) : 38 Mad 220.
15. (15) AIR 1915 Bom 42 (44) : 39 Bom 422. (15) AIR 1915 Cal 272 (274). (27) AIR 1927 Cal 850 (851) : 55 Cal 219. (Remand after framing additional issue is not a decision on a matter of controversy.)
16. (15) AIR 1915 P C 116 (118) : 42 Cal 914 : 42 Ind App 91. (27) AIR 1927 Pat 296 (297) : 6 Pat 380.
17. (28) AIR 1928 Oudh 362 (364) : 3 Luck 628 (FB).
- Note 7**
1. (28) AIR 1928 Lah 841 (843). (Case not finally disposed of—No appeal lies.) (85) 9 Bom 183 (195). (Order not deciding the suit not a decree.) (33) AIR 1933 All 261 (262). (An order remanding the suit for retrial with a proviso demanding the plaintiff to file certain papers within one month is not a decree.) (31) AIR 1931 Mad 471 (473, 474) : 54 Mad 337. (Decision finally disposing of matter between parties is decree though named as "Order" in the proceedings.) (12) 16 Ind Cas 45 (46) (Mad). (Order directing parties to put draft schemes is not decree.) (37) AIR 1937 Oudh 12 (13) : 12 Luck 586. (Suit under S. 33 U. P. Agriculturists Relief Act—Adjudication made therein is a decree.)

should take a certain shape; and the second Judge varies certain of his predecessor's findings in the final judgment, the order of the first Judge is not a decree.²

8. There must be a formal expression of the adjudication.— A decree is a necessary part of the ultimate procedure in all suits; without it a judicial record does not speak and the law could not be executed.¹

It is essential for a decree that there should be a *formal expression* of the adjudication.² Such expression must be both deliberate and given in the manner provided by law.³ But it need not be in any particular *form*.⁴

It has, however, been held by the Nagpur Judicial Commissioner's Court in some cases⁵ that the absence of a formal decree will not make an adjudication any the less a decree, if, in point of law, it operates as a decree. The Lahore High Court has also in some cases⁶ held that if an order *could* be formally drawn up as a decree it may be taken to be a decree. This seems to be arguing in a circle, as according to the Section itself and according to all the other High Courts, nothing will operate as a decree unless formally drawn up.⁷ The said decisions of the Lahore High Court, therefore, cannot be accepted as laying down sound law.

Again, it has been held⁸ that the omission to draw up a decree does not affect a party's *right of appeal*. This view also, it is submitted, is not based on sound principles. An appeal under Section 96 lies only against a *decree* and where there is in fact no decree (*i. e.*, a formal expression of an adjudication) there can be no appeal.⁹

The mere drawing up of an *order* in the form used for decrees will not, however, make it a decree, if it does not, in itself, really fall within the definition of a decree.¹⁰

('35) AIR 1935 Pat 456 (456). (Order of remand conclusively determining the rights of parties with regard to matter in controversy.)

[See also ('86) 8 All 108 (111).]

2. ('08) 4 Low Bur Rul 256 (258, 261).

Note 8

1. ('83) 5 All 520 (526).

2. ('14) AIR 1914 Sind 122 (123); 8 Sind LR 260. ('24) AIR 1924 Bom 33 (34). (Unless a decree is drawn up there is no appeal.)

('83) 5 All 520 (526).

('02) 29 Cal 758 (760) (FB). (Preliminary orders in partition and account suits, if they declare the rights of the parties, ought to be formally drawn up as decrees.)

('18) AIR 1918 Upp Bur 28 (29); 3 Upp Bur Rul 1. ('Adjudication,' meaning.)

3. ('09) 4 Ind Cas 829 (830); 34 Bom 182.

4. ('12) 16 Ind Cas 45 (46) (Mad).

5. ('21) AIR 1921 Nag 108 (108); 17 Nag LR 66.

('30) AIR 1930 Nag 122 (123); 26 Nag LR 24. (Following 19 C W N 755 and AIR 1923 Cal 308.)

6. ('11) 9 Ind Cas 1019 (1022); 1911 Pun Re No 41. ('30) AIR 1930 Lah 125 (126).

7. ('24) AIR 1924 Bom 33 (34, 35).

('10) 34 Bom 182 (188).

('16) AIR 1916 All 34 (35); 32 Ind Cas 104 (106); 38 All 111.

('18) 19 Ind Cas 894 (895); 37 Bom 480.

('92) 16 Bom 243 (248).

('91) 15 Bom 370 (375). (Withdrawal of appeal—No decree is drawn up. Therefore order is not a decree.)

('24) AIR 1924 Cal 1006 (1007). (Time does not run for purposes of appeal until decree is drawn up.)

('92) 19 Cal 463 (467, 468) (FB). (In this case the decision was adjudicated on the rights of the parties—The order was treated as decree against which there could be an appeal for the benefit of suitors.)

('12) 16 Ind Cas 45 (46) (Mad).

('12) 15 Ind Cas 935 (936); 8 Nag L R 92.

8. ('19) AIR 1919 Lah 53 (54); 1919 Pun Re No 66.

('15) AIR 1915 Cal 272 (273). (Court refused to draw up decree.)

[See also ('13) 19 Ind Cas 894 (895); 37 Bom 480.]

9. See the cases noted in foot-note 7 above.

10. ('26) AIR 1926 Nag 75 (75).

('21) AIR 1921 Nag 108 (108); 17 Nag LR 66.

('26) AIR 1926 Bom 237 (238).

('13) 20 Ind Cas 1 (1) (Cal).

('30) AIR 1930 Nag 206 (207); 26 Nag LR 166.

('34) AIR 1934 Pat 13 (14).

9. Classes of decrees. — The Code recognises the following classes of decrees:

- (1) preliminary decree,
- (2) final decree,
- (3) decree partly preliminary and partly final,
- (4) order rejecting plaint, and
- (5) determination of a question within Section 47 or Section 144.

A decree passed in appeal is really a decree in the suit, for, an appeal is only a continuation of the suit.¹ A compromise or a consent decree is a decree within the meaning of this Section.²

10. Preliminary decree. — Where an adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit, but does not *completely* dispose of the suit, it will be a *preliminary* decree.¹ Where it completely disposes of the suit it is a *final* decree.² In other words, a preliminary decree is passed in those cases in which the Court has first to adjudicate upon the rights of the parties and has then to stay its hand, for the time being, until it is in a position to pass a final decree in the suit.³

It has been seen in Note 6 above, that interlocutory orders which do not decide the rights of the parties are not decrees.⁴ Such orders cannot consequently be treated as preliminary decrees.⁵ Thus, a finding that a defendant is an agriculturist within the meaning of the Dekkan Agriculturists' Relief Act, or, that a plaintiff's suit is not barred by *res judicata*, is not a preliminary decree.⁶

Note 9

1. ('17) AIR 1917 Mad 597 (598).
2. ('22) AIR 1922 Cal 358 (361): 49 Cal 220.

Note 10

1. ('24) AIR 1924 Cal 160 (161).
('17) AIR 1917 Lah 153 (153): 1917 Pun Re No. 7.
('21) AIR 1921 Bom 220 (223): 45 Bom 627.
('09) 3 Ind Cas 999 (1000) (Cal).
('21) AIR 1921 Nag 108 (108): 17 Nag L R 66.
('84) AIR 1934 Oudh 307 (309). (Where in a suit for contribution the Court decided that the defendants were liable to contribute and also the extent of the liability and it only remained to work out the amount of the decree, it was held that the findings amounted to a preliminary decree from which an appeal was competent.)
2. ('24) AIR 1924 Cal 160 (161).
3. ('11) 9 Ind Cas 1019 (1021): 1911 Pun Re No. 41. (Followed in 15 Ind Cas 563. Lah.)
('13) 19 Ind Cas 922 (923): 6 Sind L R 287.
('31) AIR 1931 All 386 (386): 53 All 283 (FB). (Preliminary decree conclusive as regards Court passing it.)
('16) AIR 1916 Pat 370 (371): 1 Pat L Jour 406 (FB). (Preliminary decree is given effect to by the final decree.)
4. See cases in foot-notes 4 to 9 in Note 6.
5. ('16) AIR 1916 Low Bur 44 (45). (Decision on preliminary issue.)

- ('14) AIR 1914 Bom 23 (24): 38 Bom 331. (Do.)
- ('14) AIR 1914 Bom 149 (152): 39 Bom 339 (FB). (Decision on preliminary issue—Overruling practically 34 Bom 182; 36 Bom 536; 37 Bom 60: 17 Ind Cas 637.)
- ('14) AIR 1914 Bom 36 (37): 38 Bom 392. (Direction to Commissioner to take account.)
- ('15) AIR 1915 Cal 272 (274). (Decision on preliminary issue.)
- ('97) 24 Cal 725 (738, 740) (FB). (Order subsequent to the preliminary decree appointing Commissioner.)
- ('67) 7 Suth W R 222 (223). (Decision on preliminary issue.)
- ('26) AIR 1926 Lah 337 (337). (Suit for damages—Order for recovery of amount to be calculated is not a preliminary decree.)
- ('17) AIR 1917 Lah 261 (265): 1917 Pun Re No. 62. (Decision on preliminary issue.)
- ('17) AIR 1917 Lah 153 (154): 1917 Pun Re No. 7. (Do.)
- ('12) 13 Ind Cas 800 (801): 1911 Pun Re No. 82.
- ('12) 15 Ind Cas 935 (937): 8 Nag L R 92. (Decision on preliminary issue.)
6. ('21) AIR 1921 Bom 220 (222): 45 Bom 627. (Finding that party is an agriculturist is not a decree.)
- ('22) AIR 1922 Bom 336 (337). (Do.)
- ('12) 15 Ind Cas 566 (566) (All). (Preliminary issue of *res judicata*.)
- ('24) AIR 1924 Bom 33 (34). (Finding that party is an agriculturist is not a decree.)

The Code provides for the passing of preliminary decrees in the following classes of cases :

- | | | |
|---------------------|----|--|
| (1) O. 20, R. 12 | .. | Suits for possession and for rent or mesne profits. ⁷ |
| (2) O. 20, R. 13 | .. | Administration suits. |
| (3) O. 20, R. 14 | .. | Suits for pre-emption. |
| (4) O. 20, R. 15 | .. | Suits for dissolution of partnership. ⁸ |
| (5) O. 20, R. 16 | .. | Suits for accounts between principal and agent. |
| (6) O. 20, R. 18 | .. | Suits for partition and separate possession. ⁹ |
| (7) O. 34, Rr. 2, 3 | .. | Suits for foreclosure of a mortgage. |
| (8) O. 34, Rr. 4, 5 | .. | Suits for sale of mortgaged property. ¹⁰ |
| (9) O. 34, Rr. 7, 8 | .. | Suits for redemption of mortgage. |

There is a difference of opinion as to whether the list is exhaustive of the cases in which a preliminary decree can be passed. In an earlier case of the Calcutta High Court it was held that except in cases expressly provided for in the Code no preliminary decree can be passed.¹¹ A later case of the same High Court¹² held that the list is not exhaustive. The Bombay High Court has also held to the same effect.¹³ There seems to be nothing in principle to show why, if an order satisfies all the conditions of a preliminary decree as defined, it should not be taken as such simply because it is not *expressly* provided for in the Code. There is also a conflict of views as to whether there can be *more than one* preliminary decree in the same suit. Ordinarily there can be only one such decree in a suit. The Calcutta High Court has held¹⁴ that there may be exceptions to the rule. Thus, where the Appellate Court passed a preliminary decree in a suit for administration of a *debutter* estate and sent the case back ordering that the lower Court should direct a taking of accounts, and the lower Court in pursuance of the order made an order defining the extent and character of the liability of a party to render an account, it was

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| <p>(15) AIR 1915 Bom 42 (43) : 39 Bom 422. (Finding that party is an agriculturist is not a decree—But if the finding involves a direction to take an account between the parties as per S. 13 of the Dekkhan Agriculturists' Relief Act, it is a preliminary decree. 7 Ind Cas 966 and 16 Ind Cas 159 (160), which hold a contrary view are no longer good law.)</p> <p>(15) AIR 1915 Bom 21 (21) : 39 Bom 421. (Decision that a matter is not <i>res judicata</i>.)</p> <p>(13) 21 Ind Cas 387 (388) (Cal). (Preliminary issue of <i>res judicata</i>.)</p> <p>(12) 15 Ind Cas 563 (565) : 1913 Pun Re No. 16. (Do.)</p> <p>7. ('79) 4 Cal 629 (633). (Decree for possession reserving enquiry into mesne profits is a preliminary decree.)</p> <p>('70) 14 Suth W R 92 (93).</p> <p>('14) AIR 1914 Cal 804 (804). (Formally expressed decision as to possession in suit for possession and mesne profits.)</p> <p>('10) 6 Ind Cas 648 (648) (Lah). (Order declaring decree-holder entitled to mesne profits is</p> | <p>a decree reserving ascertainment of amount later on.)</p> <p>8. ('15) AIR 1915 P C 116 (117) : 42 Cal 914 : 42 Ind App 91 (PC). (Order declaring partnership dissolved from a particular date.)</p> <p>9. ('98) 20 All 311 (312). (Decree for partition is a preliminary decree.)</p> <p>('92) 19 Cal 463 (467, 469) (FB). (Order declaring rights of parties is a preliminary decree.)</p> <p>('96) 28 Cal 279 (283).</p> <p>('09) 3 Ind Cas 247 (252, 253) (Cal).</p> <p>('02) 29 Cal 758 (760, 764) (FB). (Order declaring rights of the parties and the property to be partitioned is a preliminary decree.)</p> <p>('86) 12 Cal 273 (275).</p> <p>('86) 12 Cal 209 (212).</p> <p>('95) 18 Mad 73 (87).</p> <p>('38) AIR 1938 Oudh 229 (230).</p> <p>10. ('16) AIR 1916 Bom 305 (307) : 40 Bom 321.</p> <p>11. ('19) AIR 1919 Cal 361 (362).</p> <p>12. ('24) AIR 1924 Cal 160 (162).</p> <p>13. ('21) AIR 1921 Bom 220 (222) : 45 Bom 627.</p> <p>14. ('24) AIR 1924 Cal 160 (162).</p> |
|---|---|

held that the latter order was also a preliminary decree.¹⁵ An earlier case of the Calcutta High Court¹⁶ and the Madras High Court¹⁷ hold that there cannot be more than one preliminary decree. The same view is taken by the Bombay High Court and by the Oudh Judicial Commissioner's Court.^{18a} It has been held by the Patna High Court^{18b} that the definition of a decree in this Section must be taken along with the provisions of the Code regarding the *stage* at which a decree may be prepared and that the order of an Appellate Court in an appeal from the preliminary decree in a suit for redemption, remanding the case to the lower Court and giving directions as to the mode of taking accounts is not a preliminary decree. It is not competent for a Court to dismiss a suit after a preliminary decree is passed or to vacate the preliminary decree for default in subsequent stages of the proceeding; it can only be reversed in appeal.^{18c}

Under the Code of 1877, an order directing accounts was not within the definition of "decree;"¹⁹ but, under the Code of 1882, it was so.²⁰ Such orders when they involve a decision of the rights of the parties will be preliminary decrees under the present Code.²¹

11. Final decree.—A decree may be said to become final in two ways :

(1) When the time for the last appeal has expired without any appeal being filed, or the matter has been decided by the decree of the highest Court.¹

(2) When the decree, *so far as regards the Court passing it*, completely disposes of the suit.²

It is in the latter sense that the words "final decree" are used in Section 2 sub-clause (2). The appealability of a decree therefore will not affect its character as a "final decree."

A suit is completely disposed of when there is nothing further remaining to be decided in it. Thus, where a decree is passed for a sum representing past mesne profits, and for subsequent mesne profits at a particular rate without directing any inquiry, the decree *completely* disposes of the suit and is therefore a *final* decree.³ If the Court, however, had merely declared that a party is liable for mesne profits and directed an enquiry into the amount of mesne profits, the declaration, though

15. ('24) AIR 1924 Cal 160 (162).

16. ('15) AIR 1915 Cal 272 (274).

17. ('19) AIR 1919 Mad 998 (1000) : 42 Mad 296.

('30) AIR 1930 Mad 528 (530) : 53 Mad 378.

18. ('24) AIR 1924 Bom 33 (35).

18a. ('21) AIR 1921 Oudh 224 (224) : 24 Oudh Cas 366.

18b. ('34) AIR 1934 Pat 97 (99).

18c. ('32) AIR 1932 Mad 519 (522).

19. ('83) 9 Cal 773 (777).

20. ('91) 15 Bom 155 (159) : 18 Ind App 6 (PC).

('79) 3 Bom 161 (166).

('09) 2 Ind Cas 161 (163) (Bom).

('85) 9 Bom 183 (195).

('09) 2 Ind Cas 553 (555) : 36 Cal 493.

('96) 23 Cal 406 (409).

('01) 1901 Pun Re No. 13, page 47.

('95) 18 Mad 73 (87).

21. ('15) AIR 1915 P C 116 (117) : 42 Cal 914 : 42 Ind App 91 (PC).

Note 11

1. ('17) AIR 1917 All 323 (324).

('78) 1 All 132 (134). (Followed in 7 All 107.)

('27) AIR 1927 All 848 (849) : 50 All 68.

('25) AIR 1925 All 291 (292) : 47 All 533.

('90) 12 All 129 (155, 156) (FB).

('78) 1 All 293 (295).

('31) AIR 1931 Cal 323 (324). (Decree as modified in review is the final decree.)

('09) 4 Ind Cas 167 (168) (Cal).

2. ('11) 10 Ind Cas 736 (736) : 7 Nag L R 41. (An absolute decree for redemption, sale or foreclosure is a final decree.)

3. ('25) AIR 1925 Mad 1276 (1276).

('28) AIR 1928 Cal 804 (804).

[See also ('98) 1898 All W N 99(99). (Partition suit—Final decree can be passed only after perusing the *amin's* report.)]

a decree, does not completely dispose of the suit and is therefore only a *preliminary* decree and not a *final* one.⁴

A decree to which a condition is attached, upon the fulfilment of which the decree-holder is to enjoy the fruits of his decree, does not because of that become a preliminary decree; it is nevertheless a final decree.

Illustration

A files a suit for pre-emption against *B*. A decree is passed in *A*'s favour but with the condition that unless the purchase-money is paid within two months from the date of the decree, the suit shall stand dismissed. The decree is a *final* one, inasmuch as the Court having passed such a decree has no further judicial function to perform in respect of the complete disposal of the suit.⁵

Ordinarily there will be only *one* final decree in a suit. But circumstances are not inconceivable which require the passing of more than one final decree in the same suit.

Illustration

A obtains a preliminary decree against *B*. *B* appeals and obtains an order for stay of further proceedings in the lower Court in respect of a *portion* of the subject-matter. The trial Court passes a final decree in respect of the portion not affected by the stay order. The appeal is subsequently dismissed. *A* can apply for a supplementary or *second* final decree in respect of the portion about which no final decree was passed.⁶

See also notes to Order 34 Rules 3 and 5 under the heading 'Appeal.'

12. Decree partly preliminary and partly final. — A decree may be partly preliminary and partly final. Thus, where in a suit for possession of immovable property with mesne profits, the Court —

(a) decrees possession of the property, and

(b) directs an enquiry into the mesne profits,

the portion (a) is a *final* decree and the portion (b) is a *preliminary* one.¹

Similarly, a direction in the final decree leaving distribution of assets undisposed of is in essence a preliminary decree and the decree is partly final and partly preliminary.²

13. Order rejecting plaint. — An order rejecting a plaint does not preclude the plaintiff from presenting a fresh plaint on the same cause of action.¹ Such an order, therefore, does not negative the rights of the plaintiff as in the case of *dismissal* of the suit.² The Section, however, specifically provides that the rejection of a plaint shall be deemed to be a decree.³

Is an order rejecting a *memorandum of appeal* a decree? There is a conflict of opinion on the point. On the one hand, it has been held that the words "shall

4. ('87) 14 Cal 50 (53, 54).

5. ('20) AIR 1920 Oudh 25 (26):23 Oudh Cas 254.

[See also ('76) 1 All 132 (134).

('14) AIR 1914 Oudh 221 (222). (Pre-emption suit—Following 21 Ind Cas 193.)

[But see ('33) AIR 1933 All 261 (262).]

6. ('18) AIR 1918 Cal 9 (10).

Note 12

1. ('29) AIR 1929 Cal 383 (383).

('14) AIR 1914 Oudh 147 (148): 21 Ind Cas 193 (194): 17 Oudh Cas 14. (Decree declaring that on default of payment within fixed

period suit would stand dismissed is a combined decree.)

2. ('30) AIR 1930 Mad 528 (530, 531):53 Mad 378.

Note 13

1. See O. 7, R. 13.

2. See cases in Note 6, Foot Note 10.

('71) 7 Beng L R 663 (668) (F B). (Rejection for undervaluation.)

3. ('38) AIR 1938 All 150 (151). (Rejection of plaint on ground of deficiency of court-fee.)

('35) AIR 1935 Cal 336 (337): 62 Cal 61. (Rejection of plaint for non-payment of deficit court-fee.)

('36) AIR 1936 Pesh 155 (156).

refusing an application.³ The determination of a *mere issue* made prior to the passing of the final order,⁴ or an order merely determining a point of law arising *incidentally* in the course of a proceeding for determining the rights of the parties,⁵ is not a decree. Thus, a refusal to summon a witness in a proceeding under Section 47 is not a decree.⁶ In the undermentioned case^{6a} the Madras High Court held that an order in execution proceedings disallowing a plea of limitation raised in bar of the execution was a decree. It is submitted that the view is not correct. For orders under Section 47 and Section 144 which do not amount to decrees, see Notes 84 and 86 to Section 47 and Note 31 to Section 144.

There is no distinction between a decree in a suit and a decree in a proceeding under Section 47 or Section 144.⁷

15. "Decree" does not include appealable orders. — The definition expressly excludes an adjudication from which an appeal lies as an appeal from an order.¹ Orders which are so appealable are specified in Section 104 and O. 43 R. 1. of the Code. An order, therefore, which falls within the purview of Section 47 or Section 144 or is otherwise within the general definition of a decree, is nevertheless not a decree if an appeal lies therefrom under Section 104 and O. 43 R. 1.²

('14) AIR 1914 Cal 149 (149) : 41 Cal 160.

('12) 18 Ind Cas 365 (367) (Cal).

('11) 12 Ind Cas 745 (749, 750) (Cal). (Cases discussed — Tests suggested in 24 Cal 725 and 10 Ind Cas 371 (Cal).)

('01) 8 Cal W N 257 (261, 262). (Objection of the judgment-debtor to the valuation of property in execution proceedings overruled—It is a decree because it is a judgment-debtor's right to have the property properly valued.)

('88) 9 Cal 214 (215).

('39) AIR 1939 Lah 177 (178). (Order that executing Court had jurisdiction to hear objection application of judgment-debtor under S. 47 is an order which determines a very important right and is a decree.)

('82) AIR 1932 Lah 120 (121). (Order accepting or refusing security bond is not appealable.)

('20) AIR 1920 Lah 443 (444). (Question whether decree-holder is entitled to the benefit of the provisions of S. 72 is a decree under S. 47.)

('14) AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110. (Decision on a question of limitation in a proceeding under S. 144 is not a decree.)

('36) AIR 1936 Mad 623 (624).

('33) AIR 1933 Mad 152 (153) : 56 Mad 453. (Order staying or refusing stay of execution is not appealable as a decree.)

('04) 27 Mad 259 (261) (F B). (Overruling 23 Mad 568 and dissenting from 30 Cal 617.)

('33) AIR 1933 Nag 84 (85) : 29 Nag L R 121. (Order staying or refusing stay of execution is not appealable as a decree.)

('27) AIR 1927 Nag 112 (112) : 23 Nag L R 14. (Order under O. 21, R. 71 is a decree; following AIR 1922 All 200 (F B).)

('20) AIR 1920 Pat 249 (250) : 5 Pat L Jour 270.

('37) AIR 1937 Rang 157 (158, 159).

('35) AIR 1935 Rang 500 (501).

('31) AIR 1931 Rang 221 (223) : 9 Rang 354. (Order staying or refusing to stay execution is not appealable as a decree.)

3. ('91) 18 Cal 469 (472).

('88) 1888 All W N 82 (82). (An order of adjournment in an execution application—Not final—Not a decree.)

4. ('15) AIR 1915 Mad 197 (198) : 37 Mad 29. (Obiter).

5. ('14) AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110. (Point of limitation under S. 144 is incidental.)

('33) AIR 1933 Pat 498 (499). (Do.)

('91) 13 All 569 (571). (Order under O. 21, R. 71 is merely an "order"—No longer good law.)

('20) AIR 1920 Lah 117 (118).

6. ('20) AIR 1920 Lah 443 (444). (Obiter).

6a. ('36) AIR 1936 Mad 801 (801). (Following AIR 1924 Pat 683.)

7. ('25) AIR 1925 Cal 102 (103).

Note 15

1. ('28) AIR 1928 Lah 137 (139) : 9 Lah 380.

('29) AIR 1929 Lah 367 (367).

('36) AIR 1936 All 763 (764). (An order passed on an application under O. 21, R. 90, Civil P. C., is not a decree, the order being one from which an appeal is provided under O. 43, R. 1 (j).)

('39) AIR 1939 Oudh 104 (105). (Order under S. 104 (1) (f).)

2. ('12) 17 Ind Cas 884 (885) : 8 Nag L R 177.

('06) 3 Cal L Jour 276 (279).

('11) 38 Cal 339 (341). (Order on application under O. 21, R. 89.)

('15) AIR 1915 Lah 293 (295). (Order under O. 21, R. 92.)

('38) AIR 1938 Nag 107 (107, 108) : I L R 1938 Nag 436. (Order refusing to set aside sale.)

16. Decree does not include order of dismissal for default.— Under the old Code there was a conflict of decisions as to whether a dismissal for default of a suit or of an appeal was a decree.¹ The conflict has now been set at rest² by the following changes in the Code :

(1) By expressly providing in clause (b) of Section 2 (2), that a dismissal for default is not a decree ; and

(2) By substituting the words "the Court shall *make an order* that the suit be dismissed" and the words "the Court shall *make an order* that the appeal be dismissed" for the words "the Court shall dismiss the suit" and the words "the appeal shall be dismissed" in O. 9 R. 8 and O. 41 Rr. 11 (2) and 17 respectively, corresponding to Sections 102, 551 and 556 of the old Code. The object of such substitution is to make it clear that the dismissal is to be regarded only as an *order*. See Note 2 above.

The words "dismissed for default" are not confined to dismissals for default in *suits* or *appeals*. They extend also to *applications* under Section 47 or Section 144 which are dismissed for default.³

Note 16

1. *The following cases held that dismissal of suit for default was a decree :*

- ('87) 9 All 427 (428). (Dismissal under S. 102, O. 9, R. 8.)
- ('88) 1888 All W N 171 (171). (Dismissal for non-production of evidence.)
- ('81) 3 All 292 (294).
- ('96) 20 Bom 786 (744).
- ('95) 19 Bom 307 (308). (Dismissal under O. 11, R. 21.)
- ('92) 16 Bom 23 (25). (Dismissal under O. 9, R. 8.)
- ('10) 5 Ind Cas 493 (494) (Cal). (S. 102, O. 9, R. 8.)
- ('04) 8 Cal W N 313 (314). (Do.)
- ('98) 1898 Pun Re No. 43. (O. 11, R. 21.)
- ('97) 1897 Pun Re No. 60. (S. 102, O. 9, R. 8.)
- ('89) 1889 Pun Re No. 32. (Do.—Overruled by 1907 Pun Re No. 121.)

The following cases held that dismissal of suit for default was not a decree :

- ('99) 22 Mad 221 (222).
- ('02) 12 Mad L Jour 473 (474).
- ('10) 5 Ind Cas 423 (423) : 32 All 373.
- ('06) 28 All 749 (752) (F B).
- ('93) 15 All 359 (362).
- ('02) 29 Cal 60 (62).
- ('83) 9 Cal 627 (628). (S. 97, O. 9, R. 2.)
- ('07) 1907 Pun Re No. 121, Page 550 (F B).
- ('02) 5 Oudh Cas 294 (297).
- ('08) 4 Low Bur Rul 17 (23) (F B). (S. 102.)

The following cases held that dismissal of appeal for default was a decree :

- ('92) 16 Bom 23 (25).
- ('03) 30 Cal 660 (664) (F B).

The following cases held that dismissal of appeal for default was not a decree :

- ('96) 23 Cal 115 (116, 117).
- ('96) 23 Cal 827 (828).
- ('93) 15 All 359 (361).
- ('92) 14 All 361 (361).
- ('81) 3 All 382 (383).

('80) 2 All 616 (617).

('83) 1893 Pun Re No. 9, Page 32.

('79) 1879 Pun Re No. 113.

('08) 31 Mad 157 (159).

('03) 6 Oudh Cas 48 (50). (When appellant withdraws from appeal without permission and the appeal is dismissed it must be taken to be a dismissal for default.)

('97) 1897 Upp Bur Rul 206.

2. ('17) AIR 1917 All 392 (393) : 39 All 393.

('12) 39 Cal 341 (343). (Dismissal of appeal for default.)

('24) AIR 1924 All 144 (144) : 45 All 669. (Where an appeal is not dismissed for default as it could have been, but on the merits, it is a decree.)

('10) 32 All 373 (376).

('17) AIR 1917 Cal 728 (730) : 44 Cal 954.

('18) 20 Ind Cas 1 (2) (Cal). (The fact that a decree is drawn up in a case of dismissal for default cannot alter the nature of the order.)

('17) AIR 1917 Mad 732 (734). (Part of the claim dismissed for default of plaintiff and part allowed on admission of defendant—Order should be considered as a decree.)

('12) 14 Ind Cas 823 (835) (Mad). (Dismissal under O. 41, R. 17.)

('20) AIR 1920 Nag 216 (218).

('25) AIR 1925 Oudh 485 (485) : 28 Oudh Cas 124.

('18) AIR 1918 Oudh 446 (448).

('23) AIR 1923 Pat 514 (515) : 2 Pat 739.

('13) AIR 1918 Pat 376 (376). (One of the plaintiffs present — Dismissal for default of others is a decree.)

[See ('12) 15 Ind Cas 601 (602). (But where a decree is passed under O. 9, R. 8 on defendant's admission, on the plaintiff's non-appearance it is not a dismissal for default.)]

3. ('26) AIR 1926 All 401 (401).

('88) 11 Mad 319 (321). (Order dismissing application to set aside sale in execution; following 10 Bom 433.)

('07) 29 All 596 (597).

In the undermentioned case⁴ the Allahabad High Court proceeded on the view that a dismissal for default means a dismissal for *non-appearance* and held that where an appellant's pleader was present but expressed his unpreparedness to argue the appeal and the appeal was dismissed for non-prosecution, the dismissal was not one for "default" and constituted a decree. This view, however, seems to be opposed to the undermentioned decisions of the Privy Council⁵ in which the Privy Council has taken the view that an order dismissing an appeal for want of prosecution is not a "judicial" order at all.

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made :

Synopsis

- 1. Legislative changes.
- 2. Scope of the definition.

Other Topic

Capable of Execution. See Note 2, Pt. (3).

1. Legislative changes. — The words "and includes any person to whom such decree or order is transferred" which occurred in the old Code, have now been omitted. For reasons, see Note 2.

2. Scope of the definition. — Under the old Code the transferee from the decree-holder was included in the definition of the term "decree-holder."¹ This was found too general as including even *oral* assignments whereas under Section 232 of the same Code an assignment, in order to be recognised, had to be in *writing*.² The words "and includes any person to whom such decree or order is transferred" have consequently been removed. The result is that a decree-holder under the present definition must be a person in *whose favour* a decree is passed and *whose* name is on the record in the suit.^{2a} But the rights of the transferee, however, are not affected by the change and remain practically the same as before.

Where a decree for specific performance is passed, such decree is capable of execution both by the plaintiff as well as by the defendant; consequently even the defendant in such a case would be a "decree-holder."³

The term "decree-holder" does not include an attaching creditor.⁴

(‘36) AIR 1936 Cal 267 (268). (Order directing an execution case to be dismissed for non-prosecution is not a decree.)

(‘04) 31 Cal 207 (209). (Followed in AIR 1915 Cal 539.)

(‘99) 27 Cal 414 (415). (Dismissal for default of application to set aside a sale.)

(‘32) AIR 1932 Nag 14 (15): 27 Nag L R 339. [But see observations in (‘24) AIR 1924 Cal 830 (834), which confines dismissal for default to cases treated as such by the Code itself.]

4. (‘37) AIR 1937 All 284 (285).

5. (‘33) AIR 1933 P C 68 (70) : 60 Cal 662 : 60 Ind App 83 (P C).

(‘14) AIR 1914 P C 66 (67) : 36 All 350 (PC).

(‘98) 20 All 539 (542).

(‘87) 11 Bom 153 (158).

(‘99) 26 Cal 250 (253).

(‘80) 5 Cal 592 (593).

(‘04) 14 Mad L Jour 393 (393).

(‘03) 26 Mad 258 (259).

(‘80) 2 Mad 216 (217). (The transfer must however be by a person whose name is on the record as the decree-holder.)

2. (‘07) 2 Mad L Tim 93 (93).

(‘91) 15 Bom 307 (309).

(‘85) 9 Bom 179 (181).

2a. (‘29) AIR 1929 Bom 279 (281).

(‘37) AIR 1937 Mad 605 (606). ("Decree-holder" does not include transferee from him.)

(‘37) AIR 1937 Nag 30 (30, 31) : I L R 1937 Nag 82.

3. (‘23) AIR 1923 Bom 26 (27) : 46 Bom 990.

(‘32) AIR 1932 Cal 579 (583): 59 Cal 501 (511).

4. (‘25) AIR 1925 All 123 (124).

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court:

Synopsis

1. Legislative changes.
2. "District Court," meaning of.

Other Topic

District. See Note 2.

1. **Legislative changes.** — The latter half of the old definition declaring the subordination of the various Civil Courts has now been transferred to Section 3.

2. **"District Court," meaning of.** — The term "*district*" means:

(1) The local limits of the jurisdiction of a principal Civil Court of original jurisdiction.¹

(2) The local limits of the ordinary original civil jurisdiction of the High Court.²

The words "*District Court*," however, do not mean necessarily a High Court wherever they occur,³ but mean only the principal Civil Court of original jurisdiction.⁴

The definition, as the opening of the Section shows, applies only where nothing is *repugnant* in the subject or context. In construing the term therefore in any Section the particular provisions thereof will have first to be considered.⁵

This Section does not apply to the scheduled districts.⁶

(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by *the Central Government or the Crown Representative*:^a

a. Substituted for the words "the Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.

Scope of the definition. — Three conditions must be satisfied in order to bring a Court within the definition of a "foreign Court":

- (1) It must be situate *outside British India*,¹
- (2) It must have *no authority in British India*, and

Section 2 (4) — Note 2

1. ('79) 4 Cal 222 (228). (Deputy Commissioner of Sonthal Pergunnahs has been vested with powers of District Judge. The effect of this is that the Sonthal Pergunnahs is a district.)
2. ('15) AIR 1915 Mad 608 (609).
3. ('27) AIR 1927 Cal 290 (290). (Explaining 12 Cal W N 446.)
4. ('89) 16 Cal 18 (15). (Chota Nagpur—Court of Judicial Commissioner is the District Court.) ('97) 21 Bom 45 (47). (Second Class Sub-Judge of Pandarpur invested with powers of District

Court under the Provincial Insolvency Act—His Court for that purpose is a District Court.)

5. ('08) 12 Cal W N 446 (447). (In S. 29 (1) of the Inventions and Designs Act V of 1888, "District Court" includes High Courts in its ordinary original civil jurisdiction. "District Court" in S. 2 of the Indian Patents and Designs Act II of 1911, has the same meaning as in the Code.)
6. ('95) 17 All 483 (484).

Section 2 (5)

1. ('02) 29 Cal 509 (516). (Supreme Court of Mauritius is a foreign Court.)

- 9) (9) "judgment" means the statement given by the Judge of the grounds of a decree or order :

"Judgment."—The essential element of a judgment is that there should be a *statement of the grounds* of the decision.¹ It need not, however, be a decision on *all* the issues in a case. An order deciding a preliminary issue in the case may be a judgment.² The shorthand notes dictated by the Judge cannot, until they have been approved by the Judge, be considered as part of his actual judgment.³

As to meaning of "judgment" under the Letters Patent, see Notes under Clause 15 of the Letters Patent and the undermentioned cases.⁴

- (10) (10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made :

"Judgment-debtor."—The definition does not include the judgment-debtor's assignee.¹

A person who has stood surety for costs and against whom a decree for costs has been passed, is a judgment-debtor within the clause.²

- (11) (11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued :

"Legal representative."—See Order 22 Rule 3.

Section 2 (9)

1. ('12) 15 Ind Cas 212 (212) : 15 Oudh Cas 78.
('88) AIR 1933 Oudh 385 (386). (Order setting aside ex parte decree is judgment.)
2. ('26) AIR 1926 Lah 638 (638).
('12) 14 Ind Cas 371 (372) (Lah).
3. ('27) AIR 1927 Bom 113 (115) : 51 Bom 267.
4. ('31) AIR 1931 Rang 286 (286) : 9 Rang 478.
('31) AIR 1931 Rang 147 (148) : 9 Rang 31 (FB).
('93) 15 All 373 (374).
('87) 9 All 655 (656, 657) (S B).
('81) AIR 1931 Bom 166 (166). (Order refusing leave to sue as pauper is "judgment".)
('21) AIR 1921 Bom 128 (128).
('97) 22 Bom 891 (892, 893).
('75) 12 Bom H O R 129 (137).
('72) 9 Bom H O R 393 (407).
('14) AIR 1914 Cal 388 (389) : 41 Cal 323.
('09) 4 Ind Cas 329 (330) (Cal).
('08) 35 Cal 1096 (1098).
('99) 26 Cal 361 (368, 377, 378, 380) (S B).
('97) 25 Cal 236 (238, 239).
('95) 22 Cal 928, (929).
('94) 21 Cal 473 (475). ("Judgment" means a decision which affects the merits of the question between the parties by determining some right or liability.)
('00) 18 Cal 182 (185, 186).
- ('90) 17 Cal 455 (458).
- ('83) 9 Cal 482 (493) : 10 Ind App 4 (F C).
- ('82) 8 Cal 147 (148).
- ('81) 7 Cal 339 (341, 342).
- ('81) 6 Cal 594 (599, 602).
- ('78) 4 Cal 531 (534).
- ('78) 2 Cal L Rep 583 (585).
- ('77) 2 Cal 466 (467).
- ('75) 1 Cal 102 (103).
- ('74) 21 Suth W R 303 (307).
- ('72) 17 Suth W R 364 (369).
- ('69) 12 Suth W R 459 (460).
- ('67) 7 Suth W R 277 (279).
- ('10) 8 Ind Cas 340 (342) : 35 Mad 1. (An order on an independent proceeding which is ancillary to the suit is a "judgment.")
- ('01) 25 Mad 548 (550).
- ('01) 24 Mad 358 (359).
- (1900) 23 Mad 169 (170).
- ('99) 22 Mad 68 (80, 84, 99) (F B).
- ('97) 20 Mad 407 (410, 417).
- ('97) 20 Mad 152 (155).
- ('96) 19 Mad 422 (424).
- ('93) 17 Mad 100 (102).
- ('76) 1 Mad 148 (151).
- ('68) 3 Mad H O R 384 (387, 388).

Section 2 (10)

1. ('12) 13 Ind Cas 659 (660) (Mad).
2. ('34) AIR 1934 Bom 252 (254) : 53 Bom 485.

(12) “mesne profits” of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession :

“Mesne profits.” — See Order 20 Rule 12.

(13) “moveable property” includes growing crops :

“Moveable property.” — This definition is new and negatives the view taken by the decisions under the old Code that growing crops are immovable property.¹ It is however confined to the purposes of this Code only.² Compare Section 3 (25) of the General Clauses Act (X of 1897). See also the undermentioned cases.³

(14) “order” means the formal expression of any decision of a Civil Court which is not a decree :

“Order.” — The word ‘order’ as defined in the Code is analogous to a decree and does not imply what is popularly understood, namely the views expressed by a Judge on the merits of the case before him and his decision thereon.¹ See definition of ‘judgment’ *ante*.

See also Section 2 sub-section (2).

(15) “pleader” means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court :

“Pleader.” — See Order 3 Rule 4.

(16) “prescribed” means prescribed by rules :

Rules. — For the definition of “rules,” see clause 18 *infra*.

(17) “public officer” means a person falling under any of the following descriptions, namely :—

(a) every Judge ;

(b) every member of the Indian Civil Service ;

(c) every commissioned or gazetted officer in the mili-

Section 2 (13)

1. ('92) 14 All 30 (34).
- ('82) 6 Bom 592 (593).
- ('89) 13 Bom 87 (89).
- ('08) 7 Cal L Jour 152 (166).
- ('98) 25 Cal 692 (699) (F B).
- ('95) 22 Cal 877 (885).
- ('70) 5 Beng L R 194 (194).
- ('03) 26 Mad 438 (440). (Growing crops — Immoveable property implied.)
- ('90) 13 Mad 15 (16). (Do).

('88) 11 Mad 193 (196).

2. ('15) AIR 1915 Nag 69 (69) : 11 Nag L R 18.
- ('16) AIR 1916 Mad 1142 (1142). (The definition in the C. P. C. does not govern Limitation Act.)
3. ('31) AIR 1931 All 392 (393) (F B). (Standing timber intended to be cut down and removed is moveable property.)
- ('32) AIR 1932 Pat 344 (345).

Section 2 (14)

1. ('33) AIR 1933 All 762 (763) : 56 All 27.

tary, naval or air^a forces of His Majesty * * *^b while serving under the Crown;^c

(d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties ;

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

(f) every officer of *the Crown*,^c whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of *the Crown*,^c or to make any survey, assessment or contract on behalf of *the Crown*,^c or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of *the Crown*,^c or to make, authenticate or keep any document relating to the pecuniary interests of *the Crown*,^c or to prevent the infraction of any law for the protection of the pecuniary interests of *the Crown*,^c and

(h) every officer in the service or pay of *the Crown*,^c or remunerated by fees or commission for the performance of any public duty :

a. Substituted by Act XXXV of 1934, for "or naval."

b. Words "including His Majesty's Indian Marine Service" omitted by Act XXXV of 1934.

c. Substituted for the words "the Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

"Public officer." — Compare Section 21 of the Indian Penal Code. A public officer is a "person" falling within the description of clauses (a) to (h) of this sub-section. Under the General Clauses Act (X of 1897), the word "person" includes "any body or association of individuals".¹ A cantonment committee has accordingly been held to be a public officer.² The Nagpur Judicial Commissioner's Court has, however, taken a different view. According to it a committee cannot be

Section 2 (17)

1. See S. 3 (39) of Act X of 1897.

('30) AIR 1930 Mad 844 (852, 853). (But a body corporate must fall under any of the

clauses of S. 2 (17). A Municipality constituted under the District Municipalities Act is not a "public officer".)

2. ('10) 34 Bom 593 (587).

described as an "officer" or as a person who "holds any office." It has accordingly held that a village sanitation panchayat is not a public officer.³ It is submitted that the former view is the sounder of the two.

(a). For definition of "Judge," see clause (8) above.

(c). The words "while serving under the Government" mean "while still in the actual service of the Government." It therefore excludes persons placed in the retired list.⁴

An Assistant Surgeon in the Indian Medical Service,⁵ a British Officer in the Indian Army,⁶ a Major in the Indian Staff Corps⁷ are all public officers, but not an officer of the Regular Corps.⁸

(d). A Receiver appointed under the Provincial Insolvency Act 5 of 1920,⁹ an Official Liquidator,^{9a} the Liquidator of a Co-operative Society,^{9b} the Official Receiver appointed by the Calcutta High Court to act as a Receiver in any particular case,^{9c} a Receiver appointed under Order 401 Rule 1 of the Civil Procedure Code and on whom the powers referred to in the said Rule have been conferred,^{9d} an Official Assignee or Official Trustee,¹⁰ a common manager appointed under Section 95 of the Bengal Tenancy Act,¹¹ the bench clerk of a Civil Court¹² and the Sheriff of Bombay¹³ are all Officers of Courts of Justice and are public officers.

(e). To place or keep a person in confinement connotes something more than mere arrest. Hence, the mere fact that a person holds an office which empowers him to arrest a person will not make him a public officer. Thus, the Agent of a Railway Company, although he has power under Section 131 of the Railways Act to arrest certain persons for offences committed on the railway, is not a public officer, merely by reason of such power.^{13a}

(f). An Inspector of Police is a public officer.^{13b}

(h). A village headman,¹⁴ the Administrator-General,¹⁵ a Collector acting as the manager of a minor's estate¹⁶ are all public officers. An advocate engaged by the Government to conduct a civil suit on behalf of the Government and remunerated by daily fees is a public officer.^{16a} A manager of an estate under the Court of Wards is not a public officer presumably as he does not serve or receive his pay

3. ('29) AIR 1929 Nag 70 (70). (Dissenting from 34 Bom 583.)
4. ('14) AIR 1914 Oudh 199 (199) : 17 Oudh 34 Cas 99 (Obiter.)
5. ('19) AIR 1919 Bom 133 (134) : 43 Bom 368.
6. ('18) AIR 1918 Bom 32 (35) : 43 Bom 716.
7. ('02) 25 Mad 402 (405).
('02) 1902 Pun L R No. 143, page 623 (625).
8. ('02) 1902 Pun L R No. 143, page 623 (625).
('97) 24 Cal 102 (106).
9. ('20) AIR 1920 Bom 50 (50) : 44 Bom 895.
('25) AIR 1925 All 241 (242) : 47 All 291. (Official Receiver.)
('30) AIR 1930 Bom 11 (15). (Per Patkar J.)
- 9a. ('34) AIR 1934 Oudh 158 (161) : 9 Luck 577.
- 9b. ('34) AIR 1934 Nag 201 (202) : 30 Nag L R 240.
- 9c. ('31) AIR 1931 Cal 61 (62) : 57 Cal 1127.
('30) AIR 1930 Lah 708 (709).
- 9d. ('31) AIR 1931 Cal 503 (503) : 58 Cal 850.
('33) AIR 1933 Mad 105 (106).
('31) AIR 1931 Cal 175 (177). (Points left open.)
[See also ('30) AIR 1930 Cal 737 (738).]
10. ('81) 7 Cal 499 (502).
- ('89) 12 Mad 250 (252).
- ('25) AIR 1925 Bom 344 (344) : 49 Bom 638.
- ('02) 26 Bom 809 (811).
11. ('20) AIR 1920 Cal 575 (579).
('19) 16 Ind Cas 193 (195, 196) : 40 Cal 150.
[See also ('32) AIR 1932 Cal 275 (281, 282) : 59 Cal 961.]
12. ('18) AIR 1918 Upp Bur 28 (30) : 3 U B R 1.
13. ('27) AIR 1927 Bom 521 (523, 524) : 51 Bom 749.
- 13a. ('39) AIR 1939 Cal 386 (387).
- 13b. ('37) AIR 1937 All 90 (94) : I L R (1937) All 990.
14. ('23) AIR 1923 Rang 250 (251).
15. ('04) 8 Cal W N 913 (915).
('04) 28 Bom 529 (532).
16. ('88) 11 Mad 317 (318, 319).
('81) 3 All 20 (22, 23).
('14) AIR 1914 Bom 125 (126).
('12) 16 Ind Cas 445 (446) (Bom).
('90) 14 Bom 395 (402). (Talukdari Settlement Officer acting as Manager under Act 21 of 1881)
('89) 13 Bom 343 (346).
('75) 1 Bom 318 (320).
- 16a. ('39) AIR 1939 Pat 77 (79, 80) : 17 Pat 706.

- (17) from the Government.¹⁷ But where a person performs a *public* duty, the fact that he is paid out of commission charged to a private person, does not take him out of the category of a public officer.¹⁸

It has been held that an assistant surgeon of a station hospital in military employ is not a public officer merely by reason of his serving, or receiving his pay from, the Government.¹⁹ The reasoning of the decision is not clear and the decision cannot be accepted as good law in the face of the clear words of the Section.

For cases under Section 21 of the Penal Code (defining "public servants"), see the undermentioned cases.²⁰

- (18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125:

"Rules" — See Notes to Section 2 (1).

- (19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds: and

Stock. — For meaning thereof, see Section 2 of the Indian Trustees Act, XXVII of 1866.

Debenture. — No precise definition of this word is found anywhere.¹ It is a charge in writing on certain property, for the repayment, at a fixed time, of money lent by a person therein named at a given interest. It is frequently resorted to by public companies to raise money for the prosecution of their undertaking.²

Debenture stock. — This differs from debenture bonds in that it is usually irredeemable.³

Bonds. — For meaning thereof, see Section 2 (5) of the Indian Stamp Act, II of 1899 and Section 2 (3) of the Limitation Act, IX of 1908.

- (20) (20) "signed," save in the case of a judgment or decree, includes stamped.

"Signed" — Seal, mark, initials. — Under Section 3 clause (52) of the General Clauses Act, the word "sign" includes in the case of a person who is

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| 17. ('20) AIR 1920 Cal 167 (168). | ('99) 26 Cal 158 (160). (Surveyor of khas mahal department employed by Collector.) |
| 18. ('28) AIR 1928 Sind 76 (78): 22 Sind L R 63. | ('95) 22 Cal 759 (761). (Peon delegated by Nazir to execute warrant of arrest.) |
| ('28) AIR 1928 Nag 33 (33). (Government school-master whose services are lent to Municipality is a public officer.) | ('91) 18 Cal 534 (537). (Patwari is not.) |
| 19. ('10) 5 Ind Cas 802 (803, 804): 1910 Pun Re No. 10. | ('91) 18 Cal 518 (519). (Person appointed by Collector under S. 69 of the Bengal Tenancy Act is not a public servant.) |
| 20. ('70) 2 N W P H C R 298 (299). (Naib Nazir.) | ('77) 3 Cal 497 (497). (Person appointed by Government Solicitor with sanction of Government to act as Government Prosecutor.) |
| ('69) 6 Bom H C R Cr O 64 (69). (Engineer who receives and pays others Municipal moneys.) | ('71) 16 Suth W R Cr 27 (27). |
| ('99) 21 All 127 (129). (Manager of estate under Court of Wards.) | ('67) 7 Suth W R Cr 63 (63). (Convict warders.) |
| ('86) 8 All 201 (202). (Person who with or without pay chooses to take upon himself the position of a public servant.) | ('84) 7 Mad 17 (17). (Peon appointed by the manager of Court of Wards is not a public servant.) |
| ('05) 32 Cal 664 (667). (Clerk of Sub-Registrar paid out of an allowance given to the latter is not a public servant.) | |
| ('01) 28 Cal 344 (346). (Peon attached to Superintendent of Salt Department.) | |

Section 2 (19)

- (1881) 7 Q B D 165 (172), *British India Steam Navigation Co. v. Commissioner of In. Rev.*
- Wharton's Law Lexicon.
- Manual of law terms and phrases by K.J. Aiyar.

1. Legislative changes. — This Section corresponds to the latter part of the definition of the word "district" in Section 2 of the Code of 1882 with slight modifications.

2. Scope of the Section. — The Section declares that—

(1) the District Court is subordinate to the High Court.^{1a}

(2) (a) Every Court of Small Causes¹ and (b) every Civil Court of a grade *inferior* to that of a District Court is subordinate to the High Court and the District Court.² Thus, a Collector's Court is not of a grade inferior to that of the District Court and is therefore not subordinate to the District Court.³ A Court of Subordinate Judge is subordinate to the District Court, no matter what the forum of appeal may be in any particular case.⁴

The enumeration of Subordinate Courts in the Section is not exhaustive and does not exclude all other Courts from being subordinate to the High Court. Thus, a Collector acting under the Mamlatdar's Courts Act is a Court subordinate to the High Court.⁵

3. High Court. — "High Court" used with reference to civil proceedings means the highest Civil Court of appeal in that part of British India in which the Act or Regulation containing the expression operates.¹ It thus includes the Chief Courts and the Courts of Judicial Commissioners.

4. District Court. — See Section 2 (5), *ante*.

5. Binding authority of rulings. — See Preamble, Note 15.

4. [S. 4.] (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code

Section 3—Note 2

1a. ('29) AIR 1929 All 531 (582, 583): 51 All 957. (District Judge acting under Charitable and Religious Trusts Act is subordinate to High Court.)

[But see ('29) AIR 1929 Oudh 389 (390, 397): 4 Luck 539 (FB). (Where it is held that a District Court acting in its appellate authority over rent suits is not subordinate to the Chief Court.)]

1. These words do not include Presidency Small Cause Courts as this section is not extended by S. 8 to such Courts—Such Courts are therefore subordinate to the High Court and not to the District Court: See ('83) 8 Rom 105 (135, 147) (FB).

(1900) 23 All 56 (57).

('03) 27 Bom 604 (606).

('79) 5 Cal L Rep 170 (171). (Small Cause

Courts in Presidency Towns are subject to the order and control of the High Court.)

2. ('94) 17 Mad 377 (378).

('09) 3 Ind Cas 539 (540) (Cal).

3. ('78) 3 Cal L Rep 508 (509), (Collector's Court not a Civil Court.)

('30) AIR 1930 Nag 271 (271): 26 Nag L R 309. (Collector acting under S. 18 of the Land Acquisition Act is not subordinate to High Court for purposes of S. 115, C. P. C.)

[See also ('30) AIR 1930 Pat 13 (14). (Revenue Courts are not subordinate to Civil Courts.)]

4. ('09) 3 Ind Cas 539 (540) (Cal).

5. ('12) 37 Bom 114 (116). (Mamlatdar's Court is subordinate to High Court.)

Note 3

1. See S. 3 Cl. 24 of the General Clauses Act X of 1897.

shall be deemed to limit or otherwise affect any remedy which a land-holder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

Synopsis

1. Legislative changes.
2. Scope of the Section.
3. Procedure prescribed by the Code is not applicable where a special procedure is provided for.
4. Sub-section (2).

Other Topic : Arbitration. See Note 3, F. N. (2).

1. Legislative changes. — This Section is wider than the corresponding Section of the old Code. While the latter saved certain Acts specifically mentioned therein, this Section generally saves any special or local law or any special jurisdiction conferred or any special form of procedure prescribed by or under any other law.

2. Scope of the Section. — It is only when anything in the Civil Procedure Code is in conflict with anything in the special or local law or with any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law, that the Code will not prevail so as to override such inconsistent provisions.¹ Otherwise the Code will apply.²

3. Procedure prescribed by the Code is not applicable where a special procedure is provided for. — For example, Clause 36 of the Letters Patent prescribes a special form of procedure in case of difference of opinion between two Judges of the High Court hearing an appeal under the Letters Patent. In such a case the procedure laid down in Section 98 of the Code will not prevail.¹ For other examples, see the cases referred to in foot-note (4) to Note 2 of the Preamble.

Section 4 — Note 2

- 1 ('86) 13 Cal 221 (223).
- ('86) 9 Mad 332 (333). (Madras Rent Recovery Act expressly providing that no revision shall lie on orders thereunder—S. 115 of the Code cannot be applied.)
- ('37) AIR 1937 All 365 (366). (Special Law overrides general jurisdiction of Civil Court—Suit in Civil Court to challenge election otherwise than on grounds in S. 19, U. P. Municipalities Act, is barred.)
- ('37) AIR 1937 All 165 (166, 167): I L R (1937) All 386. (S. 104 (2), Civil P. C., does not affect Cl. 10 of Letters Patent there being no specific provision affecting it as required by S. 4.)
- ('37) AIR 1937 All 129 (138) : I L R 1937 All 350 (FB). (Provision in Army Act 1881, S. 136 granting exemption from attachment in respect of salary of certain officers not affected by C. P. C.)
- (1900) 27 Cal 508 (511 to 514) (FB). (Overruling 24 Cal 249—Chota Nagpur Landlord and Tenant Procedure Act (I of 1879), barring expressly any second appeal from orders thereunder—S. 100 cannot be applied. See also

the Partition Act IV of 1893.)
 ('94) 17 Mad 298 (299). (Following 16 Mad 451.)
 ('32) AIR 1932 Oudh 163 (164).
 ('31) AIR 1931 Oudh 385 (385). (Oudh Laws Act prevails over the C. P. C.)
 ('30) AIR 1930 Pat 130 (133); 8 Pat 830 (S. 114 of the Code does not apply to Bengal Estates Partition Act.)

[See also ('38) AIR 1938 Lah 658 (663). (Provision in Companies Act inconsistent with the Code—Former prevails.)]

[See however ('30) AIR 1930 Cal 53 (54): 56 Cal 704. (Local Acts have no effect beyond the local jurisdiction.)]

2. See Note 2 to the Preamble.
- ('32) AIR 1932 Oudh 210 (213): 7 Luck 601 (FB).

Note 3

1. ('21) AIR 1921 P C 6 (7): 45 Bom 718: 48 Ind App 181 (PC).
 - ('17) AIR 1917 Bom 62 (79) (SB).
 - ('03) 26 All 10 (13).
 - ('83) 9 Cal 482 (493, 494): 10 Ind App 4 (PC).
 - ('29) AIR 1929 Mad 641 (659): 52 Mad 563 (FB).
- See also Notes to S. 98 *post*.

under-values the claim for the purpose of choosing his forum.² In the latter case, it is the *true* value at which the plaintiff *ought* to have been valued that will represent the "value of the suit."³ As it is only the valuation in the plaintiff that determines jurisdiction, it is not affected by the *defendant's plea* in the suit.⁴

As to what is the "value of a suit" for the purpose of determining the *forum of appeal*, see Note 18 to Section 96.

See also Section 15.

5. Court's power to pass decree in excess of its pecuniary jurisdiction. — (1) *A* sues *B* in the Munsif's Court for recovery of Rupees 2,000 for *past* mesne profits, (*i. e.*, mesne profits up to date of suit) and for *future* mesne profits at the rate of Rupees 1,000 per annum. It is found at the time of the decree that the plaintiff is entitled to Rupees 4,500 for past and future mesne profits. Can the Munsif's Court pass a decree for that amount?

(2) *A* sues *B* in the Munsif's Court for accounts valuing the suit *tentatively* at Rupees 500. On the taking of accounts after the preliminary decree, the amount found due to plaintiff is Rupees 4,500. Can the Munsif's Court pass a decree for that amount?

The High Courts of Allahabad,¹ Bombay,² Calcutta,³ Madras,⁴ Patna⁵ and

('90) 15 Bom 82 (83). (Larger of two reliefs determines stamp.)

('85) 10 Bom 370 (372).

('85) 7 Bom 448 (451).

('24) AIR 1924 Cal 783 (785) : 51 Cal 737.

(Held that jurisdiction continues unless different principle comes into operation to make the proceedings abortive.)

('96) 23 Cal 536 (542, 543).

('77) 25 Suth W R 76 (76). (Suit should not be dismissed for improper valuation.)

('71) 16 Suth W R 248 (248).

('34) AIR 1934 Lah 803 (803).

('17) AIR 1917 Mad 663 (663). (Court should confine to allegations contained in the plaint.)

('15) AIR 1915 Mad 683 (684).

('01) 24 Mad 34 (36).

('88) 6 Mad 140 (141). (Properly treated as suits for land for purpose of valuation although it results in decree for redemption.)

('28) AIR 1928 Nag 288 (288) : 24 Nag L R 23.

('99) 2 Oudh Cas 103 (106, 107).

('35) AIR 1935 Pat 160 (161) : 14 Pat 414.

('15) AIR 1915 Sind 3 (3) : 9 Sind L R 164.

[See also ('96) 20 Bom 675 (676).]

[See however ('78) 2 Cal L R 134 (136, 137).]

2. ('91) 13 All 320 (322, 323). (Value of plaint must be value for appeal.)

('93) 15 All 363 (365) (Do.).

('11) 10 Ind Cas 746 (747) (Bom). (Consent of parties cannot affect jurisdiction.)

('12) 16 Ind Cas 940 (941) (Cal). (For appeal in a suit for mesne profits the amount found in trial Court determines valuation.)

('11) 12 Ind Cas 464 (476) : 38 Cal 639.

('35) AIR 1935 Oudh 296 (297) : 10 Luck 587.

[See ('37) AIR 1937 Cal 643 (644, 645).]

3. ('90) 17 Cal 680 (683).

('83) 8 Bom 31 (33, 34).

4. ('64) 1864 Suth W R Act X, 52.

('64) 1864 Suth W R Act X, 25.

('88) 10 All 524 (528).

('81) 3 All 822 (823, 824).

('80) 2 All 778 (780).

('89) 13 Bom 489 (491).

('68) 9 Suth W R 598 (598).

('89) 1889 Pun Re No. 69, page 220. (Value of set-off by defendant does not control the value of the plaint.)

('88) 1888 Pun Re No. 169, page 447.

('88) 1888 Pun Re No. 44, page 112 (F B).

(Suit by mortgagor for redemption — Value of suit is value of charge.)

('26) AIR 1926 Mad 37 (38).

('98) 21 Mad 271 (273).

[See also ('10) 6 Ind Cas 131 (132, 133, 134) (Cal). (Suit for rent — Defendant claiming deductions in excess of Courts pecuniary jurisdiction — No bar to suit.)

('91) 15 Bom 400 (405).]

Note 5

1. ('94) 16 All 286 (290). (Accounts.)

('11) 33 All 97 (99). (Redemption.)

[See also ('25) AIR 1925 All 376 (377) : 47

All 534. (Accounts.)

('91) 13 All 320 (322).]

2. ('27) AIR 1927 Bom 83 (83) : 50 Bom 839. (Not following 15 Bom L R 1021.)

('32) AIR 1932 Bom 111 (113) : 56 Bom 23.

('29) AIR 1929 Bom 337 (339). (Suit for accounts.)

3. ('25) AIR 1925 Cal 1076 (1081, 1082, 1083) : 53 Cal 14 (F B). (Approving 21 Cal 550 and 40 Cal 56, overruling 43 Cal 650 and 24 Cal W N 342.)

4. ('18) AIR 1918 Mad 998 (1002) : 40 Mad 1 (7) (F B). (Accounts.)

('15) AIR 1915 Mad 683 (684).

('02) 25 Mad 543 (544). (Accounts.)

[See also ('86) 9 Mad 208 (212, 213).]

('21) AIR 1921 Mad 508 (509).]

5. ('21) AIR 1921 Pat 118 (119, 120) : 6 Pat L Jour 54.

sections 91 and 92,

sections 94 and 95 [so far as they authorize or relate to—

(i) orders for the attachment of immovable property,

(ii) injunctions,

(iii) the appointment of a receiver of immoveable property, or

(iv) the interlocutory orders referred to in clause (e) of section 94]^a and

sections 96 to 112, and 115.

[1877, S. 7; 1859, S. 384.]

a. Substituted by the Small Cause Courts (Attachment of Immovable Property) Act, 1926, for "so far as they relate to injunctions and interlocutory orders."

Synopsis

1. Changes introduced by the Code of 1908.

2. Amendments after 1908.

3. Scope and object of the Section.

4. Suits excepted from the cognizance of a Court of Small Causes. See Sch. 2 of the Provincial Small Cause Courts Act, 1887.

5. Execution of decrees against immovable property.

6. Attachment before judgment.

1. Changes introduced by the Code of 1908. — This Section reproduces in a concise and convenient form the purport of Section 5 and Schedule II of the old Code.¹

2. Amendments after 1908. — Clause (b) of the original Section contained, after the words "sections 94 and 95" only the words "so far as they relate to injunctions and interlocutory orders." These latter words gave rise to the following constructions :

(1) that attachments *before* judgment of immovable property were not prohibited, as the said words referred only to clauses (c) and (e) of Section 94 and not to clause (b) also;¹

(2) that the words "interlocutory orders" when read with "injunctions" meant only interlocutory orders on applications for *injunction* and that, therefore, an order for compensation under Section 95 for wrongful *attachment before judgment* was not prohibited.²

The Section has, by Act I of 1926, been amended by omitting the words "so far as they relate to injunctions and interlocutory orders" and substituting the words within square brackets in the Section, thus negating both the constructions abovementioned.

Section 7 — Note 1

1. Section 5 and Sch. II of the Code of 1882 were themselves reproductions of S. 5 and Sch. II of the Code of 1877, with this difference that S. 360 which empowered the Local Government to extend insolvency provisions of the Code to Small Cause Courts was not mentioned in Sch. II of the Code of 1877. Under that Code the Government could not, there-

fore, invest Courts of Small Causes with powers under Chap. XX of that Code.

('86) 9 Mad 112 (113).

('78) 2 Bom 641 (642).

Note 2

1. See Note 6 below.

2. ('15) AIR 1915 Mad 1072 (1072).

('07) 1907 Pun Re No. 77, page 397.

A new Rule, being Rule 13, has also been added to Order 38 to make the matter clearer still.

3. Scope and object of the Section. — Section 17 of the Provincial Small Cause Courts Act (IX of 1887), provides that the procedure prescribed in the Code shall be the procedure followed in a Court of Small Causes, except —

(1) where it is otherwise provided in the Provincial Small Cause Courts Act itself, or

(2) where it is otherwise provided by this Code.

This Section specifies the provisions of the *body of the Code*, which are not applicable to the Provincial Small Cause Courts and Order 50 specifies the provisions of the *Rules*, which are not applicable to such Courts.

4. Suits excepted from the cognizance of a Court of Small Causes. — See Schedule II of the Provincial Small Cause Courts Act (IX of 1887).

5. Execution of decrees against immovable property. — A Small Cause Court cannot, as such, execute its decrees against any immovable property, even though such Court is also an ordinary Court.¹ But a Small Cause Court can transfer its decree under Section 39, *post*, for execution to an ordinary Court or to the same Court on its ordinary side and then, the latter can execute the decree against immovable property.²

A Small Cause Court cannot also execute its decree against a share in joint property where part thereof is immovable property.³

A Small Cause Court can, however, create a charge on immovable property.⁴

For the meaning of "immovable property", see Section 16, Note 4.

6. Attachment before judgment. — An attachment before judgment of *moveable* property by a Small Cause Court is not prohibited by the Section.¹ Such an order falls within Section 94 clause (b), and is not an "interlocutory order" referred to in Section 94 clause (c).²

As for attachment before judgment of *immovable* property, it had been held before Act I of 1926 that that also was not prohibited by the Section.³ It is now clearly enacted that such an order cannot be passed by a Small Cause Court.⁴

8. [S. 8.] Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act,

Presidency Small Cause
Courts.

Note 5

1. ('29) AIR 1929 Lah 398 (398). (The decree should be formally transferred to regular side.) ('19) AIR 1919 Mad 264 (265). ('09) 31 All 1 (2). ('81) 132 Ind Cas 208 (208) (Lah).
2. ('25) AIR 1925 Mad 1179 (1181). ('29) AIR 1929 Lah 398 (398). ('09) 31 All 1 (2). (To a different Court.)
3. ('14) AIR 1914 Nag 13 (13) : 10 Nag L R 17.
4. ('37) AIR 1937 All 194 (195).

[But see ('39) AIR 1939 Nag 118 (120).]

Note 6

1. ('19) AIR 1919 Cal 6(7): 46 Cal 717 (720, 721.) ('25) AIR 1925 Cal 1 (4): 52 Cal 275 (F B). (*Held* that a Small Cause Court can pass an order for attachment of immovable property also but cannot actually attach.)
2. ('25) AIR 1925 Cal 1 (6) : 52 Cal 275 (F B).
3. ('25) AIR 1925 Mad 589 (591): 48 Mad 488. (Distinguishing 6 Mad H C R 91 which was a decision under the Code of 1859.) ('25) AIR 1925 Cal 1 (5) : 52 Cal 275 (F B). (Approving AIR 1924 Cal 198 and overruling AIR 1923 Cal 176.)
4. See Note 2 above.

12. Valuation of plaint determines jurisdiction — See Section 15.
13. Appellate Jurisdiction — See Section 96.
14. Jurisdiction of foreign Courts — See Section 13.
15. "Subject to the provisions herein contained."
16. Suits of a civil nature.
 17. Suits relating to rights in property — General.
 18. "Property," meaning of — See Note 17.
 19. Suits respecting temple and other religious property.
 20. Suits for damages for civil wrongs and for breaches of contract.
 21. Right to specific relief.
 22. Other common law rights.
 23. Right of worship.
 24. Right relating to religious and other processions.
 25. Right of burial.
 26. Right of person elected as director of company to act as such.
 27. Right of franchise.
 28. Restitution of conjugal rights.
 - 28a. Right of person as member of club.
 29. Rights under contract.
 30. Suit for, or on, accounts.
 31. Suits for contribution.
 32. Suits relating to partnership.
 - 33 & 34. Co-sharers — See Note 31.
 35. Suit for office.
 36. Suit for secular office — See Note 35.
 37. Suit for religious office to which fees are appurtenant as of right — See Note 35.
 38. Suit for fees attached to religious office.
 39. Suit for religious office to which no fees are attached — See Note 35.
40. Suits not of a civil nature — See Notes 41 to 49 *infra*.
41. No suit lies where there is no such right as that claimed.
42. Right of privacy.
43. Suits involving principally caste questions.
 44. Suits relating to caste property.
 45. Suits for inspection of accounts of caste property.
 46. Suits relating to expulsion from caste.
47. Suits for upholding mere dignity or honour.
48. Suits relating purely to religious rites or ceremonies.
49. Suits for voluntary payments not based on agreement or prescription.
50. Suits expressly barred.
 51. Exclusive jurisdiction of Revenue Courts.
 52. Bar by the Criminal Procedure Code.
 53. Matters dealt with by a special tribunal.
 54. (*Omitted*).
55. Suits impliedly barred — General.
 56. Political questions.
 57. Acts of State.
 58. Suits barred on the ground of public policy.
 59. Barrister, if can sue for his fees.
 60. Suits based on illegal and immoral customs — See Note 58.
 61. Fraud.
 62. Where a special remedy is provided, the general remedy of suits barred.
 63. The rule does not apply in the case of summary and concurrent remedies.
 64. Alternative Courts.
65. Acts of Legislature — Powers of Civil Court to question.

Other Topics

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| <p>Abuse of civil process: See Notes 20 and 41, point (2).</p> <p>Abwab and other customary payments. See Note 58, F-N (3).</p> <p>Canal dues. See Note 20, F-N (4) and Note 51, F-N (2).</p> <p>Champertous agreements. See Note 58, F-N (3).</p> <p>Club. See Note 46, F-N (4).</p> <p>Common Carriers. See Note 20, F-N (4).</p> <p>Contract in relation to marriage. See Note 58, F-N (3).</p> <p>Contract to condone criminal offence. See Note 58, F-N (3).</p> <p>Contract induced by undue influence and coercion. See Note 58, F-N (3).</p> | <p>Contributory negligence. See Note 20, F-N (4).</p> <p>Co-sharers—Injunction suits. See Note 21, F-N (1).</p> <p>Costs — Separate suit for. See Note 62, F-N (3) and Section 35.</p> <p>Cow killing. See Note 22. Pt. (3).</p> <p>Damages for libel, slander, and malicious prosecution. See Note 20, F-N (1) to (4).</p> <p>Debtor and creditor. See Note 41, F-N (3).</p> <p>Destruction of life or causing other injuries. See Note 20, F-N (4).</p> <p>Elections. See Note 53.</p> <p>Examinations (University). See Note 53, F-N (1).</p> |
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CHAPTER VII

UPLIFT OF SCHEDULED CASTES AND TRIBES

Every country in the world has its Backward Classes, because in no country do the living conditions justify that "all men are created equal". The proportion of such backward class population is, perhaps, not so much in any other country as it is in India. Congress Governments at the Centre and in the States have taken the existence of backward classes in the country as a slur on our society and are out to ameliorate the living conditions of these unfortunate countrymen of ours and bring them on par with their fellow-citizens. That the Governments have found time and money for this work is significant especially when considered against the background of the many crises that visited this country on the wake of her Independence. All this goes only to prove that the Congress Governments are bent upon doing good to all citizens, irrespective of their importance or otherwise in the political set-up of the country.

During the year under review, the Commissioner for Scheduled Castes and Scheduled Tribes toured most of the States to gain a closer knowledge of the problems of the scheduled castes and scheduled tribes and to investigate the working of the constitutional safeguards for the backward classes. Grants-in-aid to the extent of Rs. 17.5 millions were sanctioned for 1951-52 for the welfare of the scheduled tribes in Part A States and Part B States and a further provision of Rs. 18 millions has been made for this purpose in the budget for 1952-53. It is also proposed to provide Rs. 1.5 millions to improve the conditions of the scheduled tribes in Part C States.

Ajmer has provided Rs. 2.27 lakhs in its 1952-53 budget for the grant of scholarships and for the betterment of backward classes and scheduled castes. A Harijan Welfare Board has been constituted to advise in matters relating to these backward classes.

In *Assam* substantial progress was made during the fifth year of freedom in regard to the development of the tribal districts. Politically the inhabitants of these districts entered into a new phase of existence with the inception of the District Councils (constituted under the Sixth Schedule of the Constitution) which would run the day-to-day administration of these districts, in accordance with the traditions and customs of these people. The year also saw the furtherance of the various development schemes undertaken by the State Government for the welfare of the tribal people. The primary need of these people being means of communication, a number of roads were constructed at a cost of Rs. 2 lakhs. Various schemes for improvement of agriculture were also initiated and every effort was made to wean the tribal

people from the present outmoded methods of agriculture. Besides spending over Rs. 80,000 on cooperative movement in these districts, substantial grants-in-aid were also awarded for rural development schemes run by the local inhabitants.

Special stress was laid on promotion of education in these backward areas. Medical and public health facilities were also further extended. With the fuller implementation of the Five-Year Plan for development of tribal areas a new era, it is hoped, will be ushered into the lives of these people.

Advancement of the welfare of the Aborigines, Harijans and other scheduled castes in *Bihar* continued to engage the attention of the State Government. One of the main items on the programme on welfare of backward classes was the award of stipends to poor and deserving students. Under this item a sum of Rs. 3 lakhs was spent during the year 1951-52. Special stipends were given to deserving Harijan and backward Muslim community students. In addition, steps were taken to provide suitable hostel accommodation also to these backward community students.

The Bihar Harijan (Removal of Civil Disabilities) Act, 1949, which was further amended in 1951 to make it more effective continued to be enforced during the year under review. This State is decided upon removing the civil disabilities from which the Harijans have been suffering for ages. Various ameliorative schemes were taken up in the State for the uplift of the Harijans, Aborigines and other backward classes.

In view of the special provisions in the Constitution in respect of scheduled castes and scheduled tribes and other backward classes, the *Bombay* Government formulated special schemes for scheduled tribes and areas and a provision of Rs. 17.5 lakhs has been made during the financial year 1952-53. The total provision for the backward classes welfare and the special department, amounts to Rs. 43 lakhs and covers all spheres of ameliorative action. The legislative enactments removing prohibition of temple entry and other disabilities imposed on Harijans were enforced vigorously during the year.

Freeships and lump-sum scholarships for the purchase of books and equipment were awarded to backward class children attending primary and secondary schools. Backward class agriculturists continued to receive preference for allotment of waste lands and lease of land for cultivation. A five-year programme of construction of 4,000 tenements for the Adivasis in Danges district has been introduced. The Rajendrapura colony of 50 houses which is a pilot scheme under this programme has been completed.

Coorg has got its revenue rules amended providing for grant of lands for cultivation, free of land and timber value, to Harijans and landless backward class people up to the extent of 3 acres to each person. More than 200 acres were given during the year under review. In order to spread literacy among the scheduled castes and scheduled tribes, their children are admitted free to schools and free supply of books and midday meals is made for them.

All temples in *Himachal Pradesh* receiving subvention from the Government have been opened to scheduled castes and occupancy rights have been conceded to *Bethus* (generally belonging to the scheduled castes) who have been in cultivating possession of Government lands for three or more generations on payment of one and a quarter times the land revenue and cesses, for the time being, chargeable on the land. Due representation has been given to scheduled castes in Government services so as to safeguard their rights. To promote education among the Harijans all the Harijan students have been exempted from tuition fees in all stages of school education. In addition, stipends have also been awarded to them. The State has a provision of Rs. 10,000 in its 1952-53 budget for the amelioration of the conditions of scheduled tribes and areas.

Hyderabad has begun to give pointed attention to this important problem. About 7 lakhs of Koyas, Gonds, Lambadas and Chenchus are being rescued from the abject existence that was theirs to share the benefits of a civilised and orderly life. Everything possible within the finances available is being done to put the scheduled caste population on a footing of equality with their more fortunate brethren.

Harijans and Adivasis in *Madhya Bharat* number about 14 and 11 lakhs respectively. With a view to improving their lot and to giving them equal opportunities for progress, the Removal of Harijans' Disabilities Bill was passed a few years ago giving them equal social rights. During the last five years thousands of Harijan and Adivasi children have received education with special facilities provided for them in the State. The 35 night schools in the State meant for backward class children received financial aid from the State Government. Fifteen boarding houses have also been opened specially for them.

In *Madhya Pradesh* the backward areas welfare scheme continued to tackle the problem of tribal welfare during the year under review. The scheme aims at bringing about a co-ordinated development of tribal people, by opening primary schools, middle schools, free hostels for middle school students, award of scholarships to tribal students undergoing training in middle schools, high schools and colleges, awarding stipends to hostellers and normal school trainees, establishing multi-purpose cooperative societies, and providing medical relief, water-supply, approach roads and other social amenities.

The chief measures adopted in *Madras* for the amelioration of Harijans during the year are: assignment of house sites, maintenance of schools, grant of scholarships and stipends and grants for the purchase of books, stationery, clothing, etc. Provision has also been made for wells and tanks and for the supply of drinking water and sanitary amenities, street lights, burning and burial ghats and grants to private bodies engaged in the social and economic uplift of the backward classes.

The Tribal and Rural Welfare Department in *Orissa* continued to pursue welfare measures formulated by the State Government in accordance with the Five-Year Plan. The problem is a vast one considering the large percentage of scheduled castes, scheduled tribes and other backward classes to the total population of the State. The State Government maintains schools and training centres for the benefit of tribal students. Two more ashram schools were started during the year in addition to the 28 already in existence. During the six-year course in these ashram schools literary education, spinning, weaving, carpentry and other crafts are taught to the Aborigines. The course aims at making the students fit for earning their livelihood by taking to crafts based on raw materials available near at hand while making them sufficiently educated to take a lively interest in public affairs. There is another type of schools—the sevashrams. These are day schools of the standard of primary schools, where general education is imparted along with spinning, carpentry and gardening. The intention is to develop these sevashrams into welfare centres and create among the students a bias for social work and self-help. While ashram schools are confined to Aborigines, the sevashrams are open to Aboriginal, Harijan and other backward class students. The object of the training centres is to train students in crafts, village sanitation, elementary politics, animal husbandry, etc., besides general education. Students trained from these institutions work as teachers in sevashrams and as village guides and social workers. There are three training centres. A sum of about Rs. 33,000 was spent on these centres during the year 1951–52.

All-round measures for the uplift of the 20-lakh scheduled caste and tribal population were adopted in *Rajasthan* during the year. In the scheduled areas a programme of digging 1,600 wells was put well under way. Rs. 4 lakhs were earmarked for this purpose. Agricultural implements were purchased for Rs. 40,000 for free use by backward classes. For extension of roads in scheduled areas Rs. 272,000 were spent during the year. The reservation of seats in State services for backward class candidates was also announced. Five centres to impart training in palm *gur* manufacture to the members of the backward classes were run at a cost of Rs. 40,000. A sum of Rs. 33,300 was also spent to provide facilities for such training as could be of immediate economic benefit. All restrictions on the admission of students belonging to backward classes to educational institutions have been abolished. Scholarships of the order of Rs. 75,000 were distributed among these students. About 10 hostels for them were also run whereon a sum of Rs. 130,000 was spent. Seventeen educational institutions were specially run for the educational progress of the scheduled areas. For continuance and extension of work of the *bhil* ashrams initiated by the late Thakkar Bapa Rs. 150,000 were given as grants-in-aid.

Social disabilities of scheduled castes were removed to a considerable extent. The Government also issued instructions enjoining upon all Government officers, and especially the Police officers, to pay special attention to

cases regarding harassment of scheduled castes, scheduled tribes and other backward classes arising out of their social disabilities.

Out of its total population of 4,136,000, *Saurashtra* has about 1,735,375 backward class people. The State's ameliorative schemes in regard to backward class people fall under: education, social uplift, drinking water facilities, housing, and vocational education and occupation

Backward class students were granted scholarships. Text-books and other stationery and clothings were distributed free in the primary classes. Thirty-nine cultural schools have been started to work for the social uplift of this section of the State's population. During the scarcity period of 1951 about 274 villages were provided with wells at a cost of about Rs. 10,000. Plots of land were made available during the year at nominal rates to Harijans for the purpose of construction of houses. Fifteen Harijan girls were trained as full-fledged nurses. Two tailoring classes have also been started. Ten Harijan boys were given scholarships at Morvi Engineering Institute and Gramodyog Institute at Junagadh.

The major items of ameliorative work pursued by the Government of *Travancore-Cochin* for the advancement of backward class communities in the State were the establishment of colonies, settlements and house sites, construction of common buildings like *bhajan* mutts, prayer halls, reading rooms, etc., sinking of wells, provision of burial ground, latrines, etc., conduct of pial schools, provision of grants for institutions conducted by the members of the backward communities, collective farming and rural reconstruction, organisation of cooperative societies, provision of facilities for vocational and technical training and extension of educational assistance. For the efficient administration of this work, the State has been divided into 12 regions, each under the charge of a field officer. One hundred and fifty-nine Harijan colonies were maintained and 45 pial schools conducted during the year under review.

It was, however, towards educational advancement that the main attention of the Government was directed during the year. Post-graduate students belonging to scheduled castes and scheduled tribes were given free education and were given a monthly stipend of Rs. 50 to meet their lodging and boarding expenses, besides a lump-sum grant of Rs. 60 to 70 for the purchase of books, etc. The students of the Law College and Medical College were given Rs. 150 for the last-mentioned purpose. Concession stipends were also granted to industrial, technical and fine arts students. The total expenditure towards the grant of concession to college students alone during 1951-52 was about Rs. 27,000. In addition, students belonging to other backward communities were also given fee concession on production of poverty certificates. In the case of students of secondary schools, besides fee concession they were given lump-sum grants of Rs. 25 each for middle school classes and Rs. 40 each for high school classes for the purchase of books and dress. Nearly 8,000

students were benefited under the scheme in 1951-52, the total expenditure being Rs. 2.5 lakhs. For the purchase of books for the primary school students Government spent about Rs. 70,000 during the year.

In *Uttar Pradesh* special facilities for education and technical and vocational training and opportunities of employment were provided to people belonging to backward class. In pursuance of the State's plans to improve the general economic conditions of Harijans, the District Magistrates were instructed to give preference to the schemes of Harijans who wished to settle on land for agricultural purposes, when making allotment under the provisions of the U. P. Land Utilisation Act. During 1951-52 the cost of exemption from fees of Harijan students from primary to university stage, incurred through the re-imbusement of the institutions, by means of grants, totalled about Rs. 9 lakhs. The provision for scholarships and free supply of books to Harijans rose from Rs. 3.7 lakhs in 1945-46 to Rs. 8.28 lakhs in 1951-52. Scholarships for higher stages of education were given during the year to 403 students as against 80 in 1945-46. The number of scholarships and stipends that were given during the year to students in various stages of education was phenomenal when compared with that in 1945-46.

In *Vindhya Pradesh* about 45 per cent. of the population belong to scheduled castes, scheduled tribes and other backward classes. During the year efforts were made by the Government to ameliorate the living conditions of these castes and tribes. There were six night schools and 37 other schools especially for scheduled castes and backward classes. In addition, there were also 270 schools of various types in areas where the hilly tribes and Adibasis mostly reside. Special ashrams were being run by non-official bodies for the benefit of members of backward classes.

The Centre has sanctioned about Rs. 5 lakhs for the welfare of the tribal people in the State. The State Government has submitted to the Centre a five-year plan involving an estimated expenditure of Rs. 20 lakhs, to bring about better living conditions to the backward class people in the State.

In *West Bengal* a new Department of Tribal Welfare has been created and placed in exclusive charge of a Minister, aided by a Deputy Minister, so that the amelioration of the economic and social conditions of the tribal people of the State may receive the undivided attention of a single department. About Rs. 12 lakhs are being spent every year for the promotion of education among the backward classes by grant of scholarships, stipends and other assistance to deserving students. The scheduled castes and scheduled tribes are represented in the State Assembly by 40 and 12 respectively and in the Union Parliament by 6 and 2 respectively.

CHAPTER VIII

TRANSPORT AND COMMUNICATION

Railways

The Fifth Year of Independence was an important year in the working of the Railways in India. Not only have the Indian Railways emerged successfully from the difficulties of the post-partition period but they have acquired a clear perspective of their immediate future and better capacity to deal with the growing demands made on them.

Prior to the integration of the States the Railways suffered from the consequences of multiplicity of systems, and lack of uniformity in procedure and policy. These difficulties were increased with the taking over of the ex-States Railways after Federal Financial Integration. The regrouping of the Railways into six units, each serving a fairly compact geographical area, self-sufficient as to both traffic and resources, was finalised by the Railway Board in 1950.

The first phase of the plan was implemented on April 14, 1951 with the formation of the Southern Railway by the amalgamation of the M.S.M., Mysore and S.I. Railways. Within seven months from then, on November 5, 1951, the Central and Western Railways were set up, the former being an amalgamation of the G.I.P., N.S., Scindia and Dholpur Railways, and the latter the outcome of the fusion of the B.B. & C.I., Saurashtra, Rajasthan and Jaipur Railways. Regrouping was completed with the inauguration simultaneously of the Northern, North-Eastern and Eastern Railways on April 14, 1952. The Northern Railway has been formed by combining the E.P. with the Jodhpur and Bikaner Railways, and the Allahabad, Lucknow and Moradabad Divisions of the E.I.R. The North-Eastern Railway represents a simple fusion of the O.T. and Assam Railways. In the Eastern Railway has been merged the remaining four Divisions of the E.I.R. and the B.-N.R.

The regrouped systems have been functioning smoothly and satisfactorily. The systems formed earlier have progressed satisfactorily towards integration and the advantages expected have begun to materialise, through the reduction in the number of headquarters, gradual elimination of duplication of facilities and services, etc. The Government has given special attention to the human aspects of the problem, such as those arising from dislocation of staff, and the policy of Government generally has been to limit the transfers to only those where they are voluntary or where alternative housing accommodation is available.

The high levels of freight traffic moved in recent years have generally continued during the year under review. The tonnage moved during March 1951–March 1952 was 90.7 millions, and the ton mileage 27,934 millions, an increase respectively of 3.7 per cent. and 5.4 per cent. over the figures of the previous year. During the year there was a decrease of less than 5 per cent. in the number of passengers and the passenger mileage from the peak level touched in the previous year, and this is because the upsurge of post-war passenger travel is gradually subsiding.

The finances of the Railways have maintained the upward trends which started in 1948–49. The gross traffic receipt for the financial year 1951–52 was Rs. 288 crores, about Rs. 25 crores more than in the previous year. This increase was due mainly to the enhancements in passenger fares introduced with effect from April 1, 1951.

The total ordinary working expenses during the financial year 1951–52 amounted to Rs. 196 crores—Rs. 16 crores more than in 1950–51. Including the appropriation to the Depreciation Fund and allowing for the payment to worked lines, the total working expenses amounted to Rs. 226 crores. Making allowance for the miscellaneous receipts and expenditure, the total net revenue for the year was Rs. 55.41 crores. Deducting Rs. 33.35 crores as dividend to General Revenues, the profit for the year was Rs. 22 crores. The financial results of working thus represent an improvement on the record of the previous years.

The balances in the Reserve Funds denote the soundness of the financial administration of railways. According to the revised estimates for 1951–52, the Depreciation Reserve Fund is expected to close with a balance of Rs. 114.74 crores, while the Reserve and Development Reserve Funds will have balances respectively of Rs. 26.30 crores, and Rs. 21.79 crores. Thus a total amount of Rs. 162.83 crores in these Reserve Funds has been maintained despite the withdrawal of Rs. 51 crores. About the same position regarding the total balances in the reserve is being visualised for the current year.

Although rehabilitation has had to take precedence, three new major projects were taken up, work on two of which has been completed during the year. One of these is the opening on April 7, 1952 of the Mukerian-Pathankot line, about 27 miles in length and of special strategic importance. This line short-circuits the route between Delhi and Pathankot *via* Amritsar by 44 miles. The construction of this short line includes two major bridges at Beas and Chakki and the total estimated cost is Rs. 3.77 crores. Another important line which was opened on March 29, 1952 is the Arantangi-Karaikudi link, which provides a short link between these points. Besides eliminating the need for a wide detour for passengers travelling between these two places, it affords a through connection from Madras *via* Mayavaram to the South, providing, in the event of an emergency, an alternative through

Indo-Ceylon route. The link is expected to expedite the movement of rice and paddy from the Mettur Project area to deficit areas and to assist the development of the Kauveri-Mettur Project area. This is one of the schemes approved by the Central Board of Transport and financed from the Development Fund instituted under the provisions of the revised Railway Convention of 1949. The third project, which is expected to be completed and opened in October, 1952, is the Kandla-Deesa link to serve the new port of Kandla now being developed as a major port to offset the loss of Karachi which formerly provided the outlet for the hinterland of Rajasthan and part of the Punjab.

In accordance with the policy of attaining self-sufficiency as regards railway equipment, an effort is being made to develop indigenous resources to make good the present deficiency. Thus in regard to locomotives, the Chittaranjan Locomotive Workshops and the Telco are expected between them to meet the full requirements of locomotives for Indian Railways. As regards wagons, the private builders have at present an installed capacity exceeding the normal requirements of our railways. It is only in regard to coaches that there is a substantial deficiency. A new project to set up a coach-building factory at Perambur, near Madras, has been taken up during the year. The factory has been designed to produce 350 broad-gauge coaches a year. Production is expected to be started within the next three or four years. For such additional requirements the need for which might be felt later, capacity is being developed with Indian manufacturers for the production of metre-gauge steel coaches, while railway workshops will continue to build any special types not suitable for mass production.

Restoration of the lines dismantled during the War has been urged from time to time by the public affected in the areas concerned. The number of such lines within the territory of India is 26, of which two have already been restored. All cases of dismantled lines were considered by the Central Board of Transport and it has been decided that work on the restoration of 11 of these lines should commence during the three years from 1951-52. For five lines, the Central Board of Transport could find no justification; the remaining eight dismantled lines are expected to be considered later. The lines on which work has been in progress and which would be taken up during 1952-53 are: Bijnor-Chandpursiau; Unnao-Madhoganj-Balamau; Jogindranagar-Nagrota; Madura-Bodinayakanur; Shoranur-Nilambur; Vasad-Kathana; Bobbili-Salur; Bagalpur-Mandar Hill; Utraitra-Sultanpur-Zafferabad.

Three new lines are also to be taken up for construction during 1952-53, namely, Kastagram-Paniharpur (Eastern), Madhopur-Murliganj (North Eastern), and Quilon-Ernakulam (Southern).

The arrears of rehabilitation are being steadily overtaken. In view of the limited domestic resources as against the leeway to be made, it has been necessary to order a large number of locomotives, coaches and wagons. Of

these, 876 locomotives, 1,800 coaches, and 13,000 wagons have already been received.

In the course of another year or so, an additional supply of 500 locomotives, 1,300 coaches, and 16,000 wagons are expected to be delivered. These are not all. The programme of rehabilitation includes also track, station buildings, additional facilities to the traders and the travelling public. A five-year plan of reconstruction was drawn up last year, and the annual allotment has been progressively increased to Rs. 81 crores from Rs. 60 crores in 1948-49.

With capacity limited as to power, coaches and wagons, Railways have had to rely on improved efficiency of working for their ability to move an increasing quantum of traffic. This is specially seen in the movement of freight. There has been a remarkable improvement in the index of gross ton-miles per goods-train hour in 1951-52, as compared with 1949-50 and 1950-51. Similarly, the wagon-miles per wagon-day registered a substantial improvement during 1951-52 on both broad and metre-gauges. The average wagon load during the run also reflects a distinctly better performance during the year. The average daily loadings have also been better than during the two previous years. As regards the utilisation of power, the engine-miles per day per engine on line during 1951-52 have shown an increase on both broad and metre-gauges as compared with the previous two years.

All these are significant indices of the efficiency of working and it is because of the greater efficiency of working that Railways have been able to move a larger volume of traffic.

The finances of Railways have caused less concern in recent years than the facilities and the conveniences Railways have been able to afford to the public. This has been the case particularly with passenger traffic. With their attenuated stock and power, Railways found it impossible to cope with the phenomenal post-war increases in passenger traffic; and there has been serious overcrowding of passenger trains. Special steps, such as increasing the number of train services were taken and as a result it is now possible to give some relief to the congestion in passenger trains. During the year 1951, 186 new passenger trains were introduced and 75 others were extended on the different Railways.

The operation of the *Janata* Expresses has provided an important additional service exclusively for third class passengers. In addition to the 16 *Janata* Express trains which were running up to the end of 1950-51, six were introduced during the year.

The outstanding achievement of Railways during the year, however, was averting famine in Bihar. When a grave situation developed in Bihar with less than three months left for the outbreak of the monsoon which would, it was apprehended, isolate the worst affected districts of North Bihar, the

Railways were called upon to rush food-grains to facilitate stock-piling before the transport system in rural areas was immobilised by the trains. To add to the problem, an overwhelming proportion of the movement of imported grains from Calcutta to North Bihar involved transshipment at break-of-gauge points, including the ferries, thus imposing a severe limitation on the development of transport capacity. A new transshipment yard near Banaras Cantonment was, therefore, planned and constructed in record time to balance fluctuations in traffic clearances *via* the ferry at Mokameh Ghat across the Ganges due to the vagaries of the river channel. In addition, works were promptly undertaken to increase the capacity at other transshipment points such as Bhagalpur and Sakrigali Ghats. As against 74,000 tons of food-grains that Bihar received from outside in 1950, in 1951 it received 7.8 lakh tons, of which nearly 5 lakh tons were received during the period April to August. Thus enough stocks of food-grains were transported to the scarcity areas in ample time averting successfully what at one time loomed as a disaster, not dissimilar to the Bengal famine of 1943.

In recognition of the need for improving rapidly the standards of passenger amenities, particularly for third class passengers, Railways have adopted a systematic programme, costing Rs. 3 crores per annum. In addition to the facilities provided for third class passengers, such as a special compartment for long distance passengers, reservation of seats, new type of coaches, advance booking, etc., more facilities have been provided in stations. About 235 waiting rooms and waiting halls were additionally provided or extended, and the provision or extension of such facilities to the number of 285 was under progress during 1951-52. Electric fans were provided in waiting halls in about 85 stations. Sanitary conditions in trains have been improved and the Railway Medical Department has adopted special measures to maintain hygienic conditions in station premises. Supply of drinking water has been extended to wayside stations. During the five months from March 1951, about 190 additional water taps were provided on platforms, while more than 2,000 additional watermen were employed during the summer season. Additional conveniences to the lower class passengers are the supply of electrically-cooled water at certain important stations, bathing facilities, etc.

During the nine months from March 1951, about 4,500 fans were additionally provided in third class compartments and about 1,100 in first class compartments.

Mention must be made of the new type of coaches which have been introduced for the use of lower class passengers. These coaches, manufactured at the Hindustan Aircraft Limited, Bangalore, besides being all metal and therefore, stronger in construction, provide additional amenities, such as liberal depth of seats, knee-room, provision of fans in each seat, overhead hand-basin and mirror. In the course of the year 1951-52 an experimental proved type of coaches will be placed in service which will have a larger floor area, more comfortable seats, better lighting, etc.

and modern fittings. It is not possible to make good the omissions of the past decades within a short period, but for the first time in the history of our Railways, a systematic attempt is being made on a programme basis to raise the standard of third class travel to the standards obtaining in foreign countries.

As the largest employer of labour in the country the policy of Indian Railways towards their employees has a special significance. The Government are committed to a policy of progressively improving the standards and conditions of work of their staff. There has been a significant reorientation in policy in the matter of labour relations. An increase of dearness allowance was granted with effect from June 1, 1951, to supplement the previous *ad hoc* grant, in view of the price increases. Government has accepted the principle of providing quarters for all essential operating staff, who form over 60 per cent. of the total railway employees. In the financial year 1951-52 Rs. 3.5 crores were allotted for the provision of quarters. The provision for 1952-53 has been increased to Rs. 3.7 crores. From 1947 to 1951, about 22,500 quarters were built by various Railways. For medical, educational and welfare items about Rs. 5 crores more have been allotted for expenditure during 1952-53.

The relations between labour and management on Indian Railways have remained cordial during 1951. Towards the end of the year, an important step was taken for further improving the relations with labour by the decision of the Railway Board to set up a permanent negotiating machinery for dealing with disputes between Railway Labour and Railway Administrations. The machinery is to operate in three tiers. The first is at the Railway level, recognised Unions having access to District or Divisional Officers and subsequently to officers at the Headquarters, including the General Manager. At the next tier, differences not settled at Railway level will be taken up by the respective Federations and the Railway Board. In regard to matters of sufficient importance in which agreement is not reached between the Federations and the Railway Board, a reference will be made to a Tribunal composed of Labour Representatives and Railway Administrations under a neutral Chairman. One other decision of considerable importance taken by the Railway Board was the relaxation of the provisions of the Disciplinary Rules of Railway servants in certain directions, and the provision of certain facilities for the defence of individual cases.

Roads, Road Transport, etc.

The two important recommendations made by the Nagpur Conference of Chief Engineers that met in 1943 are that roads should be classified according to their function and that the Centre should take over from the State Governments the entire liability for the maintenance and the development of the system of roads which are declared to be National Highways.

The total mileage of the roads so far selected for the purpose of National Highways is about 13,400. The recurring cost of maintenance of this National Highways System all over India exceeds Rs. 3.5 crores at present. An expenditure target of Rs. 23 crores has been fixed for capital works for development of the National Highways System during the five-year period ending 1955-56.

On the commencement of the National Highways System in 1947-48, there were approximately 1,600 miles of missing road links and 120 missing major bridges in the Highways. Out of these, 160 miles of missing road links and 17 missing major bridges have been completed and 320 miles of links and 18 major bridges are now under construction. During the remaining four years of the first Five-Year Plan it is expected that the construction of an additional 450 miles of missing road links and 43 major bridges will be taken in hand. In accordance with the spirit of the Nagpur Plan the Centre advises all the States on the plans and programmes for the development of roads other than National Highways.

Special encouragement for the development of village roads on a cooperative basis is now being given by earmarking between Rs. 15 lakhs and Rs. 20 lakhs annually from the Central Road Fund Reserve. The Central Roads Organisation is also engaged, in collaboration with the Indian Roads Congress, in advising the various Road Research Stations covering the various aspects of road construction and in formulation and dissemination of standards and designs.

The State Governments went ahead with their schemes of building new roads, improving the existing ones and reorganising and nationalising their transport system.

In *Ajmer* till the end of the financial year 1951-52 the main traffic roads were maintained by the Central P.W.D., but now it has become a State subject and provision has been made for the construction and maintenance of the roads in the State budget for 1951-52. A large number of feeder fair-weather roads constructed during the famine of 1939-40 were repaired and metalled during the year.

In *Bihar*, the scheme for the nationalisation of certain passenger transport services, originating from Patna for the first instance, has been sanctioned by the State Government. A committee has been formed for implementing the scheme, pending formation of a corporation under the Road Transport Corporation Act, 1950. Preliminaries for launching the scheme are now in progress. The State Government was, during the year, running bus service in Seraikeella and the undertaking has proved profitable.

But permits were granted on essential routes in the newly developed and congested areas and in belts like Kosifree area where transport facilities are meagre. The restriction on the issue of fresh bus permits was also withdrawn.

The working of the mobile squads had, on the whole, been satisfactory. Measures were also taken, through police, to tighten control over transport vehicles.

In *Bombay*, since the Government introduced nationalisation of State Transport in 1948 and the State-sponsored State Transport Organisation was later turned into a Statutory Corporation, it has expanded phenomenally. This organisation today possesses 1,535 vehicles, operates 870 routes and serves over 175,000 passengers daily. It may be of interest to know that the State Transport will receive 1,500 Canadian-manufactured vehicles under the Colombo Plan.

During the year, a programme for the development of 260 roads and bridges was prepared by the Government and this programme was estimated to cost Rs. 10 crores. Construction was started at 172 works out of which 46 were completed. Urgent road works costing Rs. 3,710,098 were taken up in the merged areas.

With a view to providing better travelling facilities and adequate transport, which were previously lacking, the *Himachal Pradesh* Government has nationalised transport. The entire Pradesh has been divided into three regions and one sub-region. The Transport Department of the State has at present a fleet of 147 vehicles and 3 motor cycles. A well-equipped workshop has been set up at the headquarters of each region. The transport services are at present operating roads totalling about 800 miles.

In *Hyderabad* the roadways are very meagre as compared to the rest of India. The present Five-Year Plan has drawn up a scheme for the construction of 152 miles of new roads estimated to cost Rs. 128.57 lakhs.

In *Madhya Bharat* there are about 4,500 miles of roads, and the State Government spends annually about Rs. 35 lakhs on their maintenance. The motor service, a portion of which is run by the Madhya Bharat Roadways, traverses 35 per cent. of the existing routes of the State. Almost all important places are covered by regular motor bus service. It may be of special interest to know that this service operates, both ways daily, the two longest passenger bus service in India, viz., Gwalior-Indore (308 miles) and Gwalior-Ujjain (293 miles).

The number of buses and the income have increased during the past few years. As a preliminary step towards the nationalisation of motor transport, a Transport Nationalisation Committee was set up and its report is, at the time of writing, under the consideration of the Government.

The *Punjab* Government has decided to nationalise transport progressively. At present the Transport Department is operating 195 buses from Jullundur, Ambala and Amritsar. The total outlay till the end of financial year 1951-52 was Rs. 3,800,000 and the total net profit was calculated at about Rs. 1.5

millions. Operation of State buses has been extended to 10 new routes with effect from the 1st August 1952 with a view to extending more transport facilities to the remotest parts of the State. The Government has decided to open new and closed routes and extend road transport facilities to almost all motorable roads. To facilitate inter-State traffic, agreements on traffic have been made with the adjoining States of Himachal Pradesh, PEPSU and Delhi. It is expected that such agreements will be finalised in the case of U.P., Rājasthan and Jammu and Kashmir during 1952-53.

In *Travancore-Cochin*, the State Government has introduced a programme by which all the main roads will be given a special surfacing such as concrete, tar-crete or cement grouting depending on the extent of traffic. So far about 75 miles have been specially surfaced. In the sphere of bridging important rivers, while during the 12 years before 1948 only one major bridge was constructed, since then four major bridges have been started of which one was completed in 1951 and the others are now nearing completion.

In Travancore nationalisation of transport started in 1938. The popular Government took up nationalisation with great vigour and this has resulted in increase in the number of buses and frequency of trips. Transport workshops on modern lines have been established for the building of bus bodies, including double-deckers, and for attending to all sorts of repairs.

In *Uttar Pradesh* the total capital so far invested in roadways amounts to Rs. 3.25 crores and the Government Roadways owns over 1,300 buses, about 500 trucks and 50 taxis; it operates on more than 460 miles of metalled roads and carries over 242 routes about 4 crores of passengers annually. The City Bus Services which are running in the larger cities of the State have also become very popular. The Roadways now possesses a number of well-equipped workshops and a large central workshop at Kanpur. Special amenities like time-tables, waiting sheds and refreshment stalls are now provided for the passengers. During the year a large number of metalled roads and some miles of cement concrete tracks have been constructed.

The *Vindhya Pradesh* Government has a heavy programme for the financial year 1952-53 to provide more transport facilities, costing about Rs. 52 lakhs. In the Five-Year Plan it has been proposed to build 77 bridges and to convert 148 miles of fair-weather roads into metalled roads and to construct about 200 miles of fair-weather roads.

In *West Bengal* the State Transport Service operated during the year on a total mileage of 5,337,185 and carried 59,046,222 passengers. The service now consists of 199 single-decker and 37 double-decker buses. The construction of the Central workshop and garage at Belghūrria and the garage at the Lakes was completed. The workshop is equipped with the latest machinery and is, so far as we know, the largest and most modern in the country.

Ports, Shipping, Lighthouses, Inland Waterways, etc.

During the year much progress was made towards the development and administration of *ports* in this country. The foundation-stone of the harbour at Kandla was laid by the Prime Minister on June 10, 1952. On this major port Rs. 87.16 lakhs were spent during the financial year 1950-51 and a provision of Rs. 1.75 crores has been made for the financial year 1951-52. The construction of the main harbour is expected to start within a few months and the works comprise 25 items, including a main wharf, four berths, three transit sheds, four double-storeyed ware-houses, a tidal basin for lighters and country-craft, a passenger jetty, an oil jetty, a railway track between the wharf and the transit sheds, a floating dry-dock berth and a heavy lift-berth in the bund.

In July 1952, the Port Trusts and Ports (Amendment) Act was passed. This Act aims at achieving uniformity in port administration with a view to bringing about a greater measure of Central control and supervision in matters of policy and to effecting a considerable degree of decentralisation of authority in matters of day-to-day administration in the major ports of Bombay, Calcutta and Madras.

On the recommendations of the National Harbour Board, which in November, 1951 considered the question of financing the development projects of the major ports of Bombay, Calcutta, Madras, Cochin and Visakhapatnam, details of the programme were obtained from each major port. The total estimated expenditure on the projects (excluding Visakhapatnam port) during 1952-57, according to the proposals received, was approximately Rs. 53.5 crores. The port authorities scrutinized these projects in May, 1952 and revised the programme bringing down the expenditure to Rs. 26 crores. Rapid survey of important minor ports was carried out during the year.

A word about the working of the major ports of the country. While the working of Bombay and Madras ports in 1950-51 resulted in surplus and is expected to yield surplus during the year 1951-52, the working of Calcutta port showed a deficit in the former year and is expected to show a deficit during the latter. During the year under report the Calcutta Port Commissioners have undertaken capital expenditure of a number of important works including the installation of a mechanical-cum-leading plant, construction of quarters at Shalimar for class four servants and the provision of an additional warehouse accommodation for tea. The Bombay port incurred capital expenditure in 1951 on some important works including the reconstruction of transit sheds and warehouses, construction of quarters for the shore and tug cruise and also for the non-scheduled staff, *khalasis*, etc. The Port Trust continued to absorb displaced employees of the Karachi Port Trust, the total number of such persons up to the end of November 1951 being 1,697. During the year the Madras Port Trust undertook capital expenditure on some impor-

tant works including the construction of new warehouses, a new sand pumping equipment to reduce dredging, the extension of the sand screed by 300 feet and purchase of one steel Hopper barge of 1000-ton capacity.

**Shipping* is in the private sector of our economy. There are at present 24 Indian Shipping Companies owning 108 ships in all with a gross registered tonnage of 411,250. This does not take into account Indian-owned vessels of less than 150 gross registered tonnage and the six vessels of the Mogul Line, a British Shipping Company presenting a total tonnage of 26,550, which are registered in India.

The Reconstruction Policy Sub-Committee recommended in 1947 that India should have a fleet of 2 million G.R.T. of shipping within 7 years and that Indian shipping should secure the following targets in the various trades during the same period :

- (1) 100 per cent. of the purely coastal trade of India ;
- (2) 75 per cent. of India's trade with Burma and Ceylon and with geographically-adjacent countries ;
- (3) 50 per cent. of India's distant trade ;
- and (4) 30 per cent. of the trade formerly carried in Axis vessels in the Orient.

The Government of India decided in 1947 to assist the Indian Shipping Companies in achieving these targets. Steps were taken to reserve the coastal trade of India for Indian ships only and a system of statutory licensing was introduced under the Control of Shipping Act, 1947, to give effect to this policy of coastal reservations. Some other principal steps taken by the Government to encourage the development of Indian shipping are detailed below :

- (1) The establishment of an Eastern Shipping Corporation on the State-cum-private ownership basis with an authorised capital of Rs. 10 crores, 74 per cent. of which will be contributed by the Government and the remaining by the Scindia Co. ;
- (2) Allotment of Government-owned or controlled cargoes to shipping companies engaged in overseas trades ;
- (3) Negotiations with the British shipping interests which have yielded additional opportunities for Indian shipping in the near trades, in the India-Singapore trade and in the India-UK-Continental trades ;
- (4) The sale of Visakhapatnam-built ships to Indian shipping companies on instalment basis ;
- and (5) Grant of loans to the shipping companies for the purchase of tonnage under the Planning Commission's scheme. A provision of Rs. 3 crores has been made in the budget for the year 1952-53 for this purpose.

* In the previous issues of the series, " Shipping and Lighthouses " was not dealt with, and therefore, here an effort is made to cover the period since Independence

Under the scheme drawn up by the Planning Commission it is expected that at the end of the five-year period coastal shipping will attain the figure of 300,000 G.R.T. which is considered to be all that is needed for catering to the entire needs of the coastal trade of India. As regards tonnage for overseas trades it is proposed under the Planning Commission's scheme to make an addition of about 110,000 G.R.T. to the existing tonnage of about 173,000 G.R.T. When the Five-Year Plan has been fully implemented by the end of 1955-56 the total Indian-owned tonnage, it is expected, will be about 6 lakh gross tons. This will enable Indian shipping companies to increase their share in some of the important overseas trades, such as the India-UK-Continental, the India-U.S.A. and the India-Australia runs, and to participate in some more trades such as the India-East Africa run in which they have not yet entered.

Simultaneously with the development of shipping the Government has taken steps to provide increased training facilities for officers of the merchant marine and arrangements have also been made for the training of ratings. The training ship "Dufferin" which previously trained cadets both for the executive and for the engineering line, is now reserved for cadets on the executive sides and a separate Directorate of Marine Engineering Training has been started to take care of cadets for the engineering side. In addition, a Nautical and Engineering College has been started to provide advance course of training to Mercantile Merchant Officers to enable them to qualify for a higher examination. For the training of ratings the Government has established two ships, the "Bhadra" and the "Mekhala" the former at the port of Calcutta and the latter at the port of Visakhapatnam. These two training institutes are turning out a thousand seamen every year.

Lighthouses and Light ships is a Central subject and is administered by the Central Lighthouses Department which is under the charge of an Engineer-in-Chief and is assisted by an Advisory Committee set up under the Indian Lighthouses Act, 1927. The Lighthouses Department is self-supporting and it derives its entire revenue from light dues which are recovered under the authority of the Lighthouses Act from ships visiting the country's ports. For the purpose of administration the lighthouses are divided into two broad categories—the "General" lights and the "Local" lights. General lights are those which are of use to shipping generally and are under the responsibility of the Central Lighthouses Department. The Local lights, on the other hand, are of benefit to the ships entering or leaving the port and are under the responsibility of State Governments or the port authorities concerned.

With the contemplated development of Indian Shipping it has become necessary to provide an adequate lighthouse service. With this end in view the Government has decided to reorganise the Central Lighthouses Department. This department has drawn up an ambitious development programme for the next five years costing Rs. 200 lakhs. It is hoped that this will be met partly from its own reserves which have been accumulated from

the savings from its revenues from light dues and partly from a loan which it proposes to take from the Government.

The Centre is, according to the Constitution, responsible for shipping and navigation on *National Waterways* but so far Parliament has not declared any inland waterway as National Waterway and, therefore, the State Governments have, at present, full responsibility for all waterways in the country. In the absence of a single authority to co-ordinate activities in these waterways there has been some deterioration on the more important rivers. The Central Government, therefore, recently set up, with the concurrence of the Governments of West Bengal, U.P., Bihar and Assam, the Ganga-Brahmaputra Water Transport Board to co-ordinate the activities of the State Governments in regard to navigation on the Ganga-Brahmaputra system of rivers. The Centre made a contribution of Rs. 2 lakhs to this Board during 1951-52 and will provide a similar amount during 1952-53. The State Governments are to make annual grants of Rs. 1 lakh each to the Board. The Government of India deputed three experts to participate, along with other experts drawn from the ECAFE region, in a study tour of Europe and North America. This team returned to India after studying the technological advances made in the Western countries and has submitted an interim report.

Most of the rivers of the Ganga region which were navigable for inland crafts a century ago, are no longer navigable as a result of the development of irrigation canal and lack of demand for navigation consequent on railway development. Investigations and surveys are being carried out with a view to examining the possibility of reviving navigation in this region. It is considered that the problem could be met to some extent by using shallow draft tugs for towing barges on the shallow stretches of waterways. As a first step, it has been proposed to run a pilot administration project with shallow draft tugs. The assistance of the Technical Assistance Administration has been sought in this connection and it is hoped that the services of an expert will be available from October, 1952.

In this chapter mention must be made of *tourism* in this country. The objective is to organise publicity in foreign countries and to ensure that visitors from abroad are provided with all the necessary facilities during their sojourn in this country. The year under review witnessed the expansion of the Tourist Organisation and its activities in several directions. A chain of Regional Tourist Offices has been established in Delhi, Calcutta, Bombay and Madras. Besides, various State Governments have appointed Honorary Regional Tourist Officers to maintain liaison with the Central Tourist Organisation. A number of facilities such as accommodation, catering, transport, guide services, etc., have been improved in cooperation with trade interests concerned. A tourist introduction card is also issued to all overseas tourists so that they can secure the assistance of Government officials in obtaining essential facilities like quick customs clearance, railway reservation, residential accommodation, etc. Steps have also been

taken to bring out a variety of tourist publicity material. During 1951, about 20,000 tourists visited this country.

Civil Aviation

During the year Civil Aviation made steady progress. Five new aerodromes and five communication stations were opened in the country. Bilateral Air Transport Agreements were concluded with the Netherlands and the U.K. An air transport service was established between India and Afghanistan.

During 1951, nine air transport companies were operating the scheduled air transport services and nine others operated non-scheduled services. In spite of the restricted operations from the middle of July to the end of October, 1951 due to shortage of aviation spirit, during the year March 1951–March 1952, scheduled services showed, on the whole, a slight increase.

International Indian air transport services continued their services during the year as before. The frequency of the Indo-U.K. service was restored to four a week. To help Air India International acquire two aircraft of the latest type (super constellation type 1049 C) and enable it to compete successfully with the foreign international airlines, the Government decided to give the Company a loan of Rs. 53 lakhs for the year 1952 and another loan of Rs. 25 lakhs in the next year.

On 15th August 1951, the Himalayan Aviation Ltd. commenced operation of a service between India and Afghanistan avoiding Pakistan territory altogether, as a sequel to Pakistan's refusal to allow the operation of the service along the direct route. Pakistan subsequently agreed to a non-traffic halt at Karachi and the service is now operating along the route Ahmedabad-Karachi-Saidhan-Kandhar-Kabul.

In December 1951, Airways (India) started an "airist" class scheduled air service between Delhi and Assam on the Delhi-Agra-Kanpur-Patna-Bagdogra-Gauhati route, thereby providing a direct link between Northern India and Assam. This service gives cheaper air travel by eliminating luxuries. On October 1, 1951, a revised scheme was introduced for appointment of subsidy to those air transport companies which operate scheduled air transport service under efficient economic management.

During the financial year 1951–52, five new aeronautical stations were established at Ranchi, Imphal, Muzaffarpur, Kotah and Khatmandu, and the total number is now 57. Also, besides strengthening the existing channels of communications a few new ones were opened.

Overseas Communications Service

At present the Overseas Communications Service operates Wireless telegraph service, radio telegraph service, photo telegram service and submarine cable telegraph service between Bombay, Calcutta, Madras and New

Delhi on the one side and the important cities of the world on the other. During the financial year 1951-52, radio telephone service with Egypt was opened (2nd July 1951), direct wireless telegraph service with Thailand and Russia were opened (15th March and 18th June 1951, respectively) and the second direct wireless telegraph circuit between Bombay and New York, which was suspended in 1948, was resumed (2nd July 1951).

Since Independence, India has received proposals from a large number of countries for the establishment of direct wireless circuit but due to lack of equipment and efficiency it has not been found possible to accept the proposals. A plan for the development of India's external tele-communications services has been approved at an estimated cost of Rs. 1 crore to be spread over a period of five years. This five-year plan contemplates the opening of a wireless tele-communication station at Calcutta and the expansion of the existing stations at Delhi, Bombay and Madras.

Posts and Telegraphs, etc.

First and foremost mention must be made of the very creditable manner in which the Department of Posts and Telegraphs had acquitted itself during the General Elections. Called upon to meet the needs of the biggest elections so far held in the world, this department, with careful planning, executed its work to a degree of efficiency that brought it messages of appreciation from all over the country and from all sections of the public. New post offices were opened and old ones were converted into combined posts and telegraph offices. During the election period regular mail service was extended to all villages and arrangements were made to provide daily mail service to all villages where polling stations were established, and a mail service of at least once a week to all other villages during the fortnight preceding the polling date. Due to this procedure daily mail facilities were extended to over 3,000 villages and weekly mail facilities to over 25,000 villages. In Himachal Pradesh and Bihar mobile postal unit was attached to the polling party moving from place to place.

Special steps were taken to ensure the delivery of election literature posted by candidates and parties within a period of two days in urban areas and seven days in rural areas. Facilities for the posting and delivery of mails, including registered articles, on all days of the week, not excluding Sundays and public office holidays, were provided to the Election Commission. Similar facilities, except that of delivery of mails on Sundays, were extended to the Regional Election Commissioners and the Chief Electoral Officers of the States. Candidates and political parties contesting the elections were allowed to post and also collect their registered mail at the window of the post office on public office holidays, on which days no booking or delivery of registered articles is normally effected.

The postal department was also called upon to deliver the postal ballot papers from Defence Secretariat, Delhi to the various

engaged on polling duties. On these postal ballot papers the use of Service postage stamps was authorised to obviate the voter having to pay the postage charges himself. Special instructions were issued to all post offices to ensure the careful and expeditious handling of election correspondence at all stages particularly of postal ballot papers. Many more special facilities were provided by the Posts and Telegraphs Department during the election to election authorities, parties and candidates and the public in general.

India has made a steady progress in extending the telephone service to the different parts of the country and is nearing self-sufficiency in the matter of telephone equipment. During 1951, 22 new telephone exchanges were installed and telephone exchanges at 45 stations were rehabilitated and expanded. Altogether the additions during the year were 11,883 exchange communications and 6,476 extensions. Two hundred-and thirty-eight public call offices and 88 trunk public call offices were opened during the year.

In 1951, 33 single channel, 18 three-channel and one twelve-channel carriers were installed in the country. The "Own Your Telephone" scheme which has been working in about a dozen important cities in the country was extended during the year to Indore, Dhubri and Bangalore. Two exchanges were opened, and the messages rate system of charging was extended to Nagpur and Simla.

In October 1951, the radio telephone service between India and the U.K. was extended to Ireland and in July 1951, a direct radio telephone service was opened between India and Egypt.

All India Radio

Despite the considerable financial stringency exercised by the All-India Radio during the year, AIR output continued to grow, and swelled in 1951 to 73,072 hours as against 64,529 hours in 1950. Of this, classical music claimed 16,610 hours and spoken words and items including news 24,726 hours. Broadcasts are now made in 17 languages including Sanskrit and 12 dialects in the Home Service and 13 languages, including two dialects of Chinese in External Services.

All-India Radio played an important part in the General Elections by (a) broadcasting during the pre-election period a large number of talks planned to educate the electorate and (b) announcing, once party nominations had been made and the elections had commenced, reports of the list of candidates and the results of the elections. Both the talks and the news announcements were also announced in full by each station for its area. As a matter of policy, talks on behalf of political parties or those which could be construed as campaigning for election, were not permitted, and during this period AIR scrupulously maintained its policy of complete neutrality and objectivity.

In connection with the General Elections, the News Services had to undertake the task of giving the listener a factual, objective and impartial picture of the progress of the elections, presentation of election issues as set-out in party manifestoes and speeches of party leaders, the polls and the results as declared from day-to-day. The main results of the elections, including day-to-day figures of the party position in various legislatures, were covered. In addition to this, all AIR stations announced results and voting figures of constituencies in their respective areas every evening on the results being released officially.

• During the year educational broadcasts were extended to Travancore-Cochin. In November, 1951, regular service to Europe was inaugurated. It will not be out of place if mention is made here that the External Services division "addressed" overseas audiences for about 21 hours a day.

The Five-Year Plan that was recently approved by the Planning Advisory Committee of Parliament is expected to cost about Rs. 352 lakhs with recurring expenditure of Rs. 93.99 crores per year.

Spread over a period of five years 1951, 1952-55, 1956 the plan provides for the setting up of 1 KW pilot transmitters at Bangalore, Hyderabad, Poona, Gwalior, Jodhpur, Imphal, Rajkot and Chandigarh; the installation of 50 KW Medium-wave transmitters at Bombay, Ahmedabad, Bangalore, Calcutta, Jullundur and Delhi; the construction of studio buildings at Calcutta and Madras; the extension of studio facilities at New Delhi and the provision of additional technical facilities at Mysore, Trivandrum, Hyderabad and Aurangabad, where broadcasting stations have been taken over by the Union Government from the State Governments under the financial integration scheme. Suitable provision has also been made for the setting up of 20/10 KW transmitters at Nagpur, Gauhati, Cuttack, Vijayawada and Allahabad, and the installation of high power short-wave transmitters for the External Services. Jaipur and Indore are to be provided with 20/10 KW transmitters and pilot type studios.

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CHAPTER IX

INDUSTRIES AND DEVELOPMENT PROJECTS

During the year an industrial plan was formulated for India and the plan visualises ordered industrial developments in specific directions during the next five years. This plan, prepared by the Planning Commission, involves a total outlay of Rs. 1,793 crores on developments initiated in the public sector—Rs. 1,493 crores to be spent on restoration of more or less the pre-war availability of essential consumer goods by the end of 1955–56, taking into account the expected increase in population over the period ; and Rs. 300 crores to be spent on ensuring somewhat higher rate of development during the next five years. The first part of the plan would be implemented at all costs and the second if sufficient external assistance becomes available.

In the first part of the plan the share of industries is Rs. 101 crores distributed as follows : large-scale industries Rs. 79.5 crores ; cottage industries—Rs. 15.8 crores ; scientific and industrial research—Rs. 4.6 crores and mineral developments Rs. 1.1 crores. Indian industries have been grouped into the following three categories and the order of importance is (i) Defence Industries ; (ii) Producer Goods Industries ; and (iii) Consumer Goods Industries. Defence industries fall within the purview of the public sector ; the producer goods and the consumer goods industries will mainly be controlled by the private sector.

Taking into account the objectives of the industrial planning and keeping in view the needs of the country, the Planning Commission has fixed the order of priority for the development of the industries as under : (a) Full utilisation of existing capacity in producer goods industries like jute, and consumer goods industries like cotton textiles, sugar and soap ; (b) Expansion of production capacity of producer goods industries like steel, cement, fertilisers, heavy chemicals, machine tools, etc. ; and (c) Completion of industrial units on which a part of the capital expenditure has been incurred.

The Commission has drawn out a big programme for the private sector of industries, in consultation with the representatives of various industries, and the increase in the output of some of the improved intermediate products will be of the following order : steel—300,000 tons, sulphuric acid—78,000 tons, soda ash—34,000 tons, caustic soda—18,000 tons, and cement 2,000,000 tons. The production of diesel engines will be higher by 41,000 and that of pumps by 47,000. In consumer goods industries the increase in output will be : mill-made cloth—900,000,000 yards, sugar—400,000 tons,

footwear—10,000,000 pairs, soap—168,000 tons, salt—450,000 tons, paper and paper board 56,000 tons. This increased flow of goods will reduce the pressure of demand in many lines and, in certain cases, make it possible to increase the volume of exports.

Industries in the private sector will have to accept not only the objectives of social and economic policy but also its own obligation towards the worker, the investor and the consumer. Since the bulk of public resources under the plan is to be devoted to the development of agriculture, irrigation and power, cottage industries, and social services, it follows that for the development of industries, resources must, to a large extent, come from the private sector. The Industries (Development and Regulations) Act, which emphasises the need for associating capital with labour for the development of industry was passed in October 1951.

In view of the prevailing scarcity of capital the need for relieving the middle class unemployment and the desirability of decentralisation of industry, the Planning Commission has stressed the importance of development of small-scale industries. The Commission has suggested a number of measures for the development of small-scale industries and for removing the difficulties of small-scale industries in respect of raw materials, finance, machinery and equipment, research and marketing of products. The small-scale industries can also help in the manufacture of components and accessories in the case of textiles, automobile and bicycle industries. The first part of the Five-Year Plan provides for a total expenditure of Rs. 16 crores on cottage and small-scale industries.

The Commission has assigned cottage industries a central place in the programme of rural development. The cottage industries which would offer scope for organising intensive development programmes are: Khadi, manufacture of palm *gur* and *gur*, the village oil industry, production of neem oil, utilisation of dead cattle, manufacture of hand-made paper, manufacture of woollen blankets, and, in certain areas, hand pounding of rice and manufacture of matches. For the organisation of cottage industries, the Commission relies mainly on industrial cooperation and non-official organisations engaged in constructive work in the field of cottage industries. If rural cottage industries are to be developed, the Commission says that it is necessary to deal effectively with the deficiencies from which they suffer and improve them in respect of: (1) organisation, (2) preferential local demand, (3) reasonable efficient methods of cottage or small-scale production, (4) raw materials, and (5) finance.

The general improvement to the industrial output of the country was, to a large extent, the result of the smooth industrial relations that prevailed

* Cottage Industries are dealt with more elaborately under "Local Self-Government and Rural Development".

and the judicious policy of the Government regarding exports and imports. During the year industrial relations steadily improved except in one sector, *viz.*, banks.

During the year the export and import policy was revised by the Government to meet the situation that arose due to heavy deficit in food-grains, shortage and rising prices of essential raw materials and strong and sustained demand for improved exportable commodities from India. While encouragement was given to the export of commodities like jute manufactures, tea, mica, shellac, etc., restrictions were imposed on the export of commodities like cotton textiles, ground-nut, raw cotton, etc., which were required for internal consumption. The import policy was liberalised to secure the highest possible internal production and an adequate supply of essential commodities needed by the people. The licensing procedure was simplified in respect of imports and exports and this had enabled the importers and the exporters to maintain the volume of trade at a very high level.

As a result of the several steps taken to stimulate progress, industrial development has had an impressive record to its credit during the year. The index number of industrial production was 117 for 1951 as against 109 for 1948, 106 for 1949 and 105 for 1950. Thus, the downward trend for the last three years has been definitely arrested and, what is more important, the highest level of industrial production in the post-war period has been reached during 1951. The level would have been much higher but for difficulties connected with the procurement of essential industrial raw materials, most of which are imported.

The cotton mill industry advanced its production of *cloth* from 3,665 million yards to 4,080 million yards or by 11 per cent. This does not include handloom production, which is estimated at 800 million yards. Production of yarn amounted to 1,304 million lbs. as against 1,174 million lbs. in the previous year. This too represents an improvement of 11 per cent. During the year 422,703 spindles were installed.

While the production level of *jute manufactures* was low in the earlier months of 1951, it improved later to such an extent as to encourage the industry to restore the working hours to 48 per week. Since 31st March 1952, however, the working hours have been reduced to 42½ hours a week as a temporary measure. The aggregate production in 1951 was 873,000 tons as against 835,000 tons in the previous year.

Production of *steel* in 1951 was the highest since 1947 and amounted to 1,040,000. The three major steel producers in the country have undertaken schemes to expand their production. These schemes are expected to materialise in 3 to 7 years and will result in an additional production of over 450,000 tons of steel per annum. The Tatas have a programme for expansion and modernisation of their steel works which will raise their annual production

of finished steel from 750,000 tons to 931,000 tons by the end of 1957. The expansion scheme of SCOB will raise their annual production of finished steel from 200,000 tons to 400,000 tons and is expected to be completed by 1954. The expansion programme of the Mysore Iron and Steel Works is expected to step up their annual production from 40,000 tons to 100,000 tons.

There was spectacular expansion in the output of *cement*, which improved from 2.6 million tons to 3.2 million tons, which is an improvement of 23 per cent. Proposals have been sanctioned which will step up production in the next three years by an additional 1.3 million tons per annum. There was a similar expansion in the output of *paper and paper board*, which increased from 109,000 tons to 131,000 tons, or by 20 per cent. The capacity of the industry is expected to increase to 143,000 tons by the end of 1952.

During the year 1951 there was improvement in the production of most *chemicals*. The only exception was sulphuric acid. There was an improvement of 30 per cent. in the case of caustic soda and 60 per cent. in the case of bichromates. There was improvement in the production of soda ash, liquid chlorine and bleaching powder. Now that the Sindri Factories have gone into production, ammonium sulphate is expected to show considerable improvement in the next year. Production of paints and matches went up by 21 per cent. and 10 per cent., respectively.

A number of *engineering industries* showed better, and in some cases striking, results during 1951. Production of diesel engines advanced from 4,596 to 6,850. About 7,000 more power-driven pumps were produced than in the previous year, which represents an improvement of 24 per cent. Steel belt lacing advanced from 96,994 boxes to 133,291 boxes. The ball-bearing industry made a steady advance. The manufacture of piston ring made a spectacular advance from 2.5 lakhs to 14.4 lakhs. Among non-ferrous metal industries, the extraction of virgin metals improved in respect of aluminium, copper and lead, while in respect of semi-manufactures aluminium and zinc advanced, brass and copper receiving a set-back owing to reduced imports of the metals. Manufacture of wires (non-electrical) and pipes advanced, except in the case of lead pipes, while that of rods was lower. The manufacture of conduit pipes improved from 3 million rft. to 4 million rft. The value of machine tools manufactured improved from Rs. 29 lakhs to Rs. 41 lakhs. Production of small tools advanced from 450,000 to 1,018,000. More looms and ring frames were produced than in the previous year. There were various degrees of improvement in production in respect of belting, abrasives, mathematical instruments, shafting and welding electrodes.

The *electrical group* of industries advanced almost all along the line. Production of dry cells improved by about 4 million cells. Storage batteries improved from 187,000 to 203,000, while the manufacture of electric motors expanded from 81,831 H.P. to 141,900 H.P. Power and distribution transformers advanced from 171,000 KVA to 194,000 KVA. About a million

more lamps were manufactured. Electric-fans improved from 200,000 to 223,000. About 75,000 radio receivers were produced as against 45,000 in the previous year. Among cables and wires, rubber insulated cables and flexibles made an impressive advance from 35 million yards to 42 million yards. Domestic refrigerators and electrical house service Watt-Hour meters were produced for the first time in the country in 1951.

More *automobiles* were assembled, the number being 22,252 as against 14,602 in the previous year. With increase in the assembling of automobiles, the manufacture of automobile tyres and tubes also increased. The former improved from 6.4 lakhs to 8.5 lakhs and the latter from 7.0 lakhs to 8.2 lakhs. Manufacture of cycle tyres and tubes also increased.

Rubber footwear, leather tanning, vegetable tanning and footwear production showed improvement during the year.

Very impressive improvements were recorded in various other articles. The percentage of improvement in soap was 10, paints 22, matches 10, sheet glass 16, enamelware 50, ceramic 18, leather cloth 150, plywood for tea chests 44, sewing machine 39, hurricane lanterns 40, incandescent lamps 70 and razor blades 140.

Let us now consider *salt*. For the first time in 100 years India achieved self-sufficiency in salt in 1951. During previous years India's policy was to import salt from foreign countries, but export salt produced in India to countries like Japan for earning hard currency. During the year 1951 though India had increased her export quantity she had not to import any salt from abroad. The production in 1951 was 7.47 lakh maunds and export was 4.7 lakh maunds. A salt research station has already been established at Wadala and investigations are conducted to improve the quality and reduce the cost of production.

Improvement in *coal* production also must be recorded here. In 1951 it reached the record figure of 34 million tons as against 32 million in 1942. There was an increase in coal exports. During 1951 India exported 9.88 lakh tons to Pakistan and 1.5 million to other destinations.

*Development Projects**

India's most urgent problems are food production and economic development. After our experience with imports and loans of food-grains and other essential commodities we are driven to the conclusion that the real and lasting solution of these problems lies in pushing ahead with our own plans, and the main hope in this regard are India's river valley projects. That this is so is realised is evidenced by the Planning Commission's assigning the highest priority to these projects.

* Community Projects are generally dealt with in the Chapter on "The Five-Year Plan", and work in this connection in a few States is reviewed in the Chapter on "Self-Government and Rural Development".

to the utilisation of the country's water resources for irrigation and power projects in the first Five-Year Plan. Nearly a third of the total budget of Rs. 1,500 crores for this plan has been earmarked for the river valley projects, and some of these projects are among the world's largest.

A rough survey of the possibilities of utilisation of our water wealth has revealed that the irrigated area can be doubled within the next two decades. Hundreds of miles of water-ways can be made navigable and power to the extent of about 40 million KW generated. Additional food production would not only cover the present deficit but also provide, to some extent, for the future growth of the country's population.

The first Five-Year Plan provides for 102 projects. These projects are expected to extend irrigation to 8.84 million acres and provide one million KW of additional hydel power within the five years at a cost of Rs. 511.78 crores. The ultimate benefits, when these projects are completed, will be the extension of irrigation to 16.6 million acres and an additional power of 1.96 million KW at a total cost of Rs. 782.48 crores.

It is impossible to narrate here, in detail, the working of the various projects in this country that are now at different stages of construction. Let us, however, consider how far two or three of the largest dams have progressed towards completion and how far the country will benefit when they are completed.

The important features of the *Bhakra-Nangal-Dam Project* are : construction of a main storage dam 680 ft. high—world's highest straight gravity dam—on river Sutlej near Bhakra ; a diversion dam at Nangal ; a hydel canal with two power houses and a network of canals to irrigate over 3.4 million acres.

The Nangal Dam has already been constructed. It is designed to divert the requisite supplies from the Sutlej to the Nangal Hydel Canal and to provide a balancing storage to firm up variations in supply due to load fluctuations at the Bhakra Power Plant. Construction of the hydel canal from Nangal to Rupar has made considerable progress. A total of 144,000 KW of power will be generated at this canal. The first power station is under construction and is expected to be completed by March, 1954. Many important areas including Delhi will be supplied with power from this project.

Work at the Bhakra Dam can be started only after diverting the entire flow of the river from the site of the dam. For this purpose two gigantic tunnels, each 50 feet in diameter, and about half-a-mile in length, are being constructed, one at either bank.

The *Damodar Valley Project* intended for the benefit of Bihar and West Bengal, envisages the control of the capricious Damodar by impounding its flood waters in a series of reservoirs to be created by the construction of dams

across the main river and its tributaries. In the first phase of development which is included in the Five-Year Plan, four dams are to be constructed. The reservoir will have an aggregate storage capacity of 2.44 million acre feet. Power will be generated at all the four dams and the installed capacity will be about 124,000 KW. In addition a thermal plant is being erected in the heart of the valley at Bokaro, the ultimate installed capacity of which will be 200,000 KW.

The regulated flow below the dams will be picked up at Durgapur, where a barrage is to be constructed for developing the flow into a network of canals designed to irrigate more than a million acres of *kharif* and 3 lakh acres of *rabi* crops in West Bengal.

The Hirakud Dam Project is one of the three units envisaged for the development of the Mahanadi Valley. The other two projects will be the Tikarapara Dam and the Naraj Dam in the middle and lower reaches of the river. The Hirakud Project is designed to control floods in the deltaic area of the valley, irrigate 1.9 million acres of land and generate nearly 200,000 KW of firm power.

The principal features are a main earth dam across the river about eight miles upstream of Sambalpur, a subsidiary dam at the tail of the power channel and a network of flow and lift irrigation canals. Extension of navigation in the river below the dam and construction of a coastal port are also being studied.

Lay-outs for the power station and sub-stations and the high tension transmission lines radiating from Hirakud have been finalised, and more than a third of the work on the 650 miles of irrigation canals has already been completed.

And now to one or two of the weir and canal projects. *The Kakrapar Weir and Canal Project* will be the lowermost project in the integrated development of the Tapti river basin. The weir will be about 2,175 feet long and 45 feet high above the deepest river bed. Construction work is under way.

Canals which will total 850 miles, intended to irrigate over 6 lakh acres of land in Surat district, are being excavated. Over 450 miles have already been completed. The diversion dam and part of the canal system will begin to function for *kharif* irrigation in 1953. The development of this project is expected to increase the food yield by about 160,000 tons and produce 16,000 tons of additional cotton. The project is estimated to cost a little more than Rs. 6 crores.

The Ghataprabha Canal Project is the first stage on the development of Ghataprabha valley. The canal project consists of the construction of a left bank canal running for about 44 miles from the existing pick-up weir across the Ghataprabha river in Belgaum district. It will provide seasonal irriga-

tion to about 100,000 acres of land. Begun in 1949 the project has already started irrigation over the first 8 miles and is expected to be completed in 1955-56.

Besides these and the hundred and odd projects that are now being executed, there are a number of other major projects vital to the economic growth of the country; they have been investigated and found feasible of execution. Construction of these projects is, however, conditioned by the availability of finance and how much aid and mutual assistance will be forthcoming from the Commonwealth countries. The more important of these projects are the Kosi, Krishna-Pennar, Chambal, Koyna and Ukai schemes.

The nation is now investing nearly Rs. 100 crores every year on these projects—more than the total investment so far made on irrigation projects in the Indian Union. But dividends have already started to flow, for from the middle of 1951, about 100,000 acres of land began to be irrigated from the Mayurakshi project. Benefits of a sizable nature should commence next year and in the years to come till India becomes self-sufficient in food and our posterity lives in plenty.

Any review of the functions and scopes of the development projects in this country will be incomplete without a reference to the Sindri Fertilizer Project and the 11 National Laboratories. The fertilizer factory at Sindri was completed and the production of ammonium sulphate begun at midnight on October 30, 1951. The factory has already achieved production to the extent of one-third of its capacity and during the year 1952-53 this factory is expected to reach the full production target of 1,000 tons of ammonium sulphate per day.

It is a matter of satisfaction that the national Government has so speedily started implementing the plan for establishing the National Laboratories. Boldly conceived and planned by committees of scientists and industrialists, the laboratories are erected near the main industries which they are intended to serve. A new feature of the laboratories are the pilot plants where the results of research can be tested to determine their commercial value. Possessing the latest equipment, manned by the best talent available in the country and free from profit motive, these institutions will be able to approach the national problems from a broad perspective, keeping in view the good of the country as a whole rather than that of a particular industry. The National Laboratories, however, will not supplant but supplement the efforts of other research institutions.

Since the Government is anxious to bring about a speedy improvement in the condition of the people, the National Laboratories will concentrate on problems of practical importance to the country. The National Laboratories are: (1) National Chemical Laboratory, Poona; (2) National Physical Laboratory, Delhi; (3) National Metallurgical Laboratory, Jamshedpur;

(4) Fuel Research Institute, Dhanbad ; (5) Central Glass and Ceramic Research Institute, Calcutta ; (6) Central Food Technological Research Institute, Mysore ; (7) Central Drug Research Institute, Lucknow ; (8) Central Road Research Institute, Delhi ; (9) Central Building Research Institute, Roorkee ; (10) Central Leather Research Institute, Madras ; and (11) Central Electro-Chemical Research Institute, Karaikudi.

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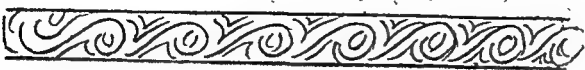
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CHAPTER X

LABOUR

Independence has indeed meant a square deal for labour. The worker is no longer left to the mercy of his employer. Not only is his dignity as a human being now recognised, but his status has been raised from that of a mere wage-earner to that of a partner in industry. Today workers in India are nearer the ideal of democracy and cooperative commonwealth than they are in many other countries.

India has about six million industrial workers and 34 million agricultural workers, and they constitute the backbone of the country's industrial structure. Labour welfare, health, housing, improved conditions of work, minimum wages, employment and training and the trade union movement are the various features of a programme of social security in independent India, that is a welfare State. Despite shortcomings the Government can justifiably claim that it has done its best to ameliorate the conditions of the working class in the land. The achievement in the realm of social security has brought about a marked improvement in their economic status and offers the workers opportunities to lead a better life. If the rise in prices remains unchecked, it is mainly because the phenomenon is universal and some of the causes are beyond the control of the Government of this land. It may be said, however, that but for the effective steps taken by the Government the adverse situation would have affected the Indian workers more seriously.

The two important legislations passed during the year under review are : The Plantation Labour Act and the Employees' Provident Fund Act. The former provides for the welfare of labour, and the regulation of conditions of work in the tea, coffee, rubber and cinchona plantations in the country. Model rules were being prepared to ensure uniformity in this matter. The latter Act was first promulgated as an ordinance and then replaced by an Act. It provides for the compulsory provident fund for employees in industrial establishments and applies to all factories employing 50 or more persons in the textile, iron and steel, cement, engineering, paper and cigarette industries. The employers' contribution is $6\frac{1}{4}$ per cent. of the basic wages and the dearness allowance of the employee. The employees also contribute the same amount. The factories owned by the Government and local authorities have, however, been excluded from the scope of this Act because the benefits enjoyed by the employees in the above factories are more favourable to them than those provided in the Act.

During the year labour welfare and industrial housing received pointed attention from the Government of India. In 1951 the Centre provided

Rs. 7,244,000 under the general welfare account and Rs. 1,935,000 under the housing account. Sanction was accorded for the extension of the Central Hospital building at Dhanbad and for the construction of a central hospital near Asansol in the Raniganj coal-fields. The Government also gave its approval for the construction of four other hospitals and dispensaries and tuberculosis clinics. The Government spent thousands of rupees on BCG vaccination, anti-malaria measures, medical help and sanitary services in the coal-fields at Jharia, Raniganj, Sambalpur and other places.

For social education and other welfare of the coal-miners and their dependants the Government accorded sanction for the construction of 20 multi-purposes welfare centres. It was also decided to provide radio sets with loud-speakers in the collieries in the Pench Valley in Madhya Pradesh. Free supply of garments for the colliers and pithead baths were strictly enforced. The statutory provisions for creches were also strictly enforced.

The coal-mines provident fund and bonus scheme holds more popular during the year. By the end of March 1952 about 5,608 colliery employees had joined the fund and a sum of Rs. 22 million had been contributed by the employers and the employees. Up till March 15, 1952, the Government had paid Rs. 202,239 from their provident fund for the welfare of the employees. The mica-miners also received equal benefits from the Government. The budget of the mica-mining areas of Madras. A grant of Rs. 9 lakhs and 20,000 for labour welfare has provided for the construction of a ward of eight beds for the exclusive use of mica-miners in the Tuberculosis Hospital which they propose to construct. Another grant of Rs. 64,000 was made by the Government for the anti-malaria measures in the mica field in Bihar and Madras.

A grant of Rs. 4 lakhs was secured from the Central Tea Board for the welfare of tea plantation labour. The State Governments concerned were requested to prepare welfare schemes which *inter alia* provide for training in subsidiary occupations like tailoring, knitting and weaving. Besides, the Government of India arrived at an agreement with the ILO to secure the services of an expert to organise vocational training for plantation workers.

To achieve the objectives of the Dock Workers (Regulation of Employment) Act, 1948 different schemes were framed for the ports of Bombay, Calcutta and Madras. These schemes provide for the registration of workers and employers, the payment of guaranteed minimum wages, attendance allowance and disappointment money to casual workers. Of the three schemes, the Bombay scheme is being implemented from February 1, 1952.

During the year it was decided that 539 houses should be constructed for the workers in the Railway collieries at a cost of Rs. 1.97 millions. The houses will give some minimum amenities like community latrines, external water-supply, street lighting, roads and drains. Under the Plantation Labour Act, 1951, the planters built 4,915 houses for workers in South India in 1951, and 10,183 houses in North India between April 1 and September 30, 1951. The Industrial Housing Scheme which had hitherto been confined to Part A States and some of the Part C States was extended to all the States. Ten States which participated in this scheme were advanced loans for this purpose. The Government expense under this head has been increasing year after year.

During the year an important step was taken by the Government in regard to forced labour. A statement giving a resumé of the measures undertaken by the Government to abolish forced labour was placed before the Parliament on September 10, 1951. Administrative action required for legal protection against forced labour was taken and data collected to help the State Government in this matter. The State Governments were also requested to give the widest publicity in the rural areas to the provisions of the Constitution on forced labour.

Under the Point-Four Programme of the USA facilities for training were given to eight officials. A team of three experts in industrial hygiene will also make a thorough study of the problems of industrial hygiene in this country. Meanwhile training facilities for officers of the Central and State Governments have been opened in the U.K., Australia and New Zealand under the Commonwealth Technical Cooperation Scheme (Colombo Plan).

The Government of India took part in all conferences convened by the ILO. India has asked the ILO for the services of experts in the field of productivity and systems of payment by results, analysis of the results of the Agricultural Labour Enquiry, vocational training for plantation workers and social security administration. The ILO was also approached to award fellowships in various fields of labour. As a first measure of technical assistance the ILO convened a seminar on labour statistics in New Delhi in November 1951. Statistical officials from several countries including India took part in the discussion.

During 1951, five more employment exchanges were added to the network at Kotah, Bhilwara, Sambalpur, Mysore and Belgaum. About 1.38 million registrations were effected in 1951 as compared to 1.21 millions during the preceding year. The number of vacancies notified to the Exchanges increased during 1951. Consequently the number of persons who were found employment by the Employment Exchanges also increased during the year. Among those who had found employment were a large number of displaced persons and members of scheduled castes.

In the field of training during 1951 an additional 3,272 vacancies were sanctioned for the displaced persons in the Adult Civilian Training Scheme

and under a special arrangement with the Ministry of Rehabilitation 1,000 of these vacancies were set apart for apprenticeship for training in U.P. and West Bengal. The first batch of trainees in vocational trades was tested in July-August 1951. Under special arrangements about 250 demobilised Servicemen were also posted for training at the Ministry of Labour's training centres.

The States also approached labour in the proper spirit and gave this problem the attention and importance it deserved.

During the year there was some discontent and agitation amongst the labourers in *Ajmer*. The cause of this unrest was the abnormal rise in the prices of essential commodities. To counteract this unrest, the Government fixed minimum wages in the textile industry where the agitation was most pronounced. Minimum wages in tobacco (including bidi making) manufactory have already been fixed and fixation of wages in other scheduled employments was also under the consideration of the Government.

In the State there were 70 disputes during the year. Sixty-five of them were settled by conciliation and five were referred to the Industrial Tribunal.

Bhopal maintained comparatively cordial industrial relations throughout the year under review and consequently there was an all-round increase in production. Most of the industrial disputes were settled through conciliation and a few were referred to the Industrial Tribunal for adjudication. With the enforcement of the Minimum Wages Act, surveys and enquiries were completed in respect of the conditions of work in some scheduled employments like road construction, building operations, stone breaking, bidi making, etc.

The machinery set up by the Government of *Bihar* for the settlement of industrial disputes has proved to be very effective. During the year, 74 such disputes, out of which 33 involved stoppage of work, were settled by conciliation and 45 referred to the Labour Tribunal for adjudication. The number of workers involved was 12,082 and the number of man-days lost 44,816. The disputes arising out of the slow-down notices were promptly settled as a result of which the number of man-days lost during 1951-52 was brought down to half of the corresponding figure in the preceding year. The minimum wages were fixed within the time-limit fixed by the Government of India.

In Bihar during the year two industrial housing schemes were at work—one planned by the State Government and the other by the Central Government. Under the former scheme Rs. 15 lakhs were advanced to the Tata Locomotive and Engineering Co. Ltd., Jamshedpur. They had already built 359 houses for their workers; more than 300 houses were under construction at the end of the period under review. A further sum of Rs. 25 lakhs was sanctioned to be advanced to the above company and another sum of Rs. 566,460 was sanctioned to be advanced to The Dwarkadas Radhakrishna & Bharitiya Engineering Works, Sahibganj. Under these schemes the recipients would

contribute half the expenses, and the other half which the Government advances as loan carries 3 per cent. interest.

Industrial relations in *Bombay* State during 1951-52 continued to be satisfactory. Although the number of work stoppage recorded a slight increase over that of the previous year, the number of workers involved was much low. The conciliation machinery set up by the Government successfully dealt with about 500 disputes while conciliation failed in about 450 and disputes were either withdrawn or not pursued in 570 cases.

The State Government got 126 Joint Committees and 288 Works Committees set up. Some of the joint committees were set up voluntarily by the employers with the approval of the employees' union. The committees represent the spirit of the industrial truce and help maintain mutual appreciation of difficulties of both the employees and the employers and contribute to efficiency in production and harmonious relations between the two parties. Unit production committees were set up in some establishments also on the voluntary basis, and they functioned efficiently. During the year 47,585 workers were employed under the decasualisation scheme as against 12,171 workers during the previous year.

The total number of registered and working factories in the State stood at 8,470 and 7,677 respectively as against 7,927 and 7,383 during the previous year. The average daily number of workers in the factories was 780,867 including 51,365 women workers. The latter are covered by the *Bombay* Maternity Benefit Act and during the year about 4,860 women workers claimed the benefit under the Act and received Rs. 188,433. The amount of compensation paid to workers under the Workmen's Compensation Act in 1951 was Rs. 823,582.

About 800 literary classes were started and about 8,000 workers were made literate. There were 289 apprentices in the industrial training workshop at Ahmedabad. The Employers' Provident Fund Scheme and the Employees' State Insurance Scheme will come into force in this State within a few months.

The Welfare Section of the Labour Department was engaged in the management of 52 labour welfare centres in *Bombay*, Ahmedabad, Sholapur and Hubli.

Almost all the labour laws of the Central Legislature were in force in *Coorg*. To enforce effectively the Payment of Wages and Weekly Holidays Act the District Magistrate of *Coorg* continued to be the certifying officer and statistics authority and the State appointed an inspector of factories and two field assistants to do the work connected with the Industrial Statistics (Labour) Rules, 1951.

The recommendations of the Advisory Board constituted under Section 7 of the Minimum Wages Act regarding minimum rates of wages for

employment in Coffee plantations and cardamom malais were accepted by the State Government. The recommendations of the Board in respect of employment in agriculture were, at the end of the period under review, pending final orders by the State Government.

The policy of the *Delhi* State towards labour is to promote the welfare of the workers and maintain industrial peace of the State. A full-fledged conciliation machinery and tribunal were set up and due to their labour the number of strikes and number of man-days lost fell considerably low during the year.

The State has enforced 12 labour laws to safeguard the interests of the workers. The enforcement of these Acts has not only improved the standard of living and the working and service conditions of the workers but has also afforded the workers the necessary protection against the unfair practices of the employers and other risks and hazards arising out of employment.

Forty-two industrial establishments have Works Committees and 25 have been certified under the Industrial Employment (Standing Orders) Act. For effectively enforcing the Minimum Wages Act, two whole-time inspectors have been appointed for regular checking and a Minimum Wages Committee has been constituted to advise the Government in regard to the minimum wages of some of the employments. The Employees' State Insurance Act has also been enforced in the State and a pilot scheme under this Act has been introduced. This scheme provides necessary security to the workers against the loss of income due to accident, sickness and maternity.

The total number of factories registered in *Hyderabad* during 1951-52 was 1,036. The Government devoted special attention to improving the working conditions of labour. The minimum wages have so far been fixed under the Minimum Wages Act in the bidi factories and tanneries. Committees have been set up to fix minimum wages for five categories of employment specified in the schedule to the Minimum Wages Act.

The construction of 300 houses for industrial workers was nearing completion in *Hyderabad* City. Labour welfare centres have been planned and the Government has sanctioned Rs. 10,000 for them during the year. Besides finding employment for ex-Servicemen, the functions of the Regional Directorate and Resettlement were extended to cover civilian employment seekers also. To resettle the personnel released recently as a result of the disbandment of the State Forces, a sum of Rs. 12 lakhs has been allotted for various farming schemes.

In *Madhya Bharat* a minimum wage of Rs. 26 a month has been fixed for the operatives of the textile mills, and standardisation of wages for different occupations has also been effected in the textile industry. A minimum wage has also been fixed in the sugar industry and partially in some of the smaller concerns—the latter have represented against this measure. In regard to

agricultural labour also, the required data were being collected in line with the all-India scheme which would form the basis of the ameliorative measures contemplated for this class of workers, especially fixation of their minimum wages, hours of work, holidays and so on. To achieve uniformity with the rest of India, all progressive labour laws have been adopted.

At Indore two labour housing schemes are already under execution. Housing has been provided by the management to a substantial number of workers at the Gwalior centre. In addition to what the employers themselves are doing as required by the Factories' Act, Government has been spending yearly Rs. 12,000 in Indore for labour welfare. Extension of labour welfare activities at other centres was under the active consideration of the Government at the end of the period under review.

For settlement of major industrial disputes, an independent judiciary has been constituted with three labour courts and one industrial court. Besides, a beginning has been made in the direction of introducing what is called 'Industrial Democracy' by the constitution of Works Committees in most of the textile mills consisting of representatives of employers and employees in equal numbers.

During the year C.P. and Berar Industrial Disputes Settlement Act was applied in *Madhya Pradesh* to the textile industry. Recognised unions of textile workers were registered for all the textile centres in the State and the stage was set for settlement of all disputes by negotiation and conciliation. Except for a long strike which occurred in the Empress Mills, Nagpur, towards the end of 1951, the real cause of which was more political than economic, the period was one of comparative peace and harmony between labour and management.

During this period the labour office successfully conciliated 46 disputes and investigated into 358 complaints; 13 agreements were registered. Standing Orders in more than 50 establishments were certified thus regulating the relations between the employers and the employees in these establishments.

During the year the State Government finalised the Minimum Wages Rules, 1951 under section 30 of the Minimum Wages Act, 1948 and the *Madhya Pradesh* Housing Board Rules, 1952. The Shops and Establishments Act continued to be in force in 21 of the more important towns of the State.

The State Government set up a Housing Board in January 1951 to look after the industrial housing scheme. This board completed all the preliminary work connected with the building of houses for industrial workers at Jabalpur, Pulgaon, Achalpur and Nagpur. Work was already started at Jabalpur and the Board was given Rs. 20 lakhs which the State Government received as interest-free loan from the Centre.

The State Government has started labour welfare activities on a somewhat moderate scheme. On the basis of Employees' Provident Fund Act,

1952, recently enacted by the Central Government, a draft scheme was prepared and circulated throughout the State for action.

In the field of labour welfare the *Madras* Government has decided to introduce, at the first instance, the working of the Employees' State Insurance Act in one centre. The Government has collected data with a view to locating areas where the Act could be enforced.

Mysore took a keen interest in promoting the welfare of labour in the State. The Bangalore City Improvement Trust Board constructed during the year 60 blocks of four units each for accommodating labourers. The expenditure, so far, has been about Rs. 5 lakhs. For the housing of the labour force in the Mysore Iron and Steel Works at Bhadravathi a considerable amount was spent during the year. Out of the Rs. 20 lakhs that the Centre granted as interest-free loan to the State, Rs. 10 lakhs have been provided in the current year's budget for housing scheme.

Due to the industrial backwardness in *Orissa* the necessity of a machinery for the administration of labour laws was not keenly felt. But the recent enactment of important labour legislations by the Central Government made it incumbent on the State to set up a separate labour department for the proper administration of the various legislations.

In this review of the labour activities of the State during the year mention must be made, *inter alia*, of the Plantations Labour Act, 1951 that was passed on the 2nd November 1951. This Act provides for the welfare of the labour and regulates the conditions of the work on plantations. A bill entitled the Orissa Maternity Benefit Bill, 1951 was introduced in the State Legislature in its September session and has been referred to a select committee. The model rules relating to Employees' Insurance Courts under clauses (a) to (c) of sub-section (1) of section 96 of the Employees' State Insurance Act, 1948 were finalised during the year. Draft Minimum Wages Rules and Industrial Statistics (Industrial & Labour Disputes) Rules were published during the year with a view to eliciting public opinion; the question of finalising these rules was under the consideration of the Government. The Bihar and Orissa Mining Settlement Act, 1920 was extended to the ex-State areas except some of the scheduled areas of the State. Chapter V-A of the Employees' State Insurance Act regarding employers' special contribution to the corporation was brought into force in Orissa and was operating from the 24th November 1951.

In the sphere of labour welfare care was taken to maintain a high standard of housing conditions, sanitation, arrangement for water-supply and medical, educational and recreational facilities for workers in factories. From the Centre the State Government received an interest-free loan of Rs. 10 lakhs for industrial housing schemes and this amount was distributed to three industrial establishments in the State. The recipients of this amount would

advance one-half of the amount received towards the construction of quarters for the labourers employed in their undertakings.

During 1951-52, *Punjab* enforced minimum wages, as recommended by the tripartite committees, in respect of workers in oil mills, tea plantations, rice, flour and dal mills, tanneries, leather factories, etc. and for subordinate staff under the local authorities. Minimum wages in respect of tea plantations have affected about 10,000 workers and in many cases improved their wages by about 40 per cent. Similarly, 30,000 workers in oil mills, road construction, building operations and private construction enterprises and 12,000 subordinate staff under the local authorities are covered by these provisions. With the enforcement of minimum wages in agriculture from October 1, 1951, a very large number of workers were also affected.

Recently the Employees' Provident Fund Act was passed providing for the institution of provident fund for employees in six scheduled industries.

The number of industrial disputes has been steadily declining. During 1951, there were only 18 disputes as compared with 58 in 1950.

The Minimum Wages Act enforced in *Rajasthan* is likely to benefit 50,000 labourers engaged in carpet, shawl and bidi factories, road and house building, and rice, flour and dal mills. The workers in the mica-mines and public motor transport will also be benefited. Unified pay scales were introduced for workers engaged in 18 power houses with varying generating capacities. Works Committees will also be formed in all the major and minor industries in the State. An Industrial Tribunal was constituted for settling industrial disputes. Two more labour welfare centres were started during the year.

Prior to the formation of the *Saurashtra* State, most of the States that now constitute Saurashtra, had no labour legislation whatsoever. Exploitation was rampant. Wages were very low. But at present, the labour legislation in the State has been brought in line with the progressive legislation in other States. The Government has undertaken labour welfare activities. Conciliation machinery has been set up by the Government. During the year 1951-52, there were 313 cases of conciliation out of which 242 were successful and 18 remained pending. During the year, there were 50 stoppages of work involving loss of 92,295½ man-days of work. Twenty-two disputes were referred to the Industrial Tribunal out of which 18 have been settled.

Trade Union activities also progressed. Seventy-six more Unions were registered during 1951-52, with a total membership of 27,282.

The working hours of the adult workers have been fixed at 48 hours a week and 9 hours a day. Besides, period of work, rest interval, exemption to women workers from the provisions of 9 hours a day, the minimum age for employment of a child worker and the age-limit of an adolescent, certificate of fitness for employment of young persons, holidays with pay, etc. are

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CHAPTER XI

LAND REFORMS

In the fifth year of freedom Congress Governments in the States took epoch-making steps in the direction of redeeming their pledge to the tillers of the land. Epoch-making, for example, was July 1 in Uttar Pradesh, when, at one stroke of the pen 31,000,000 out of 41,300,000 acres of land held by the intermediaries were acquired by the Government, the zamindars retaining an area of 72 lakh acres of *sir* lands. In most of the other States—in Bihar, Madhya Pradesh, Madhya Bharat, etc.—the process of acquisition of intermediary interests followed a slightly different course in so far as their landed property did not vest in the State on a single day. Instead, large estates were notified and taken over by the State in instalments. Thus, for example, in Bihar all estates paying Rs. 50,000 and more as land revenue were taken over by the State. This has meant the abolition of such big zamindaris as those of Darbhanga, Ramgarh, Tikari, etc. In Madras, the process of acquisition begun earlier was continued and in this State the intermediary system is now more or less abolished and parasitism in zamindari and inam lands extending to over 11,400,000 acres has been done away with. The Madhya Bharat abolition legislation will affect nearly one lakh of intermediaries and about 18,636 sq. miles of land.

The Congress has always emphasised that abolition of intermediary interests in land is not an end in itself but is a means to an end, which is to make our cultivators prosperous, to make the country self-sufficient in food and to achieve economic independence for our toiling masses through a co-operative commonwealth. It follows, therefore, that whereas the abolition of intermediary interests in land is, no doubt, important, the post-abolition land reforms are even more important. The chief plank of these reforms is to see to it that land is held for use and as a source of employment. This naturally means stopping sub-letting of land except in special cases (like widows, minors, disabled persons, etc.), fixing a ceiling on holdings, protection to tenants, consolidation of fragments and development of cooperation and cooperative farming. In all these matters the Governments have taken significant steps in the various States, a brief account of which is given below.

A very large portion of *Ajmer* is held by istimardars who pay a nominal revenue to the Government. Formerly the tenants in the istimardari areas were considered "tenants-at-will". The Ajmer Tenancy Act which came into force last year gives the tenants the right to acquire the status of hereditary tenants, abolishing the payment of all unauthorised levies.

The State Legislative Assembly recently appointed a committee to report to the Government as to the best method of the abolition of all intermediaries

between the tillers of the soil and the State. On the basis of the report of this committee, Government would bring forward in the winter session of the Assembly a bill seeking to effect far-reaching land reforms to improve the lot of the peasantry.

Assam's progress in the matter of land reforms was checked because further enforcement of the latest Acts was stayed by the Courts. The Assam State Acquisition of Zamindaris Act, 1951, which received the assent of the President on the 28th July 1951, was challenged by some proprietors while it was in the Bill stage. The cases were still pending with the Assam High Court. The State had, however, taken steps during the year, to frame rules under this Act.

The Assam Management of Estates Act was passed in 1949 with a view to protecting the natural wealth of the estates. When the Government issued necessary orders for taking over management after completing all preliminary arrangements, the Assam High Court, on petitions filed by the proprietors, stayed further proceedings. At the end of the period under review the petitions were pending in the Assam High Court.

The vast majority of tenants in *Bihar* enjoy occupancy right in respect of their lands. The Bihar Tenancy Amendment Act allows the tenants to manufacture bricks on their lands and to use their lands for charitable or education purposes. An amendment of the Act gives the ryots the rights in trees except where such trees have been recorded in the name of another ryot.

In the first phase of zamindari abolition, the State Government has decided to acquire 146 estates with a gross annual income of Rs. 50,000. The Government will have to give as compensation Rs. 150 crores if all the zamindari and jagirdaries in the State are to be acquired under the Bihar Land Reforms Act, 1950.

In *Bombay* the Tenancy Act, the Anti-fragmentation Act, the Money-lenders' Act, liquidation of inam and other feudal tenures and other progressive measures enacted since Independence constitute a land-mark in the sphere of agrarian reforms.

Coorg liberalised the revenue rules with regard to the grant of loans to Harijans and landless poor. These people are allowed land to the extent of 3 acres to each person for cultivation purposes without recovering land or timber value. As a matter of policy new grants are limited to a maximum of 50 acres per individual taking into account the land already held by the applicant.

The land reforms enacted in *Delhi* fall under two categories : (a) Consolidation of holdings ; (b) Tenancy reforms.

Consolidation of holdings was done under the Cooperative Act and the Punjab Act of 1936. In all, 78 villages were consolidated under the provisions of these Acts. In October 1951, however, it was decided to take up all the 358 villages of the State by instalments of 100 villages a year. The work of consolidation was to be undertaken under the Punjab Consolidation Act, 1948. 72 villages have, up till the end of the period under report, been completed under this Act and the work was making satisfactory progress.

The land tenancy system in Delhi State is extremely antiquated and is governed by two Acts. The 65 villages of the State (east of River Jumna) are governed under the Agra Tenancy Act, 1901, while in the remaining villages (west of Jumna) the Punjab Tenancy Act, 1887 is in vogue. Considering that in a small State like Delhi it was undesirable to have two tenancy systems the Delhi State Government has now undertaken reforms of the tenancy system on the lines of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950. A land reforms commissioner has been appointed who has been charged with the duties of preparing a scheme to ensure a unified tenancy system in the State. An official committee in that connection consisting of official and non-official representatives has already been appointed to go into the question.

Before the integration of *Himachal Pradesh* a large number of taxes were levied in the different units. The State Government abolished 27 taxes and several customary dues which were levied by the erstwhile Punjab States. *Begar* (forced labour), which was in the existence in one form or other in all the units, has been stopped by the State Government.

Occupancy rights as specified in the Punjab Tenancy Act, 1888 were conferred on the *Bethus*, who were in cultivatory possession of State lands for three generations or more on payment of an amount equal to $1\frac{1}{4}$ times the land revenue and cesses for the time being, chargeable on land revenue. The Punjab Tenants (Security of Tenure) Act, 1950, which is now enforced in *Himachal Pradesh*, gives security to the tenants who have been in possession of land for not less than four years because they cannot now be ejected from their holdings.

In *Hyderabad* the Government has since Independence introduced a series of land reforms which will constitute a sort of Magna Carta for the tenant-farmer and free him from his age-long bondage. The *sarf-e-khas*, the personal property of the Nizam, and the Jagirs which between themselves constituted above 41.5 per cent. of the entire area of the State, were taken over by the State in quick succession during 1949. Then came the Hyderabad Tenancy and Agricultural Lands Act. This Act has made it possible to transform the tenant-cultivators into peasant-proprietors which has been the end and the aim of agrarian reforms. In the consummation of these objectives lies the peace of the tenant and progress of the peasantry, and increased food production as a corollary. To help these protected tenants

who may not have enough money to take advantage of the facility of purchase of lands, the Government is opening Land Mortgage Banks which will advance loans repayable in easy instalments.

Other measures have abolished forced labour, the system of granting lands on one year's temporary tenure, and the practice of *tahibandi*, that is, the seasonal delimitation of lands which could be irrigated for the dry crop in accordance with the volume of water available.

In *Jammu and Kashmir* the Land Compensation Committee was instructed by the Constituent Assembly to examine and report upon the desirability or otherwise of the payments of compensation for lands expropriated under the "land to tiller" policy of the Government. The committee sent a questionnaire to all the public bodies and organisations of the State and published it in local newspapers so as to elicit public opinion on this important issue. The committee heard in person and recorded evidence at different centres in the State.

After a thorough investigation and examination the Committee came to the conclusion that the "stand of the land-owning interests on the antiquity of the institution of landlordism, the paucity of returns of land investments, the legal obligation of payment of compensation, the precedents of some of the Indian States, the sanctity of property rights in land and some other conditions has not stood the test of historical, economic and factual analysis". The committee recommended that, both in principle and in policy, the payments of compensation to the expropriated proprietors was not desirable. The recommendation was accepted unanimously by the Constituent Assembly.

Land tenure in *Madhya Bharat* was partly ryotwari and partly zamindari and there were 1,332 jagirs comprising of 5,046 villages with the population of nearly 1,124,532. The jagirs were spread throughout the State and this feudal system was a great handicap in the progress of the State. Some of these jagirs had police rights as well as the rights of taxation. The Bill to abolish this system was brought before the State Legislature in its October session of 1951 and was passed. Thus came to end this age-old system.

The Zamindari Abolition Act which was passed in March 1951 was enforced with effect from October 2, 1951. A uniform rate of compensation, eight times the net income would be paid to Madhya Bharat zamindars irrespective of sizes of their zamindaries. The total number of zamindars in Madhya Bharat was 121,993, the total amount of malguzari being Rs. 10,028,657. Over 90 per cent. of the zamindars belonged to the lower group paying less than Rs. 250 per year by way of malguzari.

The non-occupancy tenants would pay nothing to the Government for obtaining tenant rights. The sub-tenants would pay four times the rent amount. Sub-tenants of non-occupancy tenants would pay one year's rent to acquire tenancy rights. In regard to debt liabilities of zamindars, it has been proposed that only secure debts should be taken into consideration.

The *Madhya Pradesh* Government had during the first four years since Independence introduced several important measures of land reforms. But what should be given importance in a review of the happenings during the fifth year of freedom is the *Madhya Pradesh Abolition of Proprietary Rights Act, 1950* which was brought into force on the 26th January 1951. This has been a landmark in the revenue administration of the State. The immediate task that had to be done in enforcing the Act was assessing the compensation payable to the ex-proprietors numbering nearly 1.5 lakh persons. To complete this work expeditiously a separate department was constituted and it was able to complete the work of assessment before the 31st March 1952. Till this work was completed it was not possible to frame an equitable scheme for the disbursement of compensation, because the details of the scheme had to be settled with reference to the total liability on account of compensation and the financial resources of the State Government. The total amount of compensation that would be payable to ex-proprietors would come to about Rs. 480 lakhs and the total amount of rehabilitation grant to Rs. 9 lakhs. It has been proposed to disburse the rehabilitation grant in one instalment. As regards the compensation, it has now been decided that instead of issuing bonds carrying interests at $2\frac{1}{2}$ per cent., and redeemable in a period not exceeding 30 years, small proprietors should be paid outright immediately the total amount of compensation due to them and the others should be paid in cash in annual instalments, not exceeding eight. The amount that would be disbursed during the year 1952-53 is estimated at Rs. 229 lakhs which includes Rs. 9 lakhs on account of rehabilitation grants.

More than 95 per cent. of the holdings of *Mysore* are less than five acres in extent. What is called the land reforms policy will, therefore, apply to about only ten per cent. of the ryots in *Mysore*. To set right whatever difficulties or deficiencies there were in the case of a small number of ryots in jagir and inam villages, the *Mysore Government* took some steps and appointed a committee to examine and suggest revision of the existing land revenue system in the State as well as to examine the desirability of abolishing all classes of jagirs and inams. From the recommendations of this committee, the *Mysore Tenancy Act (Act XIII of 1952)* has been promulgated with the object of promoting harmony in the relationship between tenants and landlords. The minimum period of lease of land is fixed at five years and the arbitrary eviction of tenants is limited to half the produce of the lands. The issue of a written receipt by landholders for the rent received by them is made mandatory. The provisions of the Act were brought into force in nine taluks of the State on the 1st August 1952.

A Bill has been drafted in respect of the abolition of inams and jagirs in the State. It is pending before the Legislature. Another important measure of reform recently introduced in the State was the enactment of *Mysore Cultivation of Fallow Lands Act (Act XVII of 1951)* to enforce compulsory cultivation of lands left fallow.

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The State Government, accepting the recommendations of the committee with regard to all intermediary interests between the State and the ryot enacted the Orissa Estates Abolition Act. This Act which was passed by the Legislature in September 1951 received the assent of the President in 1952. This outstanding piece of legislation enacted during the fifth year of Independence aims at abolition of intermediaries, by whatever name known, between the State and the ryot.

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acre of irrigated land will be taken to be equivalent to three acres of unirrigated land. All jagir lands will be subject to land revenue. The ordinance provides for the protection of tenants against ejectment and grant of suitable tenancy rights to them. The amount of premium which can be charged for the conferment of full *khatedari* rights on such tenants as do not already possess them, has also been fixed at ten times the rental.

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directly or indirectly found employment from each such loan. The families that have benefited from loans, big and small, would number about 252,000.

Technical and vocational training has been given to more than 52,000 displaced persons. Another 9,000 are under training. About 28,000 newly constructed shops, 27,000 evacuee shops and 2,000 evacuee industrial establishments have been allotted to displaced persons. A number of industrial areas have been developed, and assistance is given in numerous other ways to displaced businessmen and industrialists.

A large number of West Pakistan displaced persons are benefiting from the various relief schemes which continue to be in operation. About 37,000 persons live in homes and infirmaries and for their maintenance the State has assumed complete responsibility. Over 16,000 widows, old and infirm persons receive monthly maintenance allowances. Relief assistance has also been given to about 2,500 pensioners and holders of postal policies whose dues have not been forthcoming from West Pakistan.

Let us now consider the refugees from East Pakistan. The problem of these migrants is peculiar in many ways and somewhat different from that of the displaced persons from West Pakistan. While new migrants from East Bengal are all the time coming in, many old ones are continually moving back to their original homes every time there is an improvement in the political situation in East Bengal—some even after receiving rehabilitation benefits in India. The Government of India has, therefore, at no stage been able to have full measure of the rehabilitation problem with any degree of finality.

Occupationally, a substantial proportion of the East Bengal migrants belonged originally to the middle class. Their quick resettlement in India depends largely on their own capacity to adapt themselves to new callings. This demands a certain amount of mental resilience which is often lacking. The inability of most East Bengal displaced persons to adapt themselves to new surroundings has repeatedly been the cause of the failure of many schemes to rehabilitate them outside West Bengal. They prefer to stay put in West Bengal which consequently has over 82 per cent. of the total East Bengal displaced population in this country, according to the 1951 census.

A new factor which has recently been observed is that economic distress in some of the East Bengal districts is driving into India new migrants, a high percentage of whom are destitutes, beggars and others who have always lived on charity, a proportion of them being even Muslims. Rehabilitation of such people is posing special difficulties.

The progress of rehabilitation in the eastern region must be viewed against the background of the factors mentioned above. Progress has necessarily been less spectacular than in the west, but it must be remembered that conditions which obtain in the west do not exist in the east. Here are a few facts about what has been done in the eastern region.

Out of 515,000 families to be resettled in India, 337,000 families have been resettled on land and ancillary occupations in the rural area. Employment exchanges have placed the earning members of nearly 30,000 families in jobs. Small loans through State Governments or bigger loans through the Rehabilitation Finance Administration have been sanctioned to several thousand others. In technical and vocational training centres, 8,000 persons have completed their training and 4,000 more are under training. About 37,000 unattached women and children and old and infirm persons are being looked after in homes and infirmaries. At the end of April, 1952 there were 40,000 persons living on doles in relief camps in the eastern region.

Assistance in the form of freeships, cash grants, loans and stipends has been given to several lakh students from West and East Pakistan from primary to collegiate stages, and even in regard to post-graduate and special courses of study. Over Rs. 40,000,000 have been spent in connection with the education of West Pakistan students and further large sums have been spent on East Pakistan students. Grants-in-aid have been given to several institutions disrupted on account of Partition as also to non-displaced institutions which provide facilities for education of displaced children. Aid has also been given to some State Governments for expanding educational facilities for displaced children.

Numerous training and work centres have been set up for women to enable them to live on their own earnings or to supplement the family income.

The total expenditure on displaced persons up to the end of March 1952, exceeded Rs. 146 crores. Of this sum 45.3 per cent. has been spent on evacuation and relief and rehabilitation grants; 31.3 per cent. on housing; 22.8 per cent. on resettlement and education loans; and 0.6 per cent. on establishment.

These are colossal sums. The burden on Government has been heavy. It might have been lighter if the Pakistan Government had played the game with those who had to leave their ancestral homes in Pakistan by allowing them to manage their properties, or by paying them the income from the properties which they are not allowed to manage. But Pakistan did nothing of the kind. Numerous attempts made by India to solve this problem of evacuee property have proved futile.

As India and Pakistan step into the sixth year of their independent existence, negotiations on the important problem of evacuee property continue to be in a state of deadlock. Pakistan is adamant that only one solution is possible. Under this solution, lakhs of humble men and women are to be asked to overcome individually a barrage of legalistic and other difficulties in order to sell or exchange their small worldly belongings. Even if this solution is given a second costly trial, there is bound to be a vast residue of petty properties—the “small” man’s properties—after bigger properties have

been sold or exchanged. What is to be done with these? Pakistan or other advocates of individual sales and exchanges give no answer to this vital question.

Hindus and Sikhs living in West Punjab and those of Punjabi extraction living in other provinces of West Pakistan abandoned 6,722,000 acres of land. Non-Punjabi Hindu and Sikh migrants from other provinces and states of West Pakistan (Sind, N.-W.F.P., etc.) have left nearly 3,000,000 acres of land bringing the total land abandoned in West Pakistan to between nine and ten million acres. As against this, the total land left behind by Muslims in India is a little over five million acres. It is an undisputed fact that the land left behind by Hindus and Sikhs in West Pakistan is rich fertile land irrigated by one of the finest canal systems in the world. Muslim-abandoned land in India is much inferior in quality.

The urban properties left behind by Hindus and Sikhs in Pakistan, including houses, plots and industrial undertakings, total up to 4.7 lakhs. Muslims have left behind in India less than 3 lakh urban properties. It is generally admitted that the houses of Hindus and Sikhs in West Pakistan were better built and more valuable than Muslim houses in India.

In solving the staggering problem of rehabilitating the refugees, the States played their part admirably. Below are given how Bombay, Punjab, Uttar Pradesh and West Bengal, the four States where along with Delhi more than 90 per cent. of the displaced persons are rehabilitated, faced this problem during the year under review.

Bombay had to absorb over 2.5 lakhs of displaced persons mainly from Sind. It can be said now that the Government of Bombay has to a large extent succeeded in solving the problem of their rehabilitation. Every possible State assistance was given to them to rehabilitate themselves with extension of various concessions, State loans and other facilities, establishment of their settlements and townships and other measures.

Immense progress has been made in the *Punjab* during the past 12 months in the rehabilitation of displaced persons. Various schemes introduced to provide residential and business accommodation to the displaced population and also provide financial assistance for different purposes have been progressing well.

In the 14 new townships, hundreds of new houses and sheds were built and plots laid out and sold to the people. To cater to the requirements of people of lower income groups 14 cheap housing schemes have been developed in the State. Since August, 1951 about 2,600 cheap houses were built and another 500 are now under construction.

Other efforts for the rehabilitation of the urban population relate to the provision of gainful employment to them. The most important of these

efforts is the scheme of industrial townships which have been planned at Jullundur, Ludhiana, Jagadhri, Panipat, Sonapat, and Bahadurgarh. Out of 1,700 plots laid out in these areas for construction of factories on them, about 1,000 have been already allotted. Construction work on 79 more factories was started during the year.

Loans were also given to help the displaced persons in rehabilitating themselves. House-building loans aggregating to Rs. 28.01 lakhs were disbursed since August 1951. Displaced students were given help in the shape of cash grants and stipends. Loans are also advanced by the Rehabilitation Finance Administration for the construction of factories in the industrial areas of the State. During the year this organisation had sanctioned loan amounting to over Rs. 7 lakhs to 46 industrialists.

The scheme for training displaced persons in various crafts was revised during the year, and the rate of stipends per trainee raised from Rs. 25 to Rs. 30 per mensem. Four training-cum-production centres have been opened in the women's home where work was provided to 403 women workers and trainees. In addition to these, three training-cum-production centres have been established in the infirmaries at Khanna, Palwal, and Rewari townships.

The Work Centre Scheme aims at providing means of gainful employment for persons living in mud-hut colonies or outside these colonies. Industries and crafts selected for this purpose include mainly those which can be organised on the basis of cottage industries such as smithy, weaving, spinning, hosiery, button manufacturing, etc. Fifteen such centres are being run in the State at present.

As regards the rural population, the State Government made their rehabilitation possible by giving quasi-permanent lands for cultivation, and loans for the purchase of tools, implements, tractors, pumping sets and other agricultural requirements. The total amount of loan so far given is about Rs. 4.4 crores.

In *Uttar Pradesh*, rehabilitation of displaced persons was regarded by the Government as a matter of great importance. It was found possible during the year to close down relief camps; free feeding and other relief measures are being extended now only to destitute widows and unattached children at widows' homes and orphanages.

For the housing of the displaced persons the Government has constructed over 7,000 pucca houses and over 2,000 wooden stalls and more are under construction. A scheme for an additional 3,500 single-room quarters and 1,530 double-room quarters was under way. The schemes for developing new townships for displaced persons were launched at Modinagar and Hastinapur in Meerut district, at Naini in Allahabad district and Krishnanagar in Mathura district. They are expected to provide accommodation and employment to about 10,000 families.

A large number of families of displaced agriculturists have been settled in the Ganga Kadar and Tarai colonization areas and nearly 18,000 acres of land have been allotted to them. Loans have been advanced by the Government to enable displaced persons to settle in trade or agriculture. The scheme of loans to students was revised and non-recoverable stipends under the revised scheme were granted to students reading in colleges and technical institutions. Training-cum-production centres were being run for displaced women at several places. For the rehabilitation of displaced persons from East Pakistan the State Government agreed to settle fifty families on land suitable for jute cultivation. At the request of the West Bengal Government, the Government of Uttar Pradesh also agreed to the establishment of a home at Chunar, in Mirzapur district for 250 families and unattached displaced women and children, from East Pakistan and to arrange for their training in various arts and crafts.

With these and similar other measures a large majority of the displaced persons in Uttar Pradesh have been placed again on their feet.

A statistical survey made by the Government of *West Bengal* in December 1951 placed the total number of refugees in the State at 2,301,514. Admissions into camps since then have been 79,805.

The schemes for their rehabilitation included settlement in Government-sponsored colonies of 44,963 families, on *khas mahal* lands of 9,005 families, rehabilitation on lands acquired by Government of 135,008 families, under the Union Board schemes of 13,918 families, rehabilitation by private negotiation of 13,051 families and schemes for temporary cultivation of migrants' lands of 71,955 families making the total of 287,900 families or 1,439,500 persons taking five persons per family as the average.

Urban schemes were grants of house-building loans, professional loans and business loans; and rural schemes were land purchase loans, house-building loans, business loans, small trade loans, agricultural loans and loans for weavers, paddy-huskers, and horticulturists. Facilities were provided for education and vocational and technical training; and employment was secured through the employment exchanges.

Up to December 1951, the West Bengal Government had spent Rs. 10 crores on grants and loans and Rs. 13 crores on relief, education and technical training.

CHAPTER XIII

THE DEFENCE SERVICES

Any record of events in this country during any period since Independence will be incomplete without allotting a proud place to the splendid service the Armed Forces have rendered to the country. Not only by their steadfastness, loyalty and patriotism but by their wholehearted and willing cooperation with the people of this land in their fight against the sufferings and disasters that unfortunately visited them more often since Independence than before, have the men in uniform earned the admiration and gratitude of their countrymen. We as a nation have every reason to be proud of our Services whose personnel are not only the defenders of our frontiers but also the real and sincere servants of the people.

During the year the Armed Forces had not such spectacular tasks as suppressing Razakars in Hyderabad or checking the Tribal and Pakistani invaders in Kashmir. Yet, enough has happened across the border to warrant India's strengthening her defence. During the year there were about a hundred raids on Indian territory from across the Pakistan border. Armed Pakistanis have, now and then, tried to take forcible possession of narrow strips of Indian territory lying on the border. Our gallant men standing guard on the borders have acquitted themselves in a manner that has discouraged the enemy from further and greater ventures.

India was, during the year, "threatened" by the clenched fist of Pakistan. India alerted herself quickly on the matter. Troops were moved to the border and stationed at vulnerable points. Pakistan's clenched fist was no more a threat to this land.

In India as everywhere else in the world, the primary role of the Armed Forces is the defence of the country. To effectively defend the country when called for the task, they must, during peace time, train themselves for war. To begin at the source of training, there is the National Defence Academy. The Academy will be permanently located at Khadakvasla, near Poona, where buildings are now under construction. Meanwhile the old Indian Military Academy at Dehra Dun, to which has been added a Joint Services Wing, is functioning as the Provisional National Defence Academy. Here experiments in primary combined training for the Cadets of the three Services, the Army, the Navy and the Air Force, have been going on for more than four years now and already Cadets to be trained under this scheme have been commissioned.

The other Inter-Services Training Institution is the Staff College at Wellington. This college trains officers to the three Services for command and staff appointments and consummates the work of Inter-Services Cooperation. In a ten-month course completed at the college during the year under review

selected students from the U. K., the U. S. A., Canada and Australia participated on a reciprocal basis. There are also other training institutions of the different Arms of the Services. They are being progressively developed.

The need for self-sufficiency in arms and equipment cannot be over-emphasized in a neutral country like India that plays an important role in world politics and occupies the strategic position that she occupies today. Self sufficiency has been reached in regard to some items. In others it has not been reached due mainly to the shortage of essential materials, lack of qualified technicians and skilled labour and housing shortage. The machine tool prototype factory which comes under the production projects, is in its final stages of completion; and the artisan training school attached to it has accepted the second batch of 100 students for a three-year course of technical instruction.

In the modern world, defence science is very important. The Defence Science Organisation established in 1948 has made steady and good progress. The Defence Science Services will be instituted soon, which will include civilian scientists employed in the Ministry of Defence and in the Services. Independent of this service, an institute of armament studies will also be established which will carry out research in the performance of weapons and equipment.

No country in the world can afford to maintain during peace time fighting forces large enough to meet all its requirements in any emergency without straining its resources in men and material; and even the biggest armies in the world need replacements to make good the loss sustained in war. Hence the need for reserves. In India it has been decided to have a regular reserve of officers for the Army and the Air Force and details are now being worked out.

The Territorial Army was created in 1949 as a second line of defence. Recruitment to this Army, which is still in the formative stage, is progressing well. A number of units have already gone through two annual training camps and others will soon be receiving their training. Essentially a citizen army, it depends on the voluntary cooperation of the people to make it a success. A measure of assurance for the future has been provided by a recent piece of legislation giving security of service in their civil employment to those who join the Territorial Army.

In any emergency this Army will take the place of the Regular Army for maintaining internal security; it will be responsible for anti-aircraft and coastal defence and will provide field formation and units for the Regular Army, if and when required.

The National Cadet Corps, an organisation intended to give a background of military training to the youth of the country and to infuse in them a sense of discipline, has caught the imagination of our school and college students. An important addition to the Corps during the year was the Naval Wing consisting of two units. It already had a number of Air Wing Units. For the first time a batch of 15 cadets recruited directly for the National Cadet

Corps have passed out of the Military Wing of the National Defence Academy. The Government has reserved a certain percentage of vacancies at the National Defence Academy for the N.C.C. Cadets.

Indian Navy

Owing to the need for exercising the strictest economy over expenditure and also owing to the difficulties of obtaining new ships, India could not expand her Navy at the pace she would like. During the year the emphasis was more on consolidation than on expansion. Even now for the training of officers we are depending on the facilities provided by the United Kingdom and Naval exercises are carried out with ships of the British Navy and Aircraft of the Indian Air Force and the Royal Air Force. But in the case of other ranks our naval training establishments are quite adequate; and training institutions are being expanded.

There are plans to establish a naval air station at Cochin and form a fleet requirement unit early next year. When formed it will provide the much-needed and essential air cooperation and anti-aircraft gunnery training for our ships as also training in sea reconnaissance and other duties. A steady stream of personnel who receive training here will form the nucleus for more rapid expansion when this becomes possible. The Navy soon hopes to form a "Fleet Train", that is, tankers, and repair and store ships. The Navy does not now have an aircraft carrier; yet every effort is made to keep in touch with modern trends and train the Navy's technical personnel accordingly so that the Navy can man the latest type of aircraft and ships as and when India acquires them.

India will soon have a modern Navy with an air-component and supporting shore organisations and training schools. But where does our Navy stand now? Admiral W. E. Parry just before relinquishing his post as Commander-in-Chief of the Indian Navy, said: "The Indian Navy has made remarkable progress in modern naval methods and in handling of modern ships, both as individuals and as a squadron. I feel confident that the Indian Navy would be capable of defending India in any maritime danger that might arise."

During the year also the Navy continued to act as an ambassador of goodwill to our neighbours. Ships of our Naval squadron visited Thailand, Indonesia and Malaya. In addition to providing valuable sea training these visits help to strengthen the ties of friendship between India and her neighbours.

Indian Air Force

Since Independence, the Indian Air Force has been working steadily towards its goal of providing air defence for the country. Every year has recorded valuable progress. As for training facilities, the Force is self-sufficient. The rigorous methods of recruitment and training ensure entry only of the best into this young service; India thus provides very fine material.

Like the Army the Air Force has rendered the people commendable service, the execution of which calls for a high standard of experience and skill. Among

the many humanitarian operations carried on by the Air Force, mention must be made of the food-dropping in the areas in Assam which were affected by flood and earthquake.

The Hindusthan Aircraft Ltd. have designed and built the first Indian trainer, and initial trials have been very satisfactory. This is a great step forward in the field of aircraft production.

Off-the-field Activities

India's Armed Forces have an equally glorious record off the field. In distant Korea the Indian Field Ambulance fights not any human being but sickness and disease and brings relief to the victims of war, civilians as well as soldiers. This Ambulance has won international fame and its work has been duly appreciated by the grant of a number of awards.

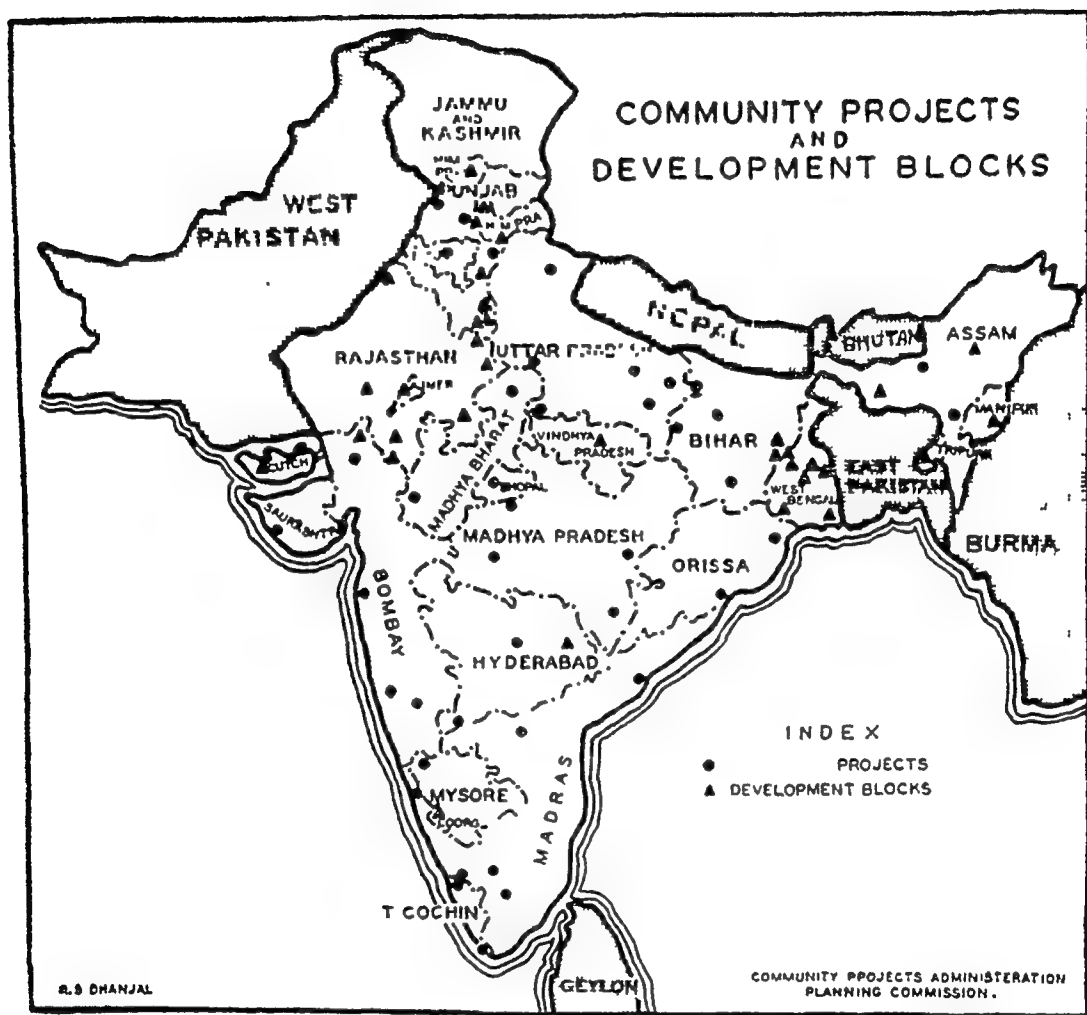
Within the country the Armed Forces have come closer to the people during the year. While in previous years they have helped in alleviating the sufferings caused by floods, earthquakes, locust invasions, etc., this year they have helped effectively to avert threatened disasters. What they have done in Saurashtra and in Rayalaseema are fresh in our memory. After their splendid work in Rayalaseema Shri C. Rajagopalachari, the Chief Minister of Madras, wrote to the Prime Minister: "The Army units have done an excellent piece of work, blasting the rocks and deepening about 120 wells in scarcely five weeks. The high hopes and great welcome with which they were received by the public wherever they went has been equalled by the success which has attended their task. They carry the gratitude of the entire population of the distressed areas and of my Government."

Our men in uniform have shown considerable interest in productive activities like Grow More Food campaign and tree plantation. By the end of 1951 the Army had cultivated 21,966 acres of land and produced about 9,000 tons of crops.

Finally, it must be recorded that though the division of the country had badly disorganised the Services, within the short period since Independence not only have the losses been made good, but the expansion of the Forces has also been kept steady and continuous. And today India's Armed Forces are well-organised, well-trained and well-equipped.

Ex-Servicemen

The Service personnel gives the best years of his life to the service of the country. In recognition of this the Government has formulated a number of schemes for the re-establishment of those servicemen who have to begin life anew after release. These schemes fall under five heads, viz., employment in Government or private service, settlement on land, vocational or technical training and industrial apprenticeship, formation of transport societies and organisation of small-scale industries.



Map showing the local Community Projects and Development Blocks
in various parts of India

CHAPTER XIV

THE FIVE-YEAR PLAN

The Five-Year Plan is conceived against the background of certain existing problems which have to be solved in the immediate present, like high prices of imported commodities on account of wartime inflation followed by a period of decontrol ; shortages of raw materials ; relief and rehabilitation of displaced persons ; existing development programme of the Central and State Governments, etc. It is a plan for a period of transition and its purpose is to restore equilibrium in the national economy while building the potential for rapid development in the future.

The draft outline of the Five-Year Plan was published by the Planning Commission in July 1951. Although the final report on the Plan has not yet been published, the Plan is in operation since April last year, and now the second year of the Plan is running.

During the year several steps have been taken for the implementation of the Plan at the Centre as well as in the States. The State Governments have set up special machinery for the implementation of the Plan for their respective areas and effective liaison between the Planning Commission and the machinery set up in the States has been established. The Commission has held discussions with different States regarding problems arising in the course of the year for the implementation of the Plan as well as on the programme of work expected to be completed in the next four years.

Although the State Governments have not yet succeeded in taking action in certain spheres as recommended by the Commission, every State has been trying to adapt its programme to the framework indicated in the Five-Year Plan. In each State, community projects are the special responsibility of the personnel responsible for co-ordinating all activities under the Five-Year Plan. The Five-Year Plan is now being organised into district plans, so that local initiative can be developed and local resources mobilised to the greatest extent possible. Planning Commission has not only sent directive and rendered assistance to the State Governments on important matters (like distribution of waters of the Krishna and Godavari rivers), but also ensured that projects should be scrutinised thoroughly prior to incurring any expenditure on them. Kosi and Chambal projects have been investigated and the Krishna-Pennar project is under the examination of a technical committee, constituted by the Commission.

The year 1951-52 saw the first steps in planning being taken. The Central Government budget considered the financial needs of the Plan and incorporated certain necessary measures to raise Central finances to the required level on

the line indicated by the estimates made in connection with the Colombo Plan. In the case of the State Governments, the plans were finalised about the middle of 1951 and accordingly it was thought that action to bring their plans, including their targets of expenditure and of resources, in line with the provisions of the Five-Year Plan would be taken later.

A comparison of the revised estimates for 1951-52 and the budget estimates for 1952-53 with the provision made for these two years in the draft outline of the Five-Year Plan reveals that the scale of expenditure as indicated in the Plan has been closely adhered to. The total expenditure for the two years has been put down at Rs. 333 crores as compared to Rs. 316 crores in the draft outline report. Financial assistance from the Centre has to be rendered for about 25% of the expenditure on the State plans. The Central Government's expenditure on its own development programme and assistance to State Governments indicates that in respect of about 60% of the Plan, the outlay has been proceeding according to schedule.

During 1951-52 it has not been possible for the State Governments to take adequate steps to bring up additional revenues on the lines recommended in the draft outline report and the expenditure in the States sector is at present below the levels indicated in the Plan. The Commission has given special attention to the increase, often inevitable, in the level of non-development expenditure of some States and to the difficulties arising out of natural calamities in certain others.

In order to implement the agricultural programme *in toto* the Planning Commission had to undertake a reappraisal of the programmes as well as targets in this field before finalising them. With the cooperation of the Ministry of Food and Agriculture and through a series of discussions with the representatives of the State Governments on the basis of the data received from them, the Commission has concluded its work of reappraisal. The report of the committee appointed in January 1952 to review specifically the Grow More Food programmes of the States was also published in June 1952.

With the enactment of the Industries Development (Regulation and Control) Act on the lines recommended by the Planning Commission, facilities for planning in the private sphere are now available. Steps are being taken to establish Development Councils for a number of industries. During the year, certain measures were initiated with a view to increasing the production of pig iron and steel in the country in quantities larger than what was recommended in the draft outline. Provision has been made in the 1952-53 budget for establishing a pig iron plant and negotiations for expanding pig iron and steel production are in progress with the International Bank as well as with Japan. It is expected that on the industrial side the Plan will be adequately strengthened.

With a view to increasing rural employment, it has been decided to take special measures for the development of khadi production. The Government

has under consideration the imposition of a cess of three pies per yard on all mill-made cloth and the establishment, from the proceeds of this cess, of a Khadi Development Fund. The Ministry of Commerce and Industry is engaged in reorganising its set-up for cottage and small-scale industries, so that an active programme of support and assistance to cottage and small-scale industries can be pursued. The problems of distressed industries like hand-weaving and coir are receiving special attention. The Government of India recently decided that in the purchase of stores, preference should be given to products of cottage and small-scale industries.

The Five-Year Plan provides a total sum of Rs. 18 crores for the amelioration of backward classes in addition to the amount provided by the Central Government under Article 275 of the Constitution. The development of scheduled tribes and scheduled areas is not to be held back on financial considerations. The Planning Commission hopes to give greater attention to this problem and to suggest the provision of funds on such a scale as may be administratively feasible. The amount provided in the draft Five-Year Plan need not be regarded as the maximum available for the development of scheduled tribes and scheduled areas.

For the development of the North-East Frontier Tribal area, a scheme costing Rs. 3 crores was prepared by the Planning Commission for the five-year period beginning 1952. While the scheme includes development projects in agriculture, forestry, education and health, by far the largest expenditure has been earmarked for development of communication which is of paramount importance in the area.

The Planning Commission has recently accepted special responsibilities in relation to the Indo-U.S. Technical Cooperation Programme and the community projects. Eleven operational agreements and two technical assistance agreements have been concluded between the Government of India and the Government of the United States of America within the general framework of the Indo-U.S. Technical Cooperation Agreement of January 5, 1952. The Technical Cooperation Agreement of January 5, 1952 provides for a fifty million fund (more commonly known as Fund A) for expenditure on agreed projects. There is also additional provision for expenditure from outside Fund A on projects which are primarily in the nature of technical assistance like provision of training facilities, technical service, etc. Projects financed out of Fund A come under the category of operational agreements and those from outside Fund A are known as technical assistance projects.

The eleven operation agreements relate to the community development programme, construction of 2,000 tubewells in Uttar Pradesh, Punjab, Bihar and PEPSU, supply of fertilisers, technical assistance and equipment for research on fertiliser use and soil fertility, supply of steel for agriculture, development of marine fisheries, locust control, training of village-level workers for community projects, malaria control, forest research and control of the

spread of desert in Rajasthan, and construction plant and equipment for some of the river valley projects in India.

The two technical assistance agreements relate to a survey of the possibilities of expansion of Sindri Fertiliser Plant and supply of engineering services to the Damodar Valley Corporation.

Community Development Programme

An important programme of work launched under the auspices of the Planning Commission during 1952 relate to the Community Development Programme which is being partly assisted from funds obtained from the United States of America under the Indo-American Technical Cooperation Agreement. Under this programme, 55 community projects spread all over India will start operations on October 2. The preliminary survey of the project areas and the training of the staff have almost been completed. A training camp for the project officers who will be actually in charge of the field operations in their respective areas was held in Nilokheri during July-August this year.

The Planning Commission in its capacity as the central committee of the Indo-American Technical Cooperation Agreement gives the policy direction regarding the community development programme and the execution is under the charge of a special organisation set up within the Commission and called the Community Projects Administration with an administrator as its head.

The 55 community projects at present selected will cover about 18,000 villages with a population of about 15 millions. The estimated expenditure on the projects is about Rs. 38.8 crores of which the dollar expenditure representing the American aid is about Rs. 4 crores.

The project areas have been selected in all the States. Each project comprises of about 300 villages with a population of about 200,000. Where for any reason, a full project area is not justified, the Planning Commission has allotted development blocks each consisting of about 100 villages with between 60,000 and 70,000 people. The statewise allocation of projects and development blocks is as follows :

Assam (2 projects and 2 development blocks) ; Bihar (4 projects and 1 development block) ; Bombay (4 projects and 1 development block) ; Madhya Pradesh (4 projects) ; Madras (6 projects) ; Orissa (3 projects) ; Punjab (4 projects) ; Uttar Pradesh (6 projects) ; West Bengal (8 development blocks) ; Hyderabad (2 projects and 1 development block) ; Madhya Bharat (2 projects) ; Mysore (1 project) ; PEPSU (1 project) ; Rajasthan (7 development blocks) ; Saurashtra (1 project) ; Travancore-Cochin (2 projects) ; Ajmer (1 development block) ; Bilaspur (1 development block) ; Bhopal (1 project) ; Coorg (1 development block) ; Delhi (1 development block) ; Himachal Pradesh (1 project) ; Kutch (1 development block) ; Manipur (1 development block) ; Tripura (1 development block) ; Vindhya Pradesh (1 development block).

The community development programme is basically different from any other rural development programme. It is not a mere conglomeration of some of the development projects in the sphere of agriculture, health, education, transport or communication, but an organised attempt whereby the villagers themselves can become, as the Prime Minister said, the "Makers of their Destiny". The programme is, therefore, not an imposition from the top but is wholly a people's programme which must be carried out by the people themselves with such assistance from the State as may be required.

The Planning Commission has given a good deal of thought to the role of the people in national development as democratic planning will not succeed unless the sanction of an awakened public opinion operates powerfully and the force of public action, in pursuit of constructive ends, continually grows. The ignorance and apathy of large numbers have to be overcome. The Commission has, therefore, evolved a set of proposals aimed at creating a national organisation for large-scale constructive work on a voluntary basis.

This body, known as the Bharat Sevak Samaj, has been formed with the object of enlisting active public participation in all constructive work especially the Five-Year Plan. The Samaj is a non-political body and is open to any individual who can devote a certain part of his time and energy in constructive work. Only those who engage or profess faith in violent or subversive activities or communal hatred or have any connection with an organisation which countenances such activities are excluded from membership.

The Planning Commission has also constituted a National Advisory Committee on Public Cooperation which met for the first time in August this year. The committee which consists of leaders of different political parties and leading social workers of the country is intended to advise and guide the Planning Commission on all important matters bearing on public cooperation in national development. The National Advisory Committee for Public Cooperation also acts as the National Advisory Committee for the Bharat Sevak Samaj.

The functions of the National Advisory Committee are :

- (a) to review and assess the progress of public cooperation in relation to national development ;
- (b) to advise the Planning Commission from time to time regarding the progress of public cooperation in relation to the fulfilment of the national plan ;
- (c) to receive reports from the Central Board of the Bharat Sevak Samaj and to consider such specific matters as may be referred to it for advice by the Central Board ; and
- (d) to make recommendations and suggestions to the Central Board of the Bharat Sevak Samaj on matters of policy and on programmes relating to public cooperation.

The Chairman and Deputy Chairman of the Planning Commission will be the Chairman and Deputy Chairman of the National Advisory Committee and the Member-in-charge of Social Service and Public Cooperation in the Planning Commission will act as Secretary of the Committee.

The Central Government has accepted in principle the proposal made in the Planning Commission's draft outline for setting up a National Development Council to strengthen and mobilise the effort and resources of the nation to support the Plan, to promote common economic policies in all vital spheres and to ensure the rapid development of all parts of the country. The fulfilment of the Plan calls for nationwide cooperation in the tasks of development, cooperation between the Central Government and the States, the States and the local authorities with voluntary social service agencies engaged in constructive work, between the administration and the people, as well as among the people themselves. Accordingly, the council was set up in August and the following functions were assigned to it :

- (i) to review the working of the National Plan from time to time ;
- (ii) to consider important questions of social and economic policy affecting national development ; and
- (iii) to recommend measures for the achievement of the aims and targets set out in the National Plan, including measures to secure the active participation and cooperation of the people, improve the efficiency of the administrative service, ensure the fullest development of the less advanced regions and sections of the community and, through sacrifice borne equally by all citizens, build up resources for national development.

The National Development Council, which will make its recommendations to the Central and State Governments will include the Prime Minister of India and the Chief Ministers of all States and the Members of the Planning Commission on its membership.

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Working funds exceed .. 3 crores

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CHAPTER XV

THE GENERAL ELECTIONS

No event in this country since Independence is as significant as the General Elections that were held during the year on the basis of adult franchise. The eyes of the world were focused on India during those days. The nations of the world, and especially countries with a higher degree of literacy, looked at India with wondering eyes. It baffled many of them how a country that has sustained so many shocks and faced so many stupendous problems could settle down within a matter of a few years to conduct the most prodigious elections in the history of free and secret ballot the world has ever known. Great as India's achievements were during the last few years, greater still was this act of hers.

Politically speaking, the Indian election would rank as the greatest demonstration on earth. Elections took place all over this vast land of long distances and of poor means of communication. What amount of skill and labour was involved in arranging elections in lakhs of the inaccessible villages of the country! How many means of communication were to be employed before the preliminary arrangements for the election could be made! And how perfectly were the minutest details like building of polling booths, providing boarding and lodging for election officers and police protection looked into! And what a task it was to see that all the election material and the election officers reached the places of voting in time! The magnitude of the task can be gauged better if only it is remembered that preparations like the above were made for the participation in the election of 174.8 million voters, about 85 per cent. of whom were illiterate; and in addition to providing for the voters to cast their votes twice in each constituency, in double-member and treble-member constituencies extra arrangements had to be made for the election of one or two more representatives respectively. Added to this is the fact that almost all the seats were contested by several candidates which by itself gave greater labour in the conduct of the election.

The Government had to see that the election was conducted free and fair and in a peaceful and orderly manner. Arrangements for the election in this regard was almost perfect. From the fairness of the election and the secrecy and freeness of the ballot to the most trivial of details, everything was done with a sense of fair-play and decorum that would give credit to any Government in any country in the world. The election authorities, the election officers and even the policemen on duty behaved in a way as much as to say: "Democracy can function in our land as much as anywhere else in the world; we know how to conduct a fair election efficiently and orderly."

Realising the fact that to make the election a real success the illiterate voter must be educated to exercise his franchise intelligently, the Government took some effective steps. A series of broadcasts explaining the basic principles of democracy, adult franchise, procedure for election, preparation of electoral rolls, delimitation of constituencies, etc., was given on the eve of the election. Such talks were arranged not only in English but in all regional languages from all stations of the All-India Radio. This series was followed by talks, from all stations starting four to six weeks before the polling dates in each area, on the mechanics of election like ballot box, voting procedure, and advice against corrupt practices. Of special importance was the series of talks given by the Chief Election Commissioner which received wide publicity. Within the period from November 1951 to January 1952 more than 100 talks in several languages were given from the different stations of the All-India Radio.

The Government decided that broadcasting facilities should not be made available to any political party for electioneering purposes. In implementation of this decision the news-bulletins of the All-India Radio confined their publicity work to the electoral policy of parties on the basis of election manifestoes, speeches and statements of leaders and party statements designed to educate the electorate in regard to their responsibilities as voters without bringing any party interests, and factual news about the formation of parties and groups within the parties and their objectives.

Announcements of local election results were arranged from all stations of the All-India Radio when polling began, regional stations giving in their local announcements the voting figures in each constituency as obtained officially from the Chief Electoral Officer. A general round-up of the results of the day was included in the main news-bulletins from the Central News-Room of the All-India Radio. In order to assist the Press and the news-agencies, an up-to-date analysis of returns was supplied by the Press Information Bureau from figures obtained from the Chief Election Commissioner providing detailed information regarding votes cast, party affiliation of candidates and the up-to-date party positions in the State and Central Legislatures.

Two films dealing specifically with elections had been prepared, one entitled "Rights and Responsibilities" and the other entitled "Democracy in Action", which were distributed through the Films Division Circuits consisting of 3,197 commercial cinemas besides mobile cinema vans and portable projectors of State Governments. At the request of the Chief Election Commissioner, 720 copies of the film "Democracy in Action" were distributed in nine languages—Hindi, Bengali, Tamil, Telugu, English, Gujarati, Kannada, Marathi and Malayalam—and copies of this film were also made available to individuals and political parties on payment. Commercial cinemas have at least two shows a day, and the audience can be estimated at 300 people per show and the working days at at least 300 a year.

The Publications Division brought out a pamphlet entitled "Your Rights as a Voter" explaining the voter's rights, delimitation of constituencies, reservation of seats, polling procedure, etc., while the Press Information Bureau issued a series of articles on the mechanics of election in English and six Indian languages which received wide publicity in the Press.

The Government took special care to see that the services of the Posts and Telegraphs Department were not only available for election work but used without party discriminations. This department has done such a clean service that it would be the pride of any Government to have directed the work of one of its departments in such a disinterested manner during a country-wide election. All the special steps that were taken and the special privileges that were extended were enjoyed by all parties alike.

Among the numerous extra activities of this department mention must be made of the special steps that were taken in ensuring the delivery of election literature posted by candidates of all parties within a period of two days in urban areas and seven days in rural areas. Facilities for the posting and delivery of mails including registered articles, on all days of the week not excluding Sundays and post office holidays, were provided to the Election Commission. Similar facilities, except that of delivery of mails on Sundays, were extended to the Regional Election Commissioners and the Chief Electoral Officers of the States. All candidates of all political parties contesting elections were allowed to book and also collect their registered mail at the window of the post office on post office holidays, on which days no booking or delivery of registered articles is normally effected.

The post office was also called upon to handle a very large number of postal ballot-papers from Defence Services personnel and public servants engaged on polling duties. On these postal ballot-papers the use of service postage stamps was authorised to obviate the voter having to pay the postage charges himself. Special instructions were issued to all post offices to ensure careful and expeditious handling of election correspondence at all stages, particularly of postal ballot-papers.

Temporary telephone connections were given to the candidates, parties and Press. Each candidate, irrespective of the party to which he belonged, was given two connections in large cities and one at other stations, for a period of two months. Connections given to parties and newspapers were extended for a period of six months. The department also put out a pamphlet entitled "This is how we are going to serve you" detailing the facilities being extended by it to candidates and political parties.

It will be of interest to know the following facts which are of statistical importance. The total number of voters in the country was 174,777,647, the total number of constituencies 2,703 and the total number of the House of the People constituencies 401. The number of those who exercised their franchise was about 107 millions, that is, over 61 per cent. The vast electorate returned the Congress Party with absolute majority in the House of the People and

in 18 out of 22 States ; in the other four States, Congress came out as the single largest party and in all the States except one (PEPSU) Congress is in power today. Congress won 362 out of the 489 elective seats for the House of the People and 2,247 out of 3,280 for the State Assemblies. The more important of those who came next in numerical strength in the House of the People are the Independents, the Communists, the Kisan Mazdoor Praja Party and the Socialists, and in the States Assemblies they are the Independents, the Communists, the Socialists, the K.M.P.P. and the Jan Sangh. Nineteen women candidates were returned to the House of the People and 82 to the State Assemblies.

The trends of the polling too are worth mentioning. The State that polled the largest percentage of votes is Travancore-Cochin with 70.8 per cent. for the House of the People and 69.37 per cent. for the State Assembly, Coorg following closely with 67.46 per cent. and 65.87 per cent. respectively. The States which polled the lowest percentages of votes are Vindhya Pradesh and Himachal Pradesh with the corresponding figures at 30.23 and 29.61, and 26.26 and 36.68 respectively. While in constituencies like Kottayam in Travancore-Cochin (80.5), Alleppey in Travancore-Cochin (78.1) and Gudivada in Madras (77) very high percentages of voters exercised their rights, in some polling stations in Jaipur and in some jungle areas in Orissa not a single voter turned to exercise his right. It is almost incredible, but all the same a fact, that 60 per cent. of the rural population exercised their votes as against 40 per cent. of the urban. The three constituencies where the successful candidates secured the highest percentages of votes are Baster in Madhya Pradesh (83), Vikarabad in Hyderabad (77) and Chaibassa in Bihar (75.9).

The conduct of this election extending over a period of about 3½ months kept a staff of nearly 5 lakhs drawn from teachers, Government servants and employees of local bodies engaged in manning the 224,000 polling booths and counting the 103.52 million votes in the Assembly election and 107.51 million votes in the House of the People election.

About 75 parties contested the election, quite a few of them having sprung up on the eve of the election. The various parties organised themselves and fought the election, by and large, on a decent plane.

Being the *primus inter pares* of the political parties in the country, the Indian National Congress had a stupendous task to perform during the election. The Congress had set up candidates in almost all the constituencies in the country. In selecting its candidates, in carrying on its propaganda and publicity and in the manifold tasks that fell on it during those busy days, the All-India Congress Committee office tuned itself up and worked with a degree of zeal and enthusiasm that has not been witnessed in that office on any other occasion after Independence. While not belittling the mite of the most obscure of workers, it must be said that the Congress owed its victory very largely to Shri Jawaharlal Nehru, the Congress President, who conducted a meteoric tour all over the country covering 18,056 miles by plane,

5,266 miles by car, 1,612 miles by train and 90 miles by boat in about nine weeks and addressing in the process millions of people at thousands of places, which is a record for any individual in any election.

The historical background and the high ideals with which the Congress sustained itself during the days of its struggle for Independence, made it inevitable that this party should demand for, and conduct election on, universal adult suffrage. That the Congress has succeeded in this regard would speak volumes about this organisation. The Congress Governments had taken particular care to see that all the political prisoners who wanted to participate in the election were released well in time. The political parties were allowed to carry on propaganda including criticism of the Congress Governments that were in power at the Centre and in the States with a degree of freedom which, one would wonder whether any other contesting party, if it were in power, would have allowed in this country.

The fairness of the election has been justified by the success that different parties had, though in isolated parts of the country. The election has shown not only that the Indian people are disciplined and democratically-minded but that our administrative machinery is capable of handling so vast an operation. The election has proved that the Congress has redeemed one of its major pledges by incorporating the principle of adult franchise in the Constitution and putting it into operation within such a short time after Independence. The election has above all proved how anxious those who are at the helm of affairs were to secure the mandate of the people in the ruling of the land.

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APPENDIX

LIST OF MINISTERS OF THE CENTRE AND STATES WITH THEIR PORTFOLIOS

(as on the 15th August 1952)

CENTRAL GOVERNMENT

Cabinet Ministers

1. Shri Jawaharlal Nehru (Prime Minister)	External Affairs.
2. Maulana Abul Kalam Azad	Education and Natural Resources & Scientific Research.
3. Shri Jagjiwan Ram	Communications.
4. Rajkumari Amrit Kaur	Health.
5. Shri N. Gopalaswami Ayyangar	Defence.
6. Shri Chintaman Dwarkanath Deshmukh	Finance.
7. Shri Gulzarilal Nanda	Planning and Irrigation & Power.
8. Dr. Kailas Nath Katju	Home Affairs and States.
9. Shri Rafi Ahmed Kidwai	Food & Agriculture.
10. Shri T. T. Krishnamachari	Commerce & Industry.
11. Shri C. C. Biswas	Law & Minority Affairs.
12. Shri Lal Bahadur Shastri	Railways & Transport.
13. Sardar Swaran Singh	Works, Housing & Supply.
14. Shri V. V. Giri	Labour.
15. Shri K. C. Reddy	Production.

Ministers

16. Shri Satya Narayan Sinha	Parliamentary Affairs.
17. Shri Ajit Prasad Jain	Rehabilitation.
18. Shri Mahavir Tyagi	Revenue & Expenditure.
19. Dr. B. V. Keskar	Information & Broadcasting.
20. Shri Dattatraya Parashurama Karmarkar	Commerce.
21. Dr. Panjabrao S. Deshmukh	Agriculture.

Deputy Ministers

22. Shri S. N. Burgaohain	Works, Housing & Supply.
23. Shri Raj Bahadur	Communications.
24. Shri Keshava Deva Malaviya	Natural Resources & Scientific Research.
25. Sardar Surjit Singh Majithia	Defence.
26. Shri Balwant Nagesh Datar	Home Affairs.
27. Shri Abid Ali	Labour.
28. Shri Manilal Chaturbhai Shah	Finance.



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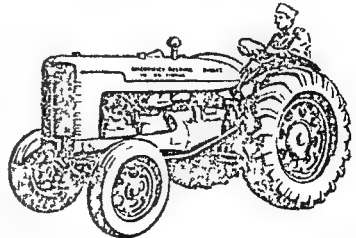
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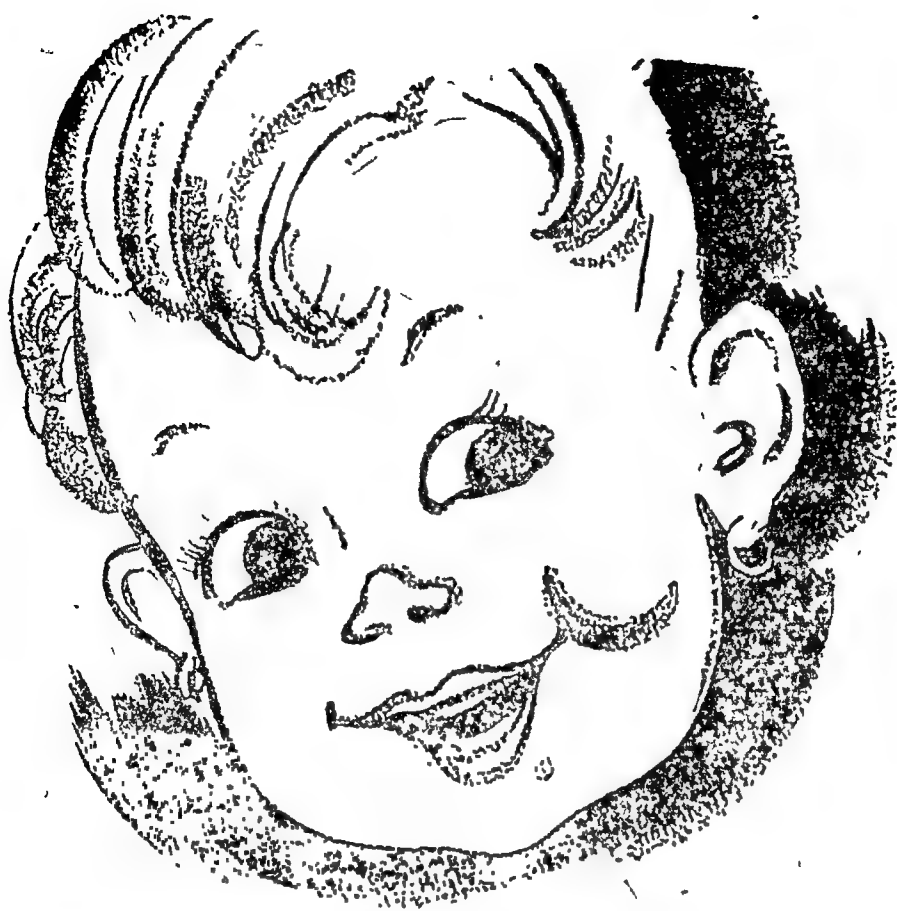
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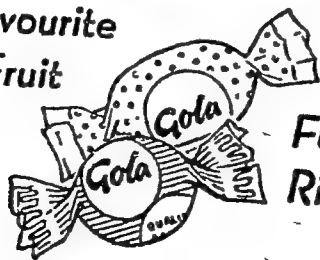


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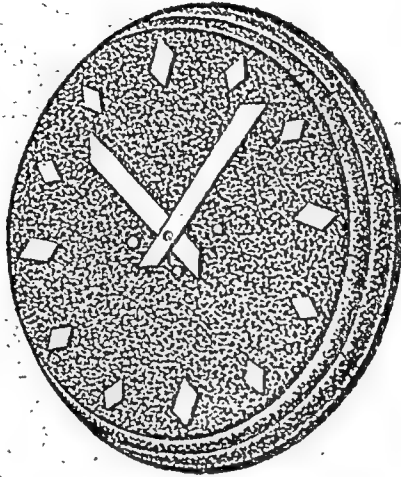
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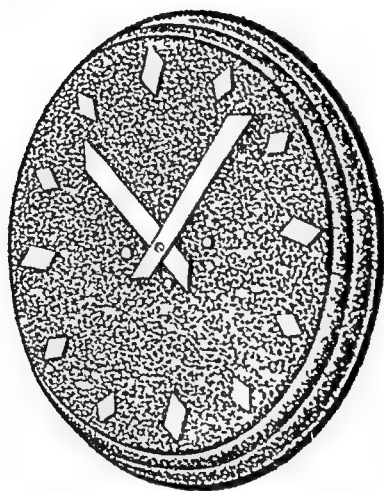
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judicata under Section 11 as between the parties thereto.¹ The undermentioned cases,² however, seem to doubt whether such proceedings are "suits" for the purposes of Section 11 but hold that a subsequent suit on the same question will be barred, in any view, on general principles of law. In *Kalipada De v. Dwijapada Das*,³ their Lordships of the Privy Council have recently held that the general principles of *res judicata* apply to probate proceedings, from which it may be inferred that such proceedings are not suits to which Section 11 is directly applicable. See also the undermentioned cases.^{3a}

Insolvency proceedings. — A decision on the merits in an insolvency proceeding is final and binding on the parties as *res judicata*.⁴ Conversely, the decision in a suit between the parties will operate as *res judicata* in a subsequent insolvency proceeding.^{4a} But the dismissal of an application for insolvency for *default* is not an adjudication on the merits and will not bar a second application for insolvency.⁵ Nor can a decision in insolvency proceedings between a creditor and the insolvent operate as *res judicata* in a subsequent suit between the insolvent and his surety.^{5a} Where a petition for adjudication as an insolvent is dismissed, a subsequent

to the genuineness or otherwise of a will is conclusive and operates as *res judicata* against the parties affected. A.I.R. 1914 Bom 8 (F.B.). Roll. Question whether the proceedings constitute a suit not adverted to.)

(36) AIR 1936 Rang 401 (402). (Where in contentious proceedings for letters of administration it has been found that a certain person is the nearest heir of the deceased, that decision is binding in a subsequent suit upon the parties to the earlier proceedings, and those claiming under them.)

4. (29) AIR 1929 Lah 761 (762).

(05) 1905 Pun Re No. 75 (F.B.). (Overruling 1884 Pun Re No. 145 and 1886 Pun Re No. 62.)

(19) AIR 1919 All 229 (230); 41 All 378 (381).

(18) AIR 1918 All 346 (349); 39 All 626.

(39) AIR 1939 Lah 145 (145). (Decision of Insolvency Court setting aside insolvent's transfer on ground of want of valuable consideration is *res judicata*.)

(37) 39 Pun L R 744 (746).

(99) 1899 Pun Re No. 76. (Notes of judgment.)

(38) AIR 1938 Mad 9 (10); 56 Mad 395.

(21) AIR 1921 Mad 456 (457).

(36) AIR 1936 Nag 112 (112); I.L.R. (1936) Nag 28.

(33) AIR 1933 Nag 373 (374); 30 Nag L R 112.

(Principle of constructive *res judicata* also applies.)

(20) AIR 1920 Nag 97 (98); 16 Nag L R 201

(203). (Judgment in rem.)

(36) AIR 1936 Rang 393 (394); 14 Rang 529.

[But see (21) AIR 1921 Lah 58 (58, 59); 2 Lah 147.

(17) AIR 1917 Lah 75 (76); 1917 Pun Re No. 22.]

4a. (37) AIR 1937 Lah 4 (5).

5. (21) AIR 1921 Pat 472 (472).

(12) 10 All L Jour 51 (51).

(28) AIR 1928 Pat 116 (117). (Dismissal under O. 9, R. 2—*Holloway* AIR 1919 Cal 108.)

5a. (32) AIR 1932 All 610 (613); 54 All 1007.

Note 28

1. (14) AIR 1914 Bom 8 (15); 38 Bom 309 (F.B.).
- (14) AIR 1914 Bom 181 (184); 38 Bom 272.
2. (24) AIR 1924 Mad 578 (580).
- (25) AIR 1925 Mad 861 (869, 870).
- (16) AIR 1916 P C 78 (80); 43 Cal 694; 43 Ind App 91 (P.C.). (Affirming on appeal 11 Cal L Jour 623.)
- (14) AIR 1914 Bom 114 (115); 38 Bom 427
- (484). (Genuineness of will.)
- (14) AIR 1914 Bom 8 (15); 38 Bom 309.
- (Validity of a will.)
- (79) 4 Cal 860 (862). (Do.)
- (18) AIR 1918 Lah 250 (257); 1918 Pun Re No. 13. (Do.)
- (30) AIR 1930 Oudh 29 (31); 5 Luck 186.
- (23) AIR 1923 Rang 257 (258); 1 Rang 258.
- (30) AIR 1930 P C 22 (23); 57 Ind App 24
- (P.C.). (Affirming on appeal AIR 1927 Cal 427.)
- (93) 20 Cal 888 (894, 895).
- (11) 8 All L Jour 1068 (1069).
- (10) 34 Bom 589 (592).
- (06) 4 Cal L Jour 492 (494, 495). (The question, whether a proceeding for the revocation of probate is a suit or not, raised but not decided.)
- (18) AIR 1918 Lah 114 (116); 1918 Pun Re No. 49.
- (93) 16 Mad 380 (383).
- (23) AIR 1923 Rang 9 (10); 11 Low Bur Rui 381.
- (10) 1 Upp Bur Rui 61 (62).
- (09) 5 Low Bur Rui 78 (79).
- (1900) 1893-1900 Low Bur Rui 653.
- [See (11) 10 Ind Gas 434 (436, 437) (Cal).]
- [See also (03) 31 Cal 186 (193).]
- 3a. (35) 39 Cal W N 1071 (1072). (Probate—Application for revocation—Dismissal operates as *res judicata* — Subsequent revocation of probate at instance of another party does not remove bar of *res judicata*.)
- (36) AIR 1936 Pesh 39 (40). (Finding of a Court under the Succession Act with regard

petition alleging a change of circumstances will not be barred by the principle of *res judicata*.⁶ See also the undermentioned cases.⁷

It has been held by the High Courts of Patna and Allahabad that an insolvency proceeding is a suit.⁸ But the Lahore High Court has held that such a proceeding is not a suit but that the general principles of *res judicata* apply to it.⁹

Proceedings under O. 22 R. 5.—As to whether an order under O. 22 R. 5 will be *res judicata*, see Note 13, ante.

Proceedings under the Land Acquisition Act.—A proceeding under the Land Acquisition Act is not a "suit,"¹⁰ but whether it is so or not, a decision in such a proceeding by a competent Court will be *res judicata* in a subsequent litigation on general principles of law,¹¹ unless the property involved in the later litigation is different from that involved in the former,¹² or the person sought to be bound by the decision was no party to it.^{12a}

Proceedings under the Income-tax Act.—The principle of *res judicata* is not applicable to orders under Section 33 of the Income-tax Act so as to prevent that decision from being re-opened in assessments made for subsequent years.¹³

Proceedings under the Indian Companies Act.—A judgment in a Civil Court will bar a remedy by way of an application under the Indian Companies Act in respect of the same matter,¹⁴ and *vice versa*¹⁵ under general principles of law. Similarly, an order in the course of liquidation proceedings settling the list of contributories will become *res judicata* if not appealed against and cannot be re-opened at a subsequent stage of the same proceedings.^{15a} But a liquidator in the winding-up of a company or a trustee in bankruptcy is entitled to ask the

6. ('35) AIR 1935 Pesh 25 (25).
7. ('36) AIR 1936 All 102 (108) : 58 All 655. (Rejection of application under S. 35, Provincial Insolvency Act is no bar to application under S. 38 of the same Act.)
8. ('38) AIR 1938 Lah 490 (491) : 1 L R (1938) Lah 585. (Decision in summary inquiry under S. 24, Provincial Insolvency Act, as to whether debtor is entitled to present petition for adjudication is not covered by S. 4 and does not operate as *res judicata*.)
9. ('30) AIR 1930 Pat 588 (592) : 9 Pat 664. ('18) AIR 1918 All 346 (349) : 39 All 626. ('37) AIR 1937 Lah 4 (5).
10. ('09) 2 Ind Cas 853 (853) (All). (Land Acquisition proceedings.)
11. ('22) AIR 1922 P C 80 (84) : 45 Mad 320 : 49 Ind App 129 (PC).
12. ('39) AIR 1939 P C 133 (136) (PC). (Whereas dispute as to the title to receive the compensation under the Land Acquisition Act has been referred to a Court, and it has been determined, the matter is *res judicata* and binds the parties in any later suit involving that issue—AIR 1922 P C 80, followed.)
13. ('32) AIR 1932 Bom 386 (389) : 56 Bom 501. (Land acquisition officer was party in acquisition proceedings : held decision not *res judicata* against Secretary of State as he was not a party.)
14. ('24) AIR 1924 Cal 757 (759); ('17) AIR 1917 Cal 442 (443).
- 15a. ('05) 2 Cal L Jour 359 (364, 365, 366, 367, 368).
15. ('18) AIR 1918 Lah 45 (47) : 1918 Pun Re No 40. ('38) AIR 1938 Lah 577 (578). (Proceedings against directors under S. 235, Companies Act for misfeasance—Subsequent suit against them for compensation for misfeasance and fraud is incompetent on principle of *res judicata*.)
- 15a. ('15) AIR 1915 Lah 227 (227).
14. ('18) AIR 1918 Lah 371 (371) : 1918 Pun Re No. 66.
13. ('29) AIR 1929 Mad 453 (456) (FB). ('30) AIR 1930 Mad 209 (213) : 53 Mad 420. ('38) AIR 1938 Mad 148 (151) : 1 L R (1938) Mad 183 (SB). (Income tax Officer is not a Court and hence doctrine of *res judicata* does not apply. His assessments are, however, final unless they can be re-opened under some provisions of the Income tax Act.)
- 12a. ('36) AIR 1936 Pesh 29 (31). ('28) AIR 1928 Lah 263 (266). ('07) 34 Cal 466 (469).
12. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).
11. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).
10. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).
9. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).
8. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).
7. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).
6. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).
5. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).
4. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).
3. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).
2. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).
1. ('09) 2 Ind Cas 853 (853) (All). ('07) 34 Cal 466 (469).

Court sitting in the respective jurisdiction to go behind the judgment obtained by a creditor in an ordinary Civil Court against the company or the insolvent.^{15b}

Administration proceedings.—Where in an administration suit the Court determines the nature of the interest of the persons interested in the estate,¹⁶ or the relationship of any of the parties to the deceased,^{16a} such decision is final and conclusive in a subsequent suit between the same parties and their representatives.

Proceedings under the Oaths Act.—A determination of a matter in issue otherwise than by the Court is not a *judicium* and will not operate as *res judicata*.

Therefore, the decision of a question of title in accordance with the Oaths Act is not an adjudication which can operate as an estoppel when the same question of title is again raised in another suit regarding another property. This is because the terms of the Act indicate that the party consents to be bound only in respect of the subject-matter of the pending proceedings.¹⁷ But a decree arrived at after taking of an oath on a question of fact in the case is nonetheless a final adjudication and binding as regards the precise question raised in the former suit.¹⁸

For other miscellaneous proceedings, see the undermentioned cases.¹⁹

- 15b. (32) AIR 1932 Bom 253 (254).
 (27) AIR 1927 All 426 (429) : 49 All 728.
 (22) AIR 1922 P C 253 (256) : 49 Cal 459 : 49 Ind App 100 (PC).
 (78) 3 Cal 340 (345).
 16a. (32) AIR 1932 Cal 634 (635).
 17. (82) 5 Mad 259 (264).
 18. (01) 24 Mad 444 (447).
 (18) 18 Ind Cas 835 (837) : 86 Mad 287.
 (38) AIR 1938 Bom 465 (467). (Hindu father suing or being sued in a representative capacity can bind his major and minor sons by special oath.)
 19. (24) AIR 1924 Rang 119 (122) : 1 Rang 500. (Application to set aside ex parte decree—Non-service of summons—Separate suit does not lie.)
 (34) AIR 1934 All 323 (323). (Decision in a proceeding for disparaging will not operate as *res judicata* in the suit.)
 (24) AIR 1924 P C 202 (206) (PC). (Application for receiver's discharge dismissed—Second application is barred.)
 (38) AIR 1938 All 477 (479). (Judgment-debtor's application under S. 30, U. P. Agriculturists' Relief Act rejected on ground that decree was satisfied—Order of Board of Revenue, effect of which was to take away force of order rejecting application—Subsequent application under S. 30 is not barred by *res judicata*.)
 (38) AIR 1938 All 153 (156) : 1 L R (1938) All 305. (Principle of *res judicata* does not apply to applications for reduction of interest under S. 30, U. P. Agriculturists' Relief Act.)
 (36) AIR 1936 All 179 (184) : 58 All 721. (Interlocutory order for accounts against guardian in proceedings under Guardians and Wards Act—Final order after taking accounts and appeal against such order in interlocutory order can be attacked as no appeal or revision lay against such former order.)
 (33) AIR 1933 All 481 (482). (Garnishee proceedings—Liability of garnishee not decided by the Court.)
 —Question can be agitated by garnishee in execution proceedings.
 (16) AIR 1916 All 238 (239). (Order passed by a settlement officer in a family amendment case is not a decision in a suit to operate as *res judicata*.)
 (05) 2 All Jour 879 (384). (Application under S. 90, Transfer of Property Act.)
 (04) 28 Bom 601 (615). (Orders of mamlat-dar's Court.)
 (04) 28 Bom 215 (226) (F.B.). (Do.)
 (1900) 24 Bom 251 (256, 257). (Do.)
 (38) AIR 1938 Cal 246 (248). (Decision on application under S. 26-f, Bengal Tenancy Act for landlord's fee is not *res judicata* even in respect of fee payable.)
 (36) 64 Cal 1 Jour 545 (546). (Decision in proceeding under S. 26-f of the Bengal Tenancy Act.)
 (30) AIR 1930 Cal 533 (533). (Bengal Tenancy Act (8 of 1886) S. 105—Two plots held under one landlord—Decree with regard to one operates as *res judicata* with regard to other if parties to suits under S. 105 same and sued in same capacities.)
 (29) AIR 1929 Cal 385 (386). (Bengal Tenancy Act S. 106—Suit under, for correction of entry in record of rights—Decision in, is *res judicata*.)
 (28) AIR 1928 Cal 706 (708). (Per Page, J.)
 Application under S. 105-A of the Bengal Tenancy Act—Custom of suspension of rent held not to exist—Decision not having been appealed against by tenant operates as *res judicata* in subsequent rent suit between the parties (Cunning, J., contra.)
 (28) AIR 1928 Cal 479 (480, 481) : 57 Cal 464. (Bengal Tenancy Act, S. 107—Decree in proceedings under S. 105 fixing the area and the rent of the holding—Landlord suing the tenant on that basis—The decree was held to be conclusive between the parties and the tenant were held to be bound to pay the rent fixed by the Settlement Officer.)

29. Two suits or appeals tried together—Appeal from decision in one only, if and when barred.

1. A sues B for adjustment of accounts and for recovery of sums found due. A decree is passed in favour of A for Rs. 680. A and B both appeal, A on the ground that more is due and B on the ground that nothing is due to plaintiff but that money is due to him. Both the appeals are tried together and a single judgment is passed, whereby B is granted a decree for Rs. 1,400. A's appeal being dismissed, A prefers a second appeal from the decree in B's appeal but not from the decree in his own appeal. Is the second appeal barred by *res judicata* by reason of not appealing from the decree in his own appeal? No; by the dismissal of his appeal, the decree of the lower Court in *his favour* for Rs. 680 was simply confirmed and his not appealing from such a decree will not on any ground disentitle him to appeal against the grant of any relief to B in his appeal. If he succeeds in his second appeal, there is nothing to conflict with the decision in his favour for Rs. 680.¹

2. A sues B on a mortgage. B contends that the interest claimed is excessive. The suit is decreed in favour of A as claimed but costs are disallowed. A appeals against the disallowance of costs and B against the award of interest. In a single judgment both appeals are disposed of by which A is given the disallowed costs in his appeal and interest also is reduced in B's appeal. A then prefers a

(19) AIR 1919 Cal 71 (72). (Rejection of application for assessment of mesne profits awarded by the decree in a suit for possession of lands debars a further application for assessment.)
(18) 18 Ind Cas 180 (180): 40 Cal 428. (Withdrawal of application for enhancement of rent under S. 105 of the Bengal Tenancy Act without leave to file fresh application does not bar a fresh suit for enhancement on the same ground.)
(72) 18 Suth W R 208 (209). (Collector's decision under S. 25 of the Act X of 1859 is not a decree.)
(69) 11 Suth W R 145 (146). (Do.)
(68) 10 Suth W R 295 (295). (Application under S. 25, Act X of 1859 is not equivalent to a suit—The Collector does not adjudicate between the parties.)
(37) AIR 1937 Lah 19 (21): 17 Lah 787. (In *Ch-Sutlej* and *Trans-Sutlej* territories, during the period between 1849 and 1865, Settlement Officer was the only judicial authority competent to decide the question of title relating to agricultural land. So the Settlement Officer's decision of the year 1853 on a question of title operates as *res judicata* and that question cannot be re-agitated in Civil Courts.)
(30) AIR 1930 Lah 501 (503). (Application to file appeal in forma pauperis set aside—Decision cannot operate as *res judicata*.)
(24) AIR 1924 Lah 498 (494): 5 Lah 105. (Decisions under Succession Certificate Act are not *res judicata*.)
(25) AIR 1925 Mad 497 (525): 48 Mad 1. (Do. It was also held that there was no final adjudication.)
(17) AIR 1917 Mad 242 (242). (Proceedings

Note 29

(38) 1938 Nag L Jour 171 (172). (Berar Patels and Patwaris Law—Proceedings in respect of appointment of Patel—Finding not based on full and fair enquiry—Subsequent vacancy—Prior finding, not *res judicata*.)
(36) AIR 1936 Oudh 225 (229): 11 Luck 642. (The decision of a Settlement Officer constituting a grant by the Crown and declaring the nature of the grant and the status and rights of the grantee in accordance with Settlement Circular No. 20 of 1863, is not ultra vires, and clearly operates as *res judicata* in a subsequent civil suit between the parties or their representatives.)
(02) 5 Oudh Cas 97 (99). (Proceeding under S. 53 of the Oudh Land Revenue Act, (1876) is a suit, and question decided in it is *res judicata*.)
(38) AIR 1938 Pat 359 (360). (A decision in a rent suit in which the constitution of the holding is expressly put in question and pronounced upon would operate as *res judicata* in a subsequent suit between the parties on the question of the actual holding of the tenants.)
(23) AIR 1923 Pat 174 (176). (Doctrine of constructive *res judicata* does not apply to proceedings under Bengal Tenancy Act, Ss. 109 and 105.)

1. (07) 29 All 730 (732).
(28) AIR 1928 All 274 (275): 50 All 517.
(18) AIR 1918 All 52 (52): 41 All 54.
(11) 8 All L Jour 605 (607).
(27) AIR 1927 Oudh 575 (575).
(13) 21 Ind Cas 264 (266) (Oudh).

1 and Madras¹⁰ that such an appeal is not barred. The basis of these decisions is that
 31 Section 11 does not in terms apply to appeals but that the general principles of *res judicata* apply, that in applying such general principles, the *substance and not the form* of the appeal should be considered, that so considering it, the object of the appeal against one of the decrees is really and in substance to get rid of the *adjudication or conclusion* which gives rise to both the decrees, and that if the appeal succeeds it would have the effect of *superseding* the decree in the other. It was further observed in *Mt. Lachhmi v. Bhulli*, A.I.R. 1927 Lahore 289 (F.B.):

"The foundation of the rule of *res judicata* as understood by ancient and modern lawyers is that a question must be *once fairly and finally* tried by a competent Court and *after* this has been done all further litigation about it should be concluded for ever between the parties. The maxim is "no one shall be vexed *twice* over the same matter." This pre-supposes that the issue has been *once fairly and finally* tried in a former litigation which was independent of the proceedings in which the same matter is again in dispute. The essence of the rule seems to be that the two proceedings should be so *independent* of each other that the trial of one cannot be confused with the trial of the other."

Where two suits having a common issue are tried together and disposed of by a single judgment or by two judgments one incorporating the other, there has been in *substance* only *one* trial and one verdict and there is no question of the successful party being *vexed twice* over the same matter.^{10a}

5. *A* sues *B* and *C*; *B* alone sues *A*. *A*'s suit is dismissed and *B*'s decreed. *A* appeals against *B*'s decree only impleading *B*. Or *A* sues *B*. *B* and *C* sue *A*: *A*'s suit is dismissed and *B* and *C*'s suit is decreed and *A* appeals only against *B*. Or *A* sues *B*, *C* and *D*. It is decreed subject to the payment to *B* by *A* of a certain sum. *C* and *D* appeal making *A* and *B* parties. *B* appeals making *A* alone a party. Both appeals are accepted and *A*'s suit is dismissed. *A* files a second appeal against the decree in favour of *B* only. The judgments in all the cases are either single or incorporating one another. The appeal in each of the cases is barred inasmuch as *the parties in both suits or appeals are not the same* and the result of not appealing is to make the decree in favour of the party not appealed against final.¹¹

Where the matter litigated in the two suits is *not the same*, an appeal in one suit only will not be barred by non-appeal in the other.¹²

30. Two suits tried together — Separate judgments — Appeal from one alone, if barred. — See Note 29.

31. Two appellate decrees in similar terms — Appeal from one, if barred. — See Note 29.

('05) 1905 Pun Re No. 85 (FB). (The following case, namely, 1904 Pun Re No. 8 must be taken to have been overruled by the Full Bench.)

('98) 1898 Pun Re No. 31.

('97) 1897 Pun Re No. 23.

('28) 109 Ind Cas 564 (566) (Lah).

10. ('05) 29 Mad 333 (335).

('26) AIR 1926 Mad 378 (378).

('35) AIR 1935 Mad 214 (215).

('16) AIR 1916 Mad 1133 (1134).

[See ('36) AIR 1936 Mad 10 (11). (Application under S. 42 (2) of the Madras Estates Land Act of 1908 by defendant in suit for

rent and suit, both disposed of by same judgment. Order on application does not bar appeal from decision in suit.)]

[See also ('17) AIR 1917 Mad 597 (598).]

10a. See also ('32) AIR 1932 Mad 125 (126, 127): 61 Mad L Jour 692 (694): 55 Mad 106. (When two judgments incorporate each other, they must be regarded as the same judgment.)

11. ('23) AIR 1923 Cal 496 (498, 499).

('22) AIR (1922) Lah 390 (391): 3 Lah 215. (Distinguishing 16 Cal 233.)

('32) 16 Rev Dec 75 (76).

12. ('23) AIR 1923 Lah 8 (9).

('27) AIR 1927 All 540 (541).

32. General principles apply to appeals.— See Note 29.

33. Matter directly and substantially in issue “constructively”—Explanation IV — General. — It has been seen in Note 7, *ante*, that a matter directly and substantially in issue may be so either *actually* or *constructively*.¹ A matter is directly in issue constructively when it *ought* to be put in issue for the determination of the suit. The rule of constructive *res judicata* is embodied in Explanation IV to the Section, but as has been seen already in Note 23 above, the rule is part of the *general principles* of the law of *res judicata* and therefore the Explanation has not introduced any innovation in the law of *res judicata*.^{1a}

An adjudication is conclusive and final not only as to the *actual* matter determined but as to every other matter which the parties *might have* litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of matters of claim or defence.² The principle underlying Explanation IV, in fact, is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided.³

The Explanation must be distinguished from the rule enacted in O. 2 R. 2; the latter Rule requires that the *whole claim* which has arisen at the date of the suit out of the *cause of action* should be included in the suit so as to avoid the splitting up of the claim arising out of one and the *same cause of action*; while Explanation IV enacts that every *ground* which could and ought to have been advanced in support of the *claim* shall be deemed to have been adjudicated upon, whether it was *actually* urged or not.⁴

Where a matter is constructively in issue it cannot, of course, be said to have been *actually* heard and decided. It could only be *deemed* to be heard and decided.⁵ If the effect of the decision in the former suit is necessarily inconsistent with the defence that ought to have been, but not raised, that defence must be *deemed* to have been finally decided against the person who ought to have raised it.⁶ But a matter

Note 33

1. See also ('98) 25 Cal 136 (189).
- 1a. ('03) 26 Mad 760 (767).
2. ('02) 26 Bom 661 (667, 668).
(17) AIR 1917 Sind 93 (93): 10 Sind L R 29 (31).
(32) AIR 1932 Cal 889 (892, 893): 59 Cal 985.
(39) AIR 1939 Mad 94 (95).
3. (1870) L R 5 C P 607 (613), *Newington v. Levy*. (Affirmed in 6 C P 180 and cited in 26 Bom 661 and AIR 1917 Sind 93.)
4. ('03) 26 Mad 760 (766).
(35) 157 Ind Cas 368 (370) (Lah).
5. ('08) 35 Cal 979 (987, 988). (Dissenting from the dictum of Banerjee, J., in 24 Cal 711 and 28 Cal 17.)
(09) 1 Ind Cas 66 (67) (Cal).
(98) 20 All 110 (113). (Confirmed in 29 All 429 (PC).)
(23) AIR 1923 Bom 36 (37).
(22) AIR 1922 Bom 119 (120, 121): 46 Bom 327.
(04) 6 Bom L R 288 (290).
(01) 25 Bom 189 (192, 197, 201).
(35) 157 Ind Cas 381 (382) (Cal).

- (26) AIR 1926 Cal 511 (511).
- (25) AIR 1925 Cal 427 (429, 430).
- (11) 11 Ind Cas 127 (128) (Cal).
- (05) 1 Cal L Jour 248 (254).
- (04) 31 Cal 79 (82).
- (29) AIR 1929 Lah 872 (874): 11 Lah 99.
- (16) AIR 1916 Lah 315 (315).
- (03) 1903 Pun Re No. 4.
- (81) 1881 Pun Re No. 96.
- (29) 117 Ind Cas 805 (805) (Lah).
- (18) AIR 1918 Mad 147 (148).
- (14) AIR 1914 Mad 399 (416): 17 Ind Cas 445 (449): 37 Mad 70.
- (98) 21 Mad 91 (99).
- (21) 62 Ind Cas 501 (502) (Mad).
- (28) AIR 1928 Oudh 155 (179, 181).
- (23) AIR 1923 Oudh 242 (244).
- (11) 14 Oudh Cas 117 (119).
- (29) AIR 1929 Rang 162 (163). 7 Rang 80.
- (23) AIR 1923 Rang 239 (240): 1 Rang 363.
- (25) AIR 1925 Sind 86 (87): 19 Sind L R 247.
- [See also ('25) AIR 1925 P C 55 (57): 47 All 158.]
6. ('23) AIR 1923 Rang 239 (240): 1 Rang 363.

constructively in issue will not be deemed to have been decided where the case has not been tried upon the *merits*, as where the prior suit was dismissed for non-joinder of parties.⁷

But, though the applicability of the rule of constructive *res judicata* does not and cannot require that the matter should have been *actually* heard and decided in the former suit, it does not dispense with the other essential requirements of the Section such as the sameness of the parties, the competency of the Court, and litigation under the same title.⁸

The Explanation does not apply where the ground of attack or defence has *actually been raised* but is not decided by the Court.⁹ Nor can it be applied against a person who has been *successful* in the previous suit.^{9a} A plea raised at a late stage and rejected on that ground must be taken as not having been raised at all, and, if it should have been raised at the proper time, will be deemed to have been constructively in issue and will be barred in a subsequent suit.¹⁰

The Explanation applies to the plaintiff to the same extent as it applies to the defendant.¹¹

Section 21 of the Code and Section 11 of the Suits Valuation Act which preclude an objection as to territorial jurisdiction or the valuation of a suit, being raised in a Court of appeal or revision for the first time, are only instances of the application of the general doctrine of constructive *res judicata*. Hence, though the above Sections refer only to subsequent stages of the *same* suit and not a *separate* suit, the question as to territorial jurisdiction or valuation impliedly decided in a prior suit cannot be re-agitated in a subsequent suit between the same parties.¹² (See also Section 21 Note 8.)

34. Where relief claimed in later suit is same though under different capacities and vice versa. — See Note 38, *infra*.

35. Grounds of attack or defence in subsequent suit which might and ought to have been alleged as grounds of attack or defence in former suit. — The object of Explanation IV is to compel the plaintiff or defendant to rely upon all grounds of attack or defence which were open to them.¹ A party is bound to bring forward his *whole case* in respect of the matter in litigation, which was open to him upon the points for decision in the suit. He cannot abstain from relying upon, or abandon, a ground of claim which is in question and proper for consideration,

('27) AIR 1927 Rang 333 (334).

('35) 157 Ind Cas 381 (382) (Cal).

('35) 61 Cal L Jour 301 (302).

('09) 1 Ind Cas 66 (67) (Cal).

('12) 10 Ind Cas 75 (77) : 35 Mad 216.

7. ('22) AIR 1922 Mad 259 (262).

8. ('30) AIR 1930 Mad 264 (267).

('27) AIR 1927 Oudh 341 (344).

('08) 1908 Pun L R No. 65, p. 171 (173).

('98) 1 Oudh Cas 22 (26).

9. ('31) AIR 1931 Oudh 157 (158).

('99) 2 Oudh Cas 51 (54).

('33) AIR 1933 All 481 (482).

('29) AIR 1929 Bom 323 (325).

('39) AIR 1939 Cal 1 (3). (Point raised in pleading but not argued.)

('37) AIR 1937 Mad 709 (710). (It is not necessary that an issue should have been framed.)

('21) AIR 1921 Mad 21 (22, 23) (FB).

See also Note 103.

[But see ('38) AIR 1938 Pat 427 (428). (Point raised but not decided held to be *res judicata*—View submitted to be wrong.)]

9a. ('98) 1 Oudh Cas 22 (26, 27).

10. ('26) AIR 1926 Cal 511 (511).

11. ('92) 1892 All W N 224 (225).

('04) 6 Bom L R 594 (597, 598, 599).

12. ('38) AIR 1938 Mad 257 (262).

Note 35

1. ('94) 18 Bom 537 (542).

('37) AIR 1937 Lah 872 (874) : I L R (1937) Lah 496.

and afterwards make it a cause of fresh suit in respect of the same subject-matter.² Thus, where a plaintiff might and ought to have urged a question in a former litigation, he would be estopped from raising the same question in a subsequent suit.³ Similarly, a defendant, who does not raise all the objections which he might and ought to have raised in answer to the plaint claim, will be barred from raising those defences in a subsequent suit between the same parties.⁴

2. ('64) 2 Mad H C R 131 (142).
 ('23) AIR 1923 Lah 560 (563).
 ('31) AIR 1931 All 462 (466) : 53 All 568.
 ('34) AIR 1934 Mad 68 (70). (Burden of proof on defendant—Defendant giving up issue and not letting in evidence in view of pendency of another suit by him involving the same question—Decision in former suit is *res judicata*.)
 ('94) 2 Upp Bur Rul 242.
3. ('87) 11 Bom 708 (723).
 ('32) AIR 1932 Nag 36 (37, 38).
 ('67) 11 Moo Ind App 551 (606) (PC).
 ('28) AIR 1928 All 721 (723) : 50 All 394.
 ('28) AIR 1928 All 714 (715) : 50 All 306.
 ('23) AIR 1923 All 231 (232).
 ('22) AIR 1922 Bom 119 (120, 121) : 46 Bom 327.
 ('19) AIR 1919 Cal 411 (413).
 ('18) AIR 1918 Cal 535 (536).
 ('93) 20 Cal 79 (85) : 19 Ind App 234 (PC).
 ('70) 14 Suth W R 272 (273).
 ('70) 14 Suth W R 195 (195).
 ('68) 10 Suth W R 1 (3) (PC).
 ('67) 8 Suth W R 307 (308).
 ('90) 1890 Pun Re No. 146.
 ('27) AIR 1927 Mad 120 (121).
 ('32) AIR 1932 Nag 90 (91, 92). (Former suit on mortgage—Failure to take plea of invalidity of mortgage—Subsequent suit by mortgagor's son to declare invalidity of mortgage is barred.)
 ('22) AIR 1922 Nag 174 (175).
 ('24) 5 L R Oudh 137 (139).
 ('07) 10 Oudh Cas 145 (150, 158).
 ('33) AIR 1933 Pat 526 (528).
 [See ('33) AIR 1933 Pat 457 (459).]
 [See also ('18) AIR 1918 Cal 223 (224).]
4. ('02) 15 C P L R 167 (170).
 ('33) AIR 1933 Pat 104 (107) : 12 Pat 117. (Question of bar under S. 109, B. T. Act not raised in prior suit. Question must be deemed to have been decided.)
 ('30) AIR 1930 PC 177 (178) : 57 Ind App 181 : 52 All 272 (PC). (Mahomedan widow in possession in lieu of dower sued for recovery of share by other heirs—Interest on dower not claimed by widow—In a subsequent suit against her representative, claim to such interest is barred.)
 ('15) AIR 1915 P C 103 (104, 105) (PC).
 ('66) 11 Moo Ind App 50 (73, 74) (PC).
 ('38) AIR 1938 All 542 (544).
 ('31) AIR 1931 All 38 (40).
 ('31) AIR 1931 All 29 (31).
 ('30) 1930 All L Jour 601 (606). (Suit for pre-emption—Plea as to validity of sale not raised—Subsequent suit to recover possession from vendee—Bar.)
 ('30) 130 Ind Cas 495 (496) (All). (Mahomedan law—Suit by husband for restitution of conjugal rights—Omission to plead charge of adultery in defence—Subsequent suit by wife for divorce on the ground of charge of adultery.)
 ('28) AIR 1928 All 714 (715) : 50 All 306.
 ('27) AIR 1927 All 799 (799) : 50 All 28. (Prior suit on mutual account for a certain period—Subsequent suit by the defendant in earlier suit to recover a sum of money due during the same period.)
 ('27) AIR 1927 All 206 (207). (Objection not taken to maintainability of suit.)
 ('27) AIR 1927 All 39 (41) : 48 All 803. (Affirmed in AIR 1930 P C 177.)
 ('25) AIR 1925 All 417 (418).
 ('24) 5 L R A (Rev) 119 (120).
 ('23) AIR 1923 All 115 (116).
 ('22) AIR 1922 All 463 (464, 465). (Purchaser in execution of money decree who is also heir of mortgagor impleaded—Latter not pleading his purchase cannot subsequently claim to redeem.)
 ('18) AIR 1918 All 278 (279). (Sale in execution of mortgagor's claim as proprietor—Revenue Court—Mutation—Rejection—Mortgagor cannot plead non-saleable interest.)
 ('15) AIR 1915 All 194 (195, 196).
 ('14) AIR 1914 All 414 (415).
 ('11) 8 All L Jour 936 (939). (Three mortgages in favour of same person—Mortgage decree on one mortgage subject to charge—Mortgagee auction-purchaser—Suit by mortgagor's sons—Mortgagee not setting up his mortgage.)
 ('11) 9 Ind Cas 813 (815) (All).
 ('11) 8 All L Jour 358 (361).
 ('10) 6 Ind Cas 375 (376) (All).
 ('09) 3 Ind Cas 117 (121) (All).
 ('08) 5 All L Jour 117 (118, 119).
 ('07) 4 All L Jour 675 (677).
 ('05) 27 All 37 (53) : 32 Ind App 17 (PC).
 ('05) 2 All L Jour 278 (282).
 ('03) 1903 All W N 97 (98). (First suit for possession on the allegation of division—Second suit for declaration of title to possession by partition.)
 ('98) 20 All 81 (86).
 ('92) 14 All 64 (66). (Principle of *res judicata* applies to execution proceedings also.)
 ('89) 1889 All W N 4 (6, 7).
 ('82) 4 All 65 (68).
 ('82) 4 All 21 (22).
 ('81) 1881 All W N 47 (48).
 ('30) AIR 1930 Bom 431 (435) : 54 Bom 696.

1 constructively in issue will not be deemed to have been decided where the case
38 has not been tried upon the *merits*, as where the prior suit was dismissed for non-joinder of parties.⁷

But, though the applicability of the rule of constructive *res judicata* does not and cannot require that the matter should have been *actually* heard and decided in the former suit, it does not dispense with the other essential requirements of the Section such as the sameness of the parties, the competency of the Court, and litigation under the same title.⁸

The Explanation does not apply where the ground of attack or defence has *actually been raised* but is not decided by the Court.⁹ Nor can it be applied against a person who has been *successful* in the previous suit.^{9a} A plea raised at a late stage and rejected on that ground must be taken as not having been raised at all, and, if it should have been raised at the proper time, will be deemed to have been constructively in issue and will be barred in a subsequent suit.¹⁰

The Explanation applies to the plaintiff to the same extent as it applies to the defendant.¹¹

Section 21 of the Code and Section 11 of the Suits Valuation Act which preclude an objection as to territorial jurisdiction or the valuation of a suit, being raised in a Court of appeal or revision for the first time, are only instances of the application of the general doctrine of constructive *res judicata*. Hence, though the above Sections refer only to subsequent stages of the *same* suit and not a *separate* suit, the question as to territorial jurisdiction or valuation impliedly decided in a prior suit cannot be re-agitated in a subsequent suit between the same parties.¹² (See also Section 21 Note 8.)

34. Where relief claimed in later suit is same though under different capacities and vice versa. — See Note 38, *infra*.

35. Grounds of attack or defence in subsequent suit which might and ought to have been alleged as grounds of attack or defence in former suit. — The object of Explanation IV is to compel the plaintiff or defendant to rely upon all grounds of attack or defence which were open to them.¹ A party is bound to bring forward his *whole case* in respect of the matter in litigation, which was open to him upon the points for decision in the suit. He cannot abstain from relying upon, or abandon, a ground of claim which is in question and proper for consideration,

('27) AIR 1927 Rang 333 (334).

('35) 157 Ind Cas 381 (382) (Cal).

('35) 61 Cal L Jour 301 (302).

('09) 1 Ind Cas 66 (67) (Cal).

('12) 10 Ind Cas 75 (77) : 35 Mad 216.

7. ('22) AIR 1922 Mad 259 (262).

8. ('30) AIR 1930 Mad 264 (267).

('27) AIR 1927 Oudh 341 (344).

('08) 1908 Pun L R No. 65, p. 171 (173).

('98) 1 Oudh Cas 22 (26).

9. ('31) AIR 1931 Oudh 157 (158).

('99) 2 Oudh Cas 51 (54).

('33) AIR 1933 All 481 (482).

('29) AIR 1929 Bom 323 (325).

('39) AIR 1939 Cal 1 (3). (Point raised in pleading but not argued.)

('37) AIR 1937 Mad 709 (710). (It is not necessary that an issue should have been framed.)

('21) AIR 1921 Mad 21 (22, 23) (FB).

See also Note 103.

[But see ('38) AIR 1938 Pat 427 (428). (Point raised but not decided held to be *res judicata*—View submitted to be wrong.)]

9a. ('98) 1 Oudh Cas 22 (26, 27).

10. ('26) AIR 1926 Cal 511 (511).

11. ('92) 1892 All W N 224 (225).

('04) 6 Bom L R 594 (597, 598, 599).

12. ('38) AIR 1938 Mad 257 (262).

Note 35

1. ('94) 18 Bom 537 (542).

('37) AIR 1937 Lah 872 (874) : I L R (1937) Lah 496.

11 The Explanation refers to grounds of defence which would have been good
15-36 and proper grounds of defence.⁶ It refers to the condition of things at the time
the former suit was instituted and does not refer to grounds which may come into
existence by some act of the plaintiff.⁶

36. "Might."—Where a party could not have raised a ground of attack or
defence, the rule of constructive *res judicata* will not apply.¹

- (23) AIR 1923 Bom 145 (145, 146). (Standard rent—Defendant not pleading for standard rent in his counter-claim in a High Court suit.)
(83) 7 Bom 272 (278, 279).
(74) 10 Bom 11 C R 293 (294).
(25) AIR 1925 Cal 663 (663). (Plea that decree was based on fraudulent claim cannot be raised.)
(12) 16 Ind Cas 70 (73); 40 Cal 1: 39 Ind App 237 : 6 Low Bur Rul 119 (PC).
(09) 4 Ind Cas 442 (445) (Cal).
(08) 35 Cal 979 (986, 987).
(89) 16 Cal 682 (691) : 16 Ind App 107 (PC).
(79) 4 Cal 190 (196) : 5 Ind App 149 (PC).
(79) 4 Cal L Rep 599 (601, 602).
(78) 3 Cal 705 (707, 708).
(67) 8 Suth W R 307 (303). (Similar suit—Widow not claiming lien for dower.)
(37) AIR 1937 Lah 537 (541) : I L R (1937) Lah 209. (Pre-decree compromise not presented to Court in previous suit cannot be pleaded in subsequent suit.)
(30) AIR 1930 Lah 654 (655). (Plea that mortgage is void not raised in previous suit—Subsequent suit is barred and plea cannot be raised.)
(26) AIR 1926 Lah 162 (163) : 7 Lah 40.
(24) AIR 1924 Lah 26 (27).
(84) 1884 Pun Re No. 142.
(81) 1881 Pun Re No. 95.
(81) 1881 Pun Re No. 89.
(38) AIR 1938 Mad 257 (262). (Objection as to pecuniary or territorial jurisdiction.)
(34) AIR 1934 Mad 68 (70).
(29) AIR 1929 Mad 404 (408). (Execution of mortgage decree pending—Purchaser of equity of redemption joined as judgment-debtor without objection from judgment-debtor—Judgment-debtor then has no status to object on ground that purchase was benami for decree-holder.)
(26) AIR 1926 Mad 1144 (1144). (Party who is not entitled to appeal but who could file cross-objections and does not so file is barred.)
(26) AIR 1926 Mad 536 (537). (Objection to jurisdiction not raised.)
(25) AIR 1925 Mad 1148 (1149). (Property wrongly included—Suit for recovery of possession of properties delivered.)
(24) AIR 1924 Mad 608 (609) : 47 Mad 476. (Plea that minor was not properly represented in a previous suit though not taken by guardian is *res judicata* where it might and ought to have been taken.)
(23) AIR 1923 Mad 551 (552). (Suit by A against B—Plea of discharge by payment to C, A's agent, not raised in former suit—Subsequent suit by B against C for return of money paid is barred.)
(21) 62 Ind Cas 501 (502) (Mad). (Omission to set up special contract.)
(20) AIR 1920 Mad 197 (198). (Representatives of mortgagor—Omission to set up non-liability.)
(17) AIR 1917 Mad 987 (988).
(12) 15 Ind Cas 186 (187) (Mad).
(07) 30 Mad 498 (499).
(06) 29 Mad 353 (355).
(22) AIR 1922 Nag 81 (82).
(19) AIR 1919 Nag 29 (30) : 16 Nag L R 64. (Suit against father—Omission to plead invalidity under Sch. III, Para. 2, C. P. Code—Sons bound).
(35) AIR 1935 Oudh 15 (16). (Suit for actual proprietary possession of land—Defendant claiming some kind of interest in it must put forward his claim as defence.)
(27) AIR 1927 Oudh 234 (235). (Priorsuit for possession on basis of gift decreed—Subsequent suit questioning donor's right to make gift is barred.)
(26) AIR 1926 Oudh 509 (510, 511) : 1 Luck 210. (Plea of irredeemable mortgage not raised in partition proceeding.)
(26) AIR 1926 Oudh 101 (107). (Partition proceeding—Title to a share—Omission to raise.)
(25) AIR 1925 Oudh 719 (720). (Reduction from plaintiff's claim not claimed in prior suit bars subsequent suit thereof.)
(11) 10 Ind Cas 29 (30, 31) (Oudh).
(09) 12 Oudh Cas 347 (368).
(27) AIR 1927 Rang 333 (334).
(36) AIR 1936 Sind 34 (38). (Omission to raise question of jurisdiction.)
[See (71) 7 Mad H C R 263 (266.)]
[See also (05) 27 All 684 (686) (FB).]
(65) 2 Suth W R (Act X of 1859) 57 (58).]
5. (01) 4 Oudh Cas 408 (418).
(06) 8 Bom L R 296 (308, 309); 30 Bom 395.
(04) 26 All 61 (65, 67, 68) (FB).
(28) AIR 1928 Lah 967 (969) : 10 Lah 389.
(04) 14 Mad L Jour 281 (285).
(29) AIR 1929 Rang 162 (163) : 7 Rang 80.
6. (07) 10 Oudh Cas 145 (153).

Note 36

1. (25) AIR 1925 Oudh 719 (720).
(25) AIR 1925 Cal 663 (664). (Matters in subsequent suit to set aside decree outside scope of O. 9 R. 13.)
(36) 164 Ind Cas 457 (458) (Cal).
(37) AIR 1937 Mad 804 (805).

Pleas not permitted by law.—A plea which is not permitted by law to be raised in a suit cannot be said to be one which *might* have been raised.² Thus, where, in a suit to establish title under a certain transfer, the defendant could not, under the law, as it then stood, raise the plea that the transfer was fraudulent under Section 53 of the Transfer of Property Act, it was held that a subsequent suit to set aside the sale on that ground is not bad.³ Similarly, in a suit for a declaration that a decree is null and void, the plaintiff could not ask for the relief of restitution as such relief by way of *suit* is barred by Section 144 sub-clause 2.⁴

Pleas based on facts not within the knowledge of the party at the time of the former suit.—Where the facts on which a plea might have been raised by a party were not within his knowledge at the time of the former suit, it could not be said that he might have raised it.⁵ Thus, where *A* filed against *B* succession certificate proceedings in respect of a deceased person's estate and obtained a certificate, but *B* was not aware at the time that a will had been executed by the deceased person by which he (*B*) had been appointed executor, a subsequent application for revocation of the certificate granted to *A* is not barred under Explanation IV to Section 11.⁶ But the want of knowledge or mistake must be one of *fact*. A plea not raised owing to a wrong view of the *law* cannot be said to be one which could not have been raised. Thus, where a person who was a sub-mortgagee wrongly sued as an *assignee* of the mortgage and the suit was dismissed, a subsequent suit as a *sub-mortgagee* is barred inasmuch as the previous suit was based not on the want of knowledge of any *fact* but on a wrong view of the *law*.^{6a}

Pleas based on facts not in existence at the time of the former suit.—A plea based on facts which did not exist at the time of the former suit but which came into existence subsequently, cannot be said to be one which might have been raised in the former suit.⁷ Thus, *A* brings a suit against *B* for declaration of his title as owner of certain lands. The suit is dismissed on the ground that *A* is not the owner. At the time of the suit *A* is in adverse possession of the land but has not perfected his title by adverse possession. After the dismissal of the suit, he

2. See cases in foot notes (3) and (4) *infra*, and also the following cases:—

('20) AIR 1920 Cal 888 (889).

('17) AIR 1917 P C 111 (114) (PC).

('29) AIR 1929 All 252 (253). (Legal representative brought on record after preliminary decree on mortgage cannot challenge the validity of the mortgage—Final decree will not bar suit for declaration that mortgage was not binding.)

('26) AIR 1926 Mad 774 (777) : 50 Mad 320. (Suit for declaration as to invalidity of alienation—Partition and allotment of alienor's share cannot be granted by the Court.)

('23) AIR 1923 Mad 212 (214). (Point not competent to be discussed in previous proceeding such as the validity of decree in execution proceedings—Such point not raised in execution proceedings—Subsequent suit raising the point not barred.)

('15) AIR 1915 Nag 111 (112):11 Nag L R 31. (Question of title in suit under S. 9, Specific Relief Act.)

('12) 17 Ind Cas 318 (320) (Oudh).

[See also ('34) AIR 1934 All 68 (69, 70).]

3. ('25) AIR 1925 Mad 1107 (1107).

4. ('19) AIR 1919 Sind 79 (79):18 Sind L R 153.

5. ('97) 24 Cal 711 (713).

('07) 9 Bom L R 1020 (1023).

('98) 42 Cal W N 560 (564, 565).

('88) 15 Cal 800 (809) : 15 Ind App 106 (PC).

('17) AIR 1917 Lah 19 (21):1916 Pun Re No. 94.

('27) AIR 1927 Nag 83 (84). (Prior mortgage renewed by subsequent mortgage—Suit on the latter without knowledge of flaw in the former—Subsequent suit on former is not barred.)

('09) 5 Nag L R 189 (192, 193).

('10) 1 Upp Bur Rul 66 (68, 69).

('31) AIR 1931 Sind 27 (27).

[See ('34) AIR 1934 All 68 (69, 70) however the party exercising due diligence obtained a decree which was res judicata.]

6. ('11) 11 Ind Cas 320 (320) (Oudh).

6a. ('29) AIR 1929 All 252 (253).

7. ('66) 9 Mad 111 (112):11 Mad L R 31.

('04) 1904 P C 111 (114) (PC).

(1915) 11 Nag 111 (112):11 Nag L R 31.

(1925) 17 Ind Cas 318 (320) (Oudh).

(1934) AIR 1934 All 68 (69, 70).

perfects his title by adverse possession and subsequently sues *B* again on the basis of his title by adverse possession. The suit is not barred as the cause of action for the suit is based on facts not in existence at the time of the former suit.⁸ Similarly, a right to partition of properties is a *continuous* right and therefore a right to a partition at a *particular time* claimed in the previous suit does not, where the former decree has not been executed, bar a fresh suit for partition on a right to partition arising *subsequently* to the first suit; as to all points, however, which were or ought to have been decided in the first suit, they will, of course, be barred.⁹ Similarly, the mere fact that in a prior suit, a prayer for the settlement of a scheme was not granted, will not prevent a renewed attempt by way of suit to have a scheme framed when the occasion arises *at a later date*.¹⁰ *A* obtains a decree against *B*, his wife, for restitution of conjugal rights. The decree is not executed, but the wife returns to his house, stays with him for two months and again deserts him. *A* brings a second suit for restitution of conjugal rights. The suit is not barred inasmuch as it is based on a *subsequent* cause of action, not in existence at the time of the first suit.¹¹

37. "Ought." — In order that a plea might be barred by Explanation IV to Section 11, it must be one which, not only *might* have been raised in the

('32) AIR 1932 All 416 (417) : 54 All 777.

('32) AIR 1932 All 5 (15) : 53 All 815. (Dismissal of suit for restitution of conjugal rights — Subsequent suit for the same relief at the proper time is not barred.)

('31) AIR 1931 All 635 (639) : 54 All 299 (FB). (Statutory right by new Act can be raised as defence.)

('27) AIR 1927 All 421 (421, 422). (In the suit by the sons to set aside the sale by their father, the vendee could not have claimed refund of purchase money unless and until the sale was set aside.)

('16) AIR 1916 All 163 (163, 164) : 38 All 509 (515).

('06) 3 All L Jour 541 (543).

('05) 27 All 136 (137, 138).

('04) 26 All 61 (65, 67, 68) (FB).

('86) 1886 All W N 69 (69, 70).

('81) 3 All 334 (337). (Dismissal of suit by assignee of mortgage bond, on ground of sale deed being unregistered does not bar subsequent suit on the bond after registration.)

('34) AIR 1934 Bom 36 (37) : 58 Bom 119.

('27) AIR 1927 Bom 87 (88). (Heirship not in existence at the date of former suit.)

('16) AIR 1916 Bom 318 (319) : 40 Bom 614 (620).

('36) 40 Cal W N 166 (171). (Suit for rent by landlord against tenant—Plea of partial dispossession and suspension of rent—Decision negating plea — Subsequent plea in later suit not barred when there is eviction from same land subsequent to prior suit — But where plea in later suit is that dispossession pleaded in prior suit is still continuing, the plea will be barred.)

('34) AIR 1934 Cal 82 (83, 84).

('26) AIR 1926 Cal 178 (178). (Suit for redemption—Subsequent suit for mesne profits from date of deposit of redemption amount and

date of delivery of possession.)

('10) 8 Ind Cas 28 (29) (Cal).

('08) 8 Cal L Jour 303 (304). (Claim for mesne profits for period subsequent to the period in question in the first suit.)

('87) 14 Cal 401 (411). (Later suit on subsequent cause of action.)

('81) 7 Cal 169 (171, 172).

('28) AIR 1928 Oudh 411 (413). (Previous suit by reversioner for possession based on the alleged unchastity of a widow, resulting in a forfeiture of her rights, will not bar a subsequent suit for possession on the death of the widow.)

[See also ('32) 13 L R Oudh (Rev) 315 (316, 317). (Statutory rights by new Act.)]

8. ('26) AIR 1926 Lah 668 (669).

('11) 9 Ind Cas 572 (574) : 33 All 463.

('84) 1884 Pun Re No. 54.

9. ('15) AIR 1915 All 1 (2) : 37 All 155 (158).

('20) AIR 1920 Cal 108 (109).

('24) AIR 1924 All 905 (906) : 46 All 820.

('06) 28 All 627 (629).

('91) 13 All 309 (313).

('23) AIR 1923 Bom 467 (468). (Suit to recover share as per deed of partition made by the father— Suit dismissed on the ground that the partition was unequal and unfair — Second suit for partition not barred.)

('12) 37 Bom 307 (312).

('28) AIR 1928 Cal 459 (461). (Decree directing some of the properties to remain joint—Second suit for partition of such properties barred.)

('06) 10 Cal W N 839 (840).

('84) 10 Cal 97 (101, 102). (Subsequent suit by transferee from co-sharer.)

('90) 13 Mad 313 (315).

('21) AIR 1921 Low Bur 13 (15) : 11 Low Bur Rul 1.

10. ('22) AIR 1922 Mad 418 (414, 415).

11. ('94) 18 Pom 327 (329).

former suit but *ought* to have been raised therein.¹ It depends upon the facts of each particular case whether a matter ought to have been made a ground of attack or defence in the previous suit,² and various tests have been applied to determine, in individual instances, whether a plea which might have been raised is also one which *ought* to have been raised.³ One of the most important tests is to see *whether the matters raised in the two suits are so dissimilar that their union might lead to confusion.*⁴ In this view the following pleas cannot be said to be such as ought to have been raised in the former suit:—

(1) Pleas that will make the suit bad for *multifariousness* or will embarrass the trial thereof.⁵

(2) Pleas *irrelevant* to the suit,⁶ *i.e.*, pleas which are not necessary, either

Note 37

1. ('93) 16 Mad 117 (120).
 ('21) AIR 1921 Pat 326 (327).
 ('31) AIR 1931 P C 5 (9) : 10 Pat 284 : 58 Ind App 17 (PC). (Relief which plaintiff was not bound to ask for is not *res judicata*.)
 ('28) AIR 1928 All 721 (723) : 50 All 394.
 ('06) 28 All 644 (646).
 ('05) 2 All L Jour 265 (267, 268).
 ('81) 5 Bom 589 (594).
 ('81) 1881 Bom P J 204 (204, 205).
 ('38) AIR 1938 Cal 793 (794).
 ('13) 18 Ind Cas 764 (765) (Cal). (Suit for maintenance is not barred by *res judicata* by a previous one for partition.)
 ('11) 10 Ind Cas 305 (307) : 38 Cal 448.
 ('38) AIR 1938 Lah 671 (673). (Plea which it was the duty of the plaintiff in the previous suit to raise, not raised—Plea barred by *res judicata*.)
 ('35) AIR 1935 Lah 825 (826). (Suit against two defendants decreed as against defendant 2 only and plaintiff ordered to pay costs of defendant 1—Plaintiff appealed against this, impleading defendant 2 also and Court ordered defendant 2 to pay costs of the other defendant—Appeal by defendant 2 against the decree of trial Court passed against him is not barred by the other appeal.)
 ('35) AIR 1935 Lah 758 (756).
 ('33) AIR 1933 Lah 279 (282).
 ('29) AIR 1929 Lah 872 (874) : 11 Lah 99.
 ('27) AIR 1927 Lah 505 (506) : 8 Lah 308.
 ('22) AIR 1922 Lah 858 (860). (Held on the facts that he need not.)
 ('17) AIR 1917 Lah 139 (141).
 ('12) 1912 Pun L R No. 134, p. 415.
 ('30) AIR 1930 Mad 539 (540).
 ('27) AIR 1927 Mad 61 (62).
 ('15) AIR 1915 Mad 420 (420).
 ('03) 13 Mad L Jour 359 (362). (On the facts held not bound to raise it.)
 ('38) AIR 1938 Nag 193 (195).
 ('37) AIR 1937 Oudh 394 (395) : 13 Luck 323.
 ('17) AIR 1917 Oudh 410 (414) : 19 Oudh Cas 171.
 ('30) AIR 1930 Rang 197 (198). (It was impossible to say that the matter ought to have been raised in the previous suit.)
 ('37) AIR 1937 Sind 155 (156).
 [See also ('05) 28 Mad 406 (412)].

2. ('93) 20 Cal 79 (85).

- (30) AIR 1930 Mad 701 (701, 702) : 53 Mad 761. (Previous suit confined to a particular right only—Plea claiming general right in subsequent suit is not barred by constructive *res judicata*.)
 ('11) 35 Bom 507 (510).
 ('20) AIR 1920 Nag 177 (179).
 ('37) AIR 1937 Oudh 159 (163) : 12 Luck 540.
 ('28) AIR 1928 Oudh 411 (413).
 ('12) 17 Ind Cas 334 (337) (Oudh).
3. ('21) AIR 1921 Cal 321 (324).
4. ('93) 20 Cal 79 (85) : 10 Ind App 234 (PC).
 ('30) AIR 1930 Lah 487 (488).
 ('33) AIR 1933 Cal 900 (903) : 60 Cal 1158.
 ('30) AIR 1930 Cal 588 (590).
 ('09) 1 Ind Cas 808 (810) (Cal).
 ('08) 7 Cal L Jour 504 (510, 511).
 ('38) AIR 1938 Lah 443 (444) : I L R (1938) Lah 729.
 ('21) AIR 1921 Lah 17 (19).
 ('35) AIR 1935 Mad 90 (90). (The fact that the two claims have to be supported by different evidence is not a satisfactory test).
 ('31) AIR 1931 Mad 268 (269).
 ('26) AIR 1926 Mad 1128 (1129). (First suit for possession on ground of possession and dispossession—Second suit for partition on basis of joint title.)
 ('28) AIR 1928 Rang 9 (10, 11) : 5 Rang 565.
 ('23) AIR 1923 Rang 122 (123) : 11 Low Bur Rul 451.
5. ('15) AIR 1915 Lah 122 (123) : 1915 Pun Re No. 68.
 ('25) AIR 1925 All 486 (487) : 47 All 561.
 ('35) AIR 1935 Bom 181 (183).
 ('90) 14 Bom 81 (52).
 ('35) AIR 1935 Lah 753 (756).
 ('35) AIR 1935 Lah 489 (490) : 16 Lah 1060. (Reversing AIR 1935 Lah 44.)
6. ('25) AIR 1925 Mad 226 (226).
 ('29) AIR 1929 Lah 294 (295). (Suit by A for pre-emption against B, one of two vendees, and recovery of entire property—Subsequent suit by C, other vendee, against A and B for recovery of his share of property and decree therein—Suit by A against B for refund of half the price was not barred.)
 ('80) 5 Cal 425 (431).
 ('28) AIR 1928 Lah 489 (491).

solo or in the alternative to sustain the claim made,⁷ or pleas which, if proved, would not have affected the result of the suit.⁸

(3) Pleas, the evidence in support of which is such that it might be destructive of the other pleas.⁹

(4) Pleas based on causes of action which cannot be united without inconsistency and confusion.¹⁰

Where a point is one, which the Court, in its discretion, may or may not decide, it cannot be said that it ought to have been raised.¹¹

38. Grounds of attack. — The grounds of attack in Explanation IV mean grounds of attack in respect of the claim made and do not include other claims that were open to the plaintiff.¹ In respect of the claim made, the plaintiff is bound to set up all the grounds of his title in the alternative, by which he became entitled to the relief, and, if he fails to do so, cannot maintain a subsequent suit for the same claim on any ground so omitted to be raised.² If he sets up a title

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| <p>7. ('92) 1892 Pun Re No. 124.
 ('21) AIR 1921 Bom 195 (196) : 45 Bom 24.
 ('81) 1881 All W N 163 (163). (Plea as to pre-emption in a redemption suit.)
 ('82) AIR 1932 Bom 222 (223) : 56 Bom 292.</p> <p>8. ('20) AIR 1920 Pat 291 (322) : 5 Pat L Jour 164.
 ('93) 16 Mad 11 (18).
 ('88) AIR 1933 Cal 900 (903) : 60 Cal 1158. (Former suit by purchaser from Hindu widow against her and reversioners for possession—Subsequent suit by reversioners after death of widow for possession on the ground of want of legal necessity not barred.)
 ('11) 9 Ind Cas 585 (586) (Cal).
 ('25) AIR 1925 Lah 552 (553).
 ('97) 1897 Pun Re No. 76.
 ('29) AIR 1929 Mad 379 (381).
 ('13) 19 Ind Cas 589 (591) (Mad).
 ('13) 9 Nag L R 143 (144).
 ('08) 11 Oudh Cas 69 (73). (Decision in a suit instituted for inheritance would not bar a subsequent suit for dower.)</p> <p>9. ('08) 81 Mad 385 (396).
 ('21) AIR 1921 Pat 326 (327).
 ('08) 5 All L Jour 729 (730, 731).
 ('99) 1899 All W N 190 (191). (Objection which would put the objector out of Court could not be raised.)
 ('81) AIR 1931 Bom 187 (189).
 ('82) 8 Cal 819 (823).
 ('35) AIR 1935 Lah 753 (756).
 ('81) AIR 1931 Mad 268 (269). (Alternative claims should be set up in the same suit unless they are incompatible.)
 ('26) AIR 1926 Oudh 545 (545).</p> <p>10. ('23) 71 Ind Cas 1009 (1011) (Lah).
 ('12) 17 Ind Cas 334 (337) (Oudh).
 ('24) AIR 1924 All 355 (356) : 46 All 230.
 ('07) 29 All 331 (338, 339) : 34 Ind App 72 : 10 Oudh Cas 117 (PC).
 ('05) 27 All 142 (144, 145).
 ('05) 2 All L Jour 342 (344).
 ('22) AIR 1922 Bom 29 (30) : 46 Bom 803.
 ('30) AIR 1930 Cal 588 (590). (Suit for ejectment of defendant as trespasser — Plea of tenancy — Subsequent suit for ejectment as tenant after giving notice.)</p> | <p>(28) 107 Ind Cas 110 (112) (Lah).
 ('13) 18 Ind Cas 973 (974) (Mad).
 ('09) 12 Oudh Cas 347 (379).
 ('17) AIR 1917 Sind 93 (94) : 10 Sind L R 29. [See also ('14) AIR 1914 All 457 (458).
 ('27) AIR 1927 Nag 322 (322, 323). (Alternative causes of action need not be added — It is conceived that in that case the two causes of action were inconsistent with each other.)]</p> <p>11. ('27) AIR 1927 Mad 120 (121).</p> <p style="text-align: center;">Note 38</p> <p>1. ('94) 18 Bom 537 (542).
 ('29) AIR 1929 All 696 (697). (Suit for redemption of whole mortgage by one co-mortgagor — Contribution against other co-mortgagors need not be set up in the suit.)
 ('31) AIR 1931 All 73 (76). (Grounds relating to other claims need not be urged. The observations as to different grounds of title not being necessary to be urged are, it is submitted, not correct. See Note 70, <i>infra</i>.)
 ('92) 15 Mad 336 (341, 343). (First suit for declaring will as forgery—Second suit questioning validity of will not barred.)</p> <p>2. ('81) AIR 1931 Mad 268 (269).
 ('76) 2 Cal 152 (172, 173, 177) (FB).
 ('81) AIR 1931 All 462 (466) : 53 All 563.
 ('23) AIR 1923 All 231 (232). (Suit by son to avoid execution sale of joint family property on ground of no necessity — Second suit to avoid sale on ground of immorality barred.)
 ('12) 15 Ind Cas 817 (817) (All).
 ('09) 31 All 323 (325).
 ('94) 16 All 252 (253).
 ('75) 7 N W P H C R 60 (63, 64, 66) (FB). (Former suit for possession of a one-fifth share of her deceased husband's estate as legatee under an alleged will—Her claim was dismissed—Second suit on the ground of heirship to recover three out of forty-eight shares in the same estate not barred.)
 ('67) 2 Agra 305 (305, 306).
 ('13) 37 Bom 224 (230).
 ('01) 25 Bom 189 (192, 197, 201).
 ('78) 3 Bom 137 (140).</p> |
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to certain properties and he has two or more *alternative capacities* on which to rest such title, he must disclose both those capacities.³ But where the capacity in which he sues in the subsequent suit is one in which he is a *stranger* to the capacity in which he sued in the former suit, he need not set up both the capacities in the former suit.⁴ The reason is that in a such a case the litigation is itself *under a different title* from that of the former suit and on that ground the subsequent suit will not be barred by *res judicata*.⁵ The following illustrations will elucidate the above principles clearly :—

Illustrations

1. *A* sues *B* for a sum of money on a contract for the supply of boats and on failing therein sues *B* again for the same amount as compensation for services rendered in supplying the boats. The suit is barred inasmuch as the latter ground could have been advanced as a ground of attack in the former suit.⁶

2. *A*, a minor, sues to set aside a compromise on the ground of fraud. His suit is dismissed on the ground that the fraud is not proved. *A* subsequently sues to set aside the same compromise on the ground that the Court's sanction was not obtained under O. 32 R. 7, in the suit in which the

('39) 43 Cal W N 437 (439). (Mokarari lease by Mahant—Suit by his successor for ejection of successor or tenant on ground that plaintiff is heir of tenant and alternatively that tenant held only life interest—Suit dismissed — Subsequent suit by another Mahant on ground that mokarari lease was void after death of grantor — Suit barred by constructive *res judicata*.)

('08) 12 Cal W N 292 (298).

('88) 15 Cal 422 (431) : 15 Ind App 66 (PC). (That in the former suit the plaintiff asked for sub-proprietary right, and in the latter for the superior proprietary right, does not make any difference as regards the cause of action.)

('79) 4 Cal 190 (197) : 5 Ind App 149 (PC).

('79) 3 Cal L Rep 253 (256, 257). (Prior suit to set aside the sales for irregularity dismissed — Subsequent suit on the ground that the sales were void ab initio barred.)

('74) 22 Suth W R 464 (465).

('73) 20 Suth W R 482 (483).

('72) 18 Suth W R 163 (164) (PC).

('72) 17 Suth W R 351 (352).

('71) 15 Suth W R 163 (169).

('70) 13 Suth W R 209 (209).

('69) 12 Suth W R 336 (337).

('69) 12 Suth W R 55 (56).

('68) 10 Suth W R 426 (426). (Dismissal of a claim to recover land as to towfir or excess bars a subsequent suit for possession of the same land as part of the claimant's taluk.)

('31) AIR 1931 Lah 217 (219).

('08) 1903 Pun L R No. 95, p. 290. (Suit for possession as mortgagee—His claim to succeed as a reversioner not barred.)

('08) 1903 Pun L R No. 65, p. 172. (First suit on the ground that the plaintiff and not the deceased was the owner of the property dismissed — Second suit on the ground that he was adopted son and heir of the deceased not barred.)

('96) 1896 Pun Re No. 63. (Prior suit for proprietary possession dismissed — Subsequent

suit for possession as occupant without right of proprietorship barred.)

('24) AIR 1924 Mad 711 (712). (Person entitled to a share claiming whole and failing — Second suit for share is barred.)

('20) AIR 1920 Mad 900 (900).

('84) 7 Mad 264 (265).

('38) 174 Ind Cas 777 (778) (Nag). (First suit for possession based on title — Defendants pleading possession as heirs — Dismissal of suit — Subsequent suit for joint possession with defendants — Plaintiff ought to have asserted this right in former suit—Not having done so, suit held barred.)

('15) AIR 1915 Low Bur 152 (153). (Suit for redemption on the basis of a mortgage failed — Second suit based on promise to allow redemption on payment not barred.)

[But see ('06) 9 Oudh Cas 235 (238).]

3. ('23) 71 Ind Cas 1009 (1011) (Pesh).

('26) AIR 1926 Mad 849 (851).

('81) AIR 1931 Lah 217 (219).

('81) AIR 1931 Mad 268 (269).

4. ('86) 1886 Pun Re No. 6.

('10) 34 Bom 416 (419).

('38) AIR 1938 Lah 139 (145). (Former suit as exclusive owner — Subsequent suit as co-sharer for accounts not barred.)

5. See Note 70, *infra*, for a full discussion of the meaning of the words "litigating under the same title".

('32) AIR 1932 Mad 589 (591).

6. ('12) 15 Ind Cas 374 (375) (Low Bur).

('75) 1 Bom 87 (89, 90). (Prior suit on contract against the defendants as principals — Second suit on the same contract against the defendants as agents barred.)

('77) 3 Cal 23 (25).

('98) 8 Mad L Jour 197 (199). (Suit on promissory note for money due on accounts—Second suit for amount due on accounts is barred.)

('82) 5 Mad 47 (50). (First suit for money based on one partnership—Second suit based on another partnership barred.)

compromise decree was passed. The suit is barred. The latter ground ought to have been made a ground of attack in the former suit.⁷

3. *A*, the plaintiff, bases his claim on *nearness of kin* but does not mention the family custom but for which the nearness could not be proved. His suit is dismissed on the merits. Subsequently he files a suit for the same relief basing his claim on *nearness of kin by family custom*. His suit is barred.⁸

4. *A* sues to eject *B* from certain properties on the ground that he is the reversionary heir of one *X* deceased. Failing in this suit he brings a fresh suit for the same relief on the ground that he is the heir of *Y* (who had died even at the time of the former suit). The suit is barred. The plaintiff was bound to have set up both the capacities under which he became entitled to eject *B*.⁹

Where the assignee of a promissory note sues the promisor and the assignor and seeks relief against both jointly or severally, the only basis of the claim against the assignor could be that the assignment has failed for want of consideration. This ground of attack must, therefore, be taken to be one which might and ought to have been raised and impliedly decided.¹⁰

39. Grounds of defence. — A party having several grounds of defence to a suit is bound to set forth all such grounds and cannot reserve any one or more of them for a separate suit.¹ In *Srimut Rajah Mootoo Vijaya v. Katama Natchiar*,² their Lordships of the Privy Council said :

"When a plaintiff claims an estate and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge then, to bring forward."

But the grounds which will be barred must be grounds which will be *answers to the claim made* in the previous suit, that is, they must be such as, if raised, would *defeat* the plaintiff's claim.³ If not, the party is not bound to raise them.⁴

7. ('98) 21 Mad 91 (99).

8. ('25) AIR 1925 P C 55 (57) : 47 All 153 : 52 Ind App 100 (P C).

('80) 2 Mad 352 (355). (First suit — Claim for possession based on inheritance—Second suit claiming under agreement not barred.)

9. ('26) AIR 1926 Mad 234 (234).

('20) AIR 1920 Nag 37 (38).

('97) 19 All 517 (519). (First suit as owner—Second suit as mortgagee.)

('81) AIR 1981 Bom 114 (116).

('01) 25 Bom 189 (192, 197, 201). (First suit as surviving member of joint family—Second suit as reversioner.)

('30) AIR 1930 Cal 690 (691).

('77) 2 Cal 152 (172, 173, 177) (FB). (First suit as heir of *A*. Second suit as heir of *B*.)

('81) AIR 1931 Lah 217 (219). (Right of inheritance and by sale.)

('13) 1913 Pun L R No. 324, p. 1088 : 1913 Pun Re No. 86. (First suit based on one relationship—Second suit on another.)

('23) AIR 1923 Mad 257 (259) : 46 Mad 135.

(Title by purchase asserted and negatived—Subsequent suit on title by heirship.)

('17) AIR 1917 Mad 481 (482, 483). (First suit for ejectment based on ancestral right—Second suit as heir of another person.)

('03) 26 Mad 645 (646).

('28) AIR 1928 Rang 9 (10, 11) : 5 Rang 565.

(First suit as krittima adopted son—Second suit as apatitha son.)

('23) AIR 1923 Rang 122 (123, 124) : 11 Low Bur Rul 451. (First suit as donee from deceased

father—Second suit as heir of deceased father.)

[See also ('28) AIR 1928 All 127 (127) : 50 All 306. (Prior suit for possession based on title as vendee—Subsequent suit for possession on basis of mortgage.)]

10. ('29) AIR 1929 Oudh 172 (174) : 4 Luck 603 (FB).

Note 39

1. ('30) 130 Ind Cas 495 (496) (All). (Suit for restitution of conjugal rights — Wife not pleading that husband was impotent—Subsequent suit for dissolution of marriage on ground of impotency barred.)

('30) 1930 All L Jour 601 (606).

('26) AIR 1926 Lah 162 (163) : 7 Lah 40.

('24) AIR 1924 Cal 138 (139).

('78) 1 All 316 (316).

('75) 1 All 75 (76).

('81) 1881 Bom P J 281.

('14) AIR 1914 Lah 390 (392) : 1915 Pun Re No. 12.

('26) AIR 1926 Mad 1144 (1144). (Party not entitled to appeal but in a position to file cross-objection is barred by res judicata.)

('96) 19 Mad 145 (148).

('33) AIR 1933 Pat 41 (42) : 16 Pat 748.

('14) AIR 1914 Sind 24 (24, 25) : 8 Sind L R 218.

[See also ('78) 5 Ind App 149 (155) : 4 Cal 190 (P C).]

2. ('66) 11 Moo Ind App 50 (73) (PC).

3. ('24) AIR 1924 Lah 83 (83).

('14) AIR 1914 Lah 452 (453) : 1914 Pun Re No. 29.

('32) AIR 1932 Nag 36 (38).

4. ('06) 4 Cal L Jour 211 (216). (Plaintiff bringing

Illustrations

1. *A* sues *B* in ejectment. *B* is not entitled to retain possession as against *A*, but has got a right of redemption of a mortgage on the said property. He does not set up his right of redemption in *A*'s suit, but brings a separate suit therefor, subsequently. He is not barred from doing so because the existence of the right of redemption is not a valid defence to the suit for ejectment and therefore need not have been raised in the former suit.⁵

2. *A*, a purchaser of certain properties from certain members of a joint Hindu family, sues to recover the property purchased by him impleading alienees of *other* properties from the same members as parties. The latter need not claim possession of *their* properties in that suit inasmuch as such a claim will not be an answer to the plaintiff's claim.⁶

3. *A* sues *B* for recovery of a certain sum of money. *B* is entitled to plead a set-off under O. 8 R. 6, of a sum of money due by *A* to him, but does not plead it. He subsequently sues *A* for such sum. He is not barred from doing so, because the plea of set-off is not an answer to the plaintiff's claim in the first suit but is a separate claim by defendant himself against such plaintiff.⁷ Where, however, the former suit was on a *general balance of accounts*, a set-off of moneys received by the plaintiff from the defendant would be an answer to the plaintiff's claim and therefore must be pleaded as a ground of defence.⁸ In a suit for possession of land based on title, a claim for compensation for the improvements made by the defendant ought to be set up by him in defence. If it is not so set up, a decree for possession passed in the suit would operate as a bar to the further agitation of the question of compensation in a subsequent suit.^{8a} A plea of constructive *res judicata* must be determined only with reference to the suit as framed and not with reference to what under the law the suit must have been.⁹

40. Application of the above principles to mortgage suits. — The principles stated in the foregoing Notes apply to all suits, including mortgage suits.^{1a} It will, however, be useful to illustrate their applicability to different classes of cases arising out of mortgage transactions.

Several suits for redemption of the same mortgage. — There was a conflict of opinion as to whether, where nothing is done under a prior decree for redemption, a subsequent suit for redemption is barred by *res judicata*. On the one hand, it was held that a prior suit and decree for redemption which had not been executed and in which, in default of redemption, the property was not decreed to be foreclosed or the right of redemption declared to be extinguished, did not bar a subsequent suit for redemption, as, notwithstanding the decree the relationship of mortgagor and mortgagee continued.¹ The High Court of Bombay supported this view on the ground that the issue in a suit for redemption is not the existence of the mortgage, but *how much must be paid by the mortgagor to the mortgagee in*

two suits based on different causes of action with regard to the same property—Defendant need not plead in each suit what is properly a defence to the other.)

('18) 1918 Pun L R No. 82, p. 316; 1918 Pun Re No. 87.

('89) AIR 1939 Mad 70 (74). (Partition suit—Coparceners may restrict scope of suit to what may be necessary for the grant of relief by the plaintiff.)

('33) AIR 1933 Pesh 61 (63). (Plea of maintenance not complete answer to claim for possession — Suit for maintenance is not barred.)

[See also ('29) AIR 1929 Oudh 455 (455): 5 Luck 369. (Suit for redemption by puisne mortgagee — Sub-mortgagee made party need not claim payment to himself.)]

5. ('21) AIR 1921 Nag 69 (70): 17 Nag L R 33.

6. ('27) AIR 1927 Mad 61 (62).

7. ('19) AIR 1919 Lah 220 (220): 1919 Pun Re No. 74.

('15) AIR 1915 Mad 1213 (1213).

('26) AIR 1926 Mad 1020 (1021).

('25) AIR 1925 Mad 830 (831, 832).

[See also ('23) AIR 1923 Lah 146 (146).]

8. ('07) 1907 All W N 275 (275).

8a. ('38) 42 Cal W N 110 (114).

9. ('39) AIR 1939 Mad 70 (75).

Note 40

1a. See ('06) 29 Mad 65 (68). (Where it was held that S. 85 of the Transfer of Property Act, corresponding to O. 34, R. 1, does not modify the law of *res judicata*.)

1. ('10) 32 All 215 (218).

('99) 21 All 251 (262).

('29) AIR 1929 All 409 (410).

('27) AIR 1927 All 305 (305). (But second suit not maintainable during pendency of first suit or before execution is barred.)

order to entitle him to recover possession or get reconveyance of the mortgaged property, and that, if it could be shown that the mortgagor in his second suit raises in issue a substantially different matter to that decided in the first suit such, for example, as the *amount payable by him at the date of the second suit as distinct from that payable at the date of the first suit*, such second suit would not be barred.² The High Court of Madras and the Oudh Judicial Commissioner's Court, on the other hand, held a contrary view on the ground that the issue in a redemption suit is the right of redemption and when that has been decided once by an executable judgment, a second suit for the same relief is barred,³ though in another case the High Court of Madras adopted the view of the Bombay High Court.^{3a} The conflict has now been set at rest by the Privy Council in *Raghunath*

('26) AIR 1926 All 20 (21) : 48 All 17.

('25) AIR 1925 All 484 (486). (The decree in the previous suit was not under O. 34, R. 7, but was a combined decree under O. 34, R. 8, which had the effect of extinguishing the mortgage — Second suit for redemption was held barred.)

('22) AIR 1922 All 377 (379) : 44 All 730.

('13) 18 Ind Cas 326 (326) (All).

('12) 15 Ind Cas 15 (15) (All).

('11) 9 Ind Cas 158 (159) (All). (Suit for sale by prior mortgagee against puisne mortgagee — Decree not executed — Suit for redemption by latter is not barred.)

('11) 33 All 302 (305).

('09) 4 Ind Cas 410 (412, 413) (Lah).

('09) 2 Ind Cas 630 (632) (All).

('07) 29 All 481 (483, 484). (Decree that right to redeem shall be extinguished on non-payment — Second suit is barred.)

('02) 24 All 44 (52, 56, 66) (FB). (Overruling 19 All 202).

('98) 20 All 506 (510).

('89) 11 All 386 (392).

('67) 2 Agra 256 (256, 257).

('80) AIR 1930 Bom 401 (405).

('28) AIR 1928 Bom 287 (288).

('14) AIR 1914 Bom 200 (201) : 39 Bom 41 (46, 47).

('16) AIR 1916 Cal 43 (44). (Previous suit by mortgagee to remain in possession till his debt is satisfied out of the usufruct does not bar a subsequent suit for redemption — Following 14 Bom 327.)

('91) 18 Cal 189 (142).

('74) 22 Suth W R 172 (173, 174).

('30) AIR 1930 Lah 423 (424). (Right to redeem finally decided in previous suit — Subsequent suit will be barred.)

('27) AIR 1927 Lah 9 (9) : 7 Lah 420.

('25) AIR 1925 Lah 31 (31) : 5 Lah 371.

('23) AIR 1923 Lah 680 (682).

('15) AIR 1915 Lah 125 (127) : 1915 Pun Re No. 93.

('09) 1909 Pun L R No. 135, page 524.

('08) 1908 Pun L R No. 169, page 555 : 1907 Pun Re No. 43. (Order of dismissal of previous suit for redemption became final — Second suit for redemption was barred.)

('08) 1908 Pun L R No. 164 page 536 : 1908 Pun Re No. 93.

('08) 1908 Pun Re No. 93.

('67) 1887 Pun Re No. 20.

('81) 1881 Pun Re No. 14.

('77) 1877 Pun Re No. 86.

[But see (1909) 2 Ind Cas 662 (666) (Cal). (Redemption suit dismissed for default of payment.)]

2. ('18) AIR 1918 Bom 1 (6) : 43 Bom 334 (FB).
('23) AIR 1923 Bom 300 (300, 301) : 47 Bom 692.

('31) AIR 1931 Bom 480 (481).

('29) AIR 1929 Bom 116 (119).

('11) 10 Ind Cas 748 (752) (Bom).

[See also ('27) AIR 1927 Bom 32 (35) : 50 Bom 730.]

[But see ('17) AIR 1917 Bom 162 (164) : 42 Bom 246 (252). (No longer law in view of AIR 1918 Bom 1 (FB).)]

('92) 16 Bom 249 (248). (Quere.)

('88) 13 Bom 567 (570).

('83) 7 Bom 467 (470).]

3. ('16) AIR 1916 Mad 887 (888) : 39 Mad 896.
('02) 25 Mad 300 (307, 312, 315) (FB). (Overruling 6 Mad 119 ; 7 Mad 428 ; 8 Mad 478 ; 15 Mad 366 ; 21 Mad 18 and referring to 17 Mad 96.)

('26) AIR 1926 Mad 816 (820) : 49 Mad 691. (In suit for sale also right of redemption is in issue.)

('25) AIR 1925 Oudh 696 (697) : 28 Oudh Cas 212. (But see the earlier decisions, 1 Oudh Decisions 198 (199), 6 Oudh Cas 367 (369) and 1 Oudh Cas 289 (300).)

('24) AIR 1924 Oudh 245 (246).

('21) AIR 1921 Oudh 139 (140) : 24 Oudh Cas 289. (Oudh Estates Act—Claim for redemption decided by settlement officer — Subsequent suit barred.)

('18) AIR 1918 Oudh 364 (365).

('11) 12 Ind Cas 993 (998, 999) : 14 Oudh Cas 257. (1900) 3 Oudh Cas 371 (382).

See also the following cases:

('13) 6 Sind L R 140 (141, 142).

('09) 3 Sind L R 17 (23, 30).

('31) AIR 1931 Rang 283 (284, 285) : 9 Rang 360.

('30) AIR 1930 Oudh 465 (467). (Where the principles are discussed.)

3a. ('25) AIR 1925 Mad 1191 (1194).

Singh v. Mt. Hansraj Kunwar, A. I. R. 1934 Privy Council 205. In that case a decree for redemption was passed in the following terms :

"It is ordered and decreed that the plaintiff is entitled to a decree for possession by redemption of mortgage in the following terms, viz., that he should pay Rs. 4,208-6-0 by the 15th of November 1896, that if he will pay the said sum he will get all costs . . . and that in case of default *his case will stand dismissed.*"

No payment was made but a fresh suit was subsequently instituted for redemption. It was held that by the Proviso to Section 60 of the Transfer of Property Act, 1882, the right to redeem subsists unless "it has been extinguished by order of a Court," that this right conferred upon the mortgagor by express enactment can only be taken away by means and in manner enacted for the purpose, that the words in the previous decree "his case will stand dismissed" could not be construed as meaning that the plaintiff was to be debarred from all right to redeem and that consequently it did not operate as *res judicata*. See also the undermentioned case^{3aa} which proceeds on the view that where the prior decree for redemption does not provide that in default of payment within the time fixed, the right of redemption must be extinguished, a fresh suit for redemption is not barred.

But even if a fresh suit may lie for redemption, all matters actually decided, such as the *amount due*, etc., will be conclusive and cannot be raised in the fresh suit.^{3b}

Suits for redemption and settlement of accounts between mortgagor and mortgagee. — In suits for redemption there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee up to the date of the redemption.⁴ But a separate suit for mesne profits between the date of the payment under the preliminary decree and the date when the mortgagor is put in possession of the mortgaged property is not barred.⁵

Suits for redemption of several mortgages. — Where there are several mortgages by the mortgagor in favour of the same mortgagee, a suit for redemption of one of such mortgages cannot bar a subsequent suit for redemption of the other mortgages; the redemption of other mortgages is not a *ground of attack* in a suit for the redemption of the first mortgage.⁶ See Note 38, *ante*.

Suits for redemption and for ejectment. — A suit for redemption of a mortgage does not bar a subsequent suit by the mortgagor as a proprietor for ejectment of the mortgagee and *vice versa*, the matters involved in the two suits being totally different and distinct.⁷ Similarly, in a suit by a prior mortgagee

3aa. ('36) AIR 1936 Pat 420 (421) : 15 Pat 607.

3b. ('74) 22 Suth W R 269 (270).

[See also ('27) AIR 1927 Lah 9 (9) : 7 Lah 420 and 29 All 481 cited in foot-note (1) *ante* and compare 13 Moo Ind App 404 (PC).]

4. ('08) 30 All 36 (37).

5. ('92) 16 Bom 656 (659).

6. ('08) 30 All 225 (229).

7. ('36) AIR 1936 Cal 200 (202). (Mortgagor must include claim for over-payments made to mortgagee or excess profits received by latter.)

8. ('10) 6 Ind Cas 336 (337) (Cal).

9. ('07) 34 Cal 223 (232, 233, 234).

10. ('20) AIR 1920 Mad 531 (532).

11. ('09) 12 Oudh Cas 152 (153).

12. ('05) 8 Oudh Cas 302 (303).

13. ('25) AIR 1925 Rang 13 (14) : 2 Rang 382.

14. ('18) AIR 1918 Mad 284 (284).

15. ('38) AIR 1938 Mad 405 (411).

16. ('31) AIR 1931 Pat 13 (13).

[But see ('07) 31 Bom 527 (534). (Deposit under Sec. 83 of the Transfer of Property Act.)]

17. ('06) 29 Mad 153 (154) (FB).

18. ('01) 13 Mad L Jour 448 (453, 454, 457, 458) : 26 Mad 760.

19. ('30) AIR 1930 Mad 264 (266). (*cf.* AIR 1927 PC 32 which is no longer law. See T. P. Act, Section 61.)

20. ('29) AIR 1929 Lah 833 (833, 834).

21. ('99) 2 Oudh Cas 139 (142).

against a puisne mortgagee for ejectment, the latter is not bound to set up his title to redeem as it is not a valid ground of defence to the suit in ejectment.⁸ Similarly, where mortgagor sues to eject the mortgagee, not entitled to possession under his mortgage, the latter need not set up his rights under his mortgage.⁹

Suits by puisne mortgagee against the mortgagor and the prior mortgagee. — A prior mortgagee who is made a party to a suit by a puisne mortgagee on his mortgage, but whose prior mortgage is not impugned or sought to be postponed in any way, need not set up his prior mortgage, as such a plea is a paramount claim not affecting the claim made on the puisne mortgage and therefore not a ground of defence.¹⁰ Where, however, the prior mortgage is impugned or sought to be postponed in any way, the prior mortgagee must set up his rights under the mortgage. Otherwise his rights will be barred.¹¹ Thus, where a person having a prior mortgage is impleaded only as a subsequent mortgagee or as the owner of the equity of redemption, thus impliedly negating the priority, he must, by way of defence, set up his priority or he will be barred from doing so later on.¹²

Suit by mortgagee against mortgagor and puisne mortgagee. — A puisne mortgagee who is impleaded in a suit on a mortgage brought by a prior mortgagee is not simply entitled to resist the suit on the ground that he is himself entitled to be redeemed by the mortgagor. Where therefore, in such a case, the prior mortgage is satisfied before sale under the decree in favour of the prior mortgagee, the puisne mortgagee can sue the mortgagor for sale on his mortgage.¹³⁻¹⁴

Where a usufructuary mortgagee brings a suit for possession against the mortgagor, a subsequent suit by the latter for redemption is not barred inasmuch as the plea of the right of redemption is irrelevant in the former suit and therefore not one which ought to have been raised.¹⁵ See Note 37, *ante*. But in a suit on a mortgage the defendant, mortgagor, is bound to put forward a counter-claim for any sum that may be due to him by the mortgagee arising out of the mortgage transaction, the general rule being that all claims relating to the mortgage between the parties thereto must be determined in one suit.^{15a}

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| <p>(‘11) 12 Ind Cas 387 (388, 389) : 35 Bom 507.
 (‘89) 13 Bom 326 (329).
 (‘74) 11 Bom H C R 224 (230).
 (‘72) 9 Bom H C R 65 (67).
 (‘04) 27 Mad 102 (105).
 8. (‘21) AIR 1921 Nag 69 (70) : 17 Nag L R 33.
 [See also (‘39) AIR 1939 Bom 303 (304, 305):
 41 Bom L R 422 (425). (Suit for possession
 on basis of ostensible sale deed executed by
 defendant to plaintiff—Omission by defend-
 ant to plead that transaction was really
 mortgage—Effect—Plea in later suit is not
 barred by res judicata.)]
 9. (‘04) 14 Mad L Jour 485 (487).
 10. (‘20) AIR 1920 P C 81 (83) : 47 Cal 662 : 47
 Ind App 11 (P C).
 (‘30) AIR 1930 All 163 (164).
 (‘13) 35 All 111 (115).
 (‘34) AIR 1934 Cal 552 (553) : 61 Cal 494.
 (‘15) AIR 1915 Cal 373 (374).
 (‘27) AIR 1927 Mad 431 (432).
 (‘12) 13 Ind Cas 182 (182) (Mad).
 (‘33) AIR 1933 Nag 190 (192).
 (‘10) 6 Nag L R 156 (158).
 (‘29) AIR 1929 Oudh 463 (466) : 4 Luck 250.
 (‘29) AIR 1929 Oudh 88 (89) : 3 Luck 472.</p> | <p>(‘38) AIR 1938 Pat 444 (447) : 17 Pat 180.
 (‘20) AIR 1920 Pat 630 (631, 632).
 [But see (‘01) 11 Mad L Jour 333 (334)].
 11. (‘24) AIR 1924 All 927 (927).
 (‘23) AIR 1923 Pat 290 (291) : 2 Pat 435.
 (‘29) 117 Ind Cas 820 (821) (All).
 (‘12) 34 All 599 (602).
 (‘02) 24 All 429 (438) : 29 Ind App 118 (P C).
 (‘04) 31 Cal 428 (431).
 (‘35) 18 Nag L Jour 274 (278).
 12. (‘16) AIR 1916 Cal 808 (808).
 (‘12) 14 Ind Cas 496 (502) : 39 Cal 527 : 39
 Ind App 68 (P C).
 (‘15) AIR 1915 Cal 496 (498).
 (‘04) 8 Cal W N 385 (390).
 [But see (‘19) AIR 1919 Nag 57 (59, 60, 62):
 15 Nag L R 114 (FB).]
 13-14. (‘19) AIR 1919 Mad 100 (102) : 42 Mad 90.
 (‘19) AIR 1919 Mad 63 (66).
 (‘22) AIR 1922 Lah 358 (360). (Sale under
 prior mortgage decree—Deposit by subsequent
 mortgagee and application to reserve rights
 under his mortgage—Latter prayer rejected
 —Suit on his mortgage—Latter is not barred.)
 15. (‘13) 35 All 227 (233, 234) : 40 Ind App 74 (P C).
 15a. (‘20) AIR 1920 Mad 531 (532).</p> |
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In a suit to enforce a mortgage against the heirs of a mortgagor, an heir who has an *independent* title in the mortgaged properties is not bound to set up his title.^{15b}

Suit by mortgagee without impleading puisne mortgagee. — A mortgagee who omits to implead a subsequent mortgagee in his suit for sale is not debarred from afterwards bringing a second suit on the same mortgage against the subsequent mortgagee.^{15c}

Two mortgages in favour of same person — Suit on one of them only. — The High Courts of Allahabad,¹⁶ Calcutta,¹⁷ Madras¹⁸ and Patna,¹⁹ the Chief Court of Oudh^{19a} and the Judicial Commissioner's Court of Nagpur^{19b} have held that it is open to a mortgagee holding more than one mortgage on the same property to bring a suit for the recovery of his debt due only under one of the mortgages and to sell the property under the decree in that suit subject to his rights under a prior mortgage. The High Court of Bombay has, on the other hand, taken a contrary view.²⁰ The conflict has now practically been set at rest, in cases of mortgages coming into existence after 1st April 1930, the Legislature enacting in Section 67 A of the Transfer of Property Act that a mortgagee holding two or more mortgages shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages. See also O. 34 R. 1 Note 10 for a fuller discussion. Also see O. 34 R. 12 Note 2.

Plea of paramount title in mortgage suits. — A defendant claiming paramount title is an unnecessary party in a mortgage suit and he need not raise such plea in the suit.²¹ Thus, where A mortgages properties X, Y and Z to B and then mortgages X alone to C but it appears that Y and Z did not belong to A at all but to C as owner and in a suit on his mortgage by B, C is made a party as *subsequent mortgagee of property X*, the question of C's paramount title to Y and Z need not be raised by him in that suit. A subsequent suit by him, therefore, for declaration of his title to Y and Z is not barred by *res judicata*.²² But if the party claiming paramount title invites the Court to decide the question of his title

15b. ('32) AIR 1932 Cal 12 (13) : 58 Cal 1222.

15c. ('38) AIR 1938 All 115 (115).

16. ('98) 20 All 322 (324).

17. ('21) AIR 1921 Cal 321 (327). (23 Ind Cas 626; 38 Cal 60 and 7 Ind Cas 390, Referred to.)

18. ('16) AIR 1916 Mad 934 (935, 936) : 38 Mad 927 (FB). (Dissenting from 30 Mad 533).

('08) 31 Mad 530 (530). (Referring to 25 Mad 108.)

[See also ('25) AIR 1925 Mad 991 (992). (Mortgagee need not enforce separate money bond along with mortgage.)]

19. ('16) AIR 1916 Pat 113 (114) : 2 Pat L Jour 118.

19a. ('25) AIR 1925 Oudh 379 (380). (Dissenting from A I R 1919 Oudh 352.)

See also the following cases:—

('20) A I R 1920 Low Bur 160 (160) : 10 Low Bur Rul 360.

('27) AIR 1927 Nag 83 (84).

('91) 4 C P L R 164 (165).

19b. ('35) AIR 1935 Nag 226 (229) : 31 Nag L R Sup 1 (FB).

20. ('15) AIR 1915 Bom 54 (55) : 39 Bom 138 (145, 148). (30 Bom 156 referred to.)

('21) AIR 1921 Bom 282 (283) : 45 Bom 55. (The decision however proceeds on the view that O. 2, R. 2 applies.)

[See also ('10) 4 Sind L R 82 (86).]

[But see ('89) 13 Bom 45 (48). (First mortgage by A and B—Second mortgage by A—Suit on second mortgage alone—Subsequent suit on first mortgage not barred.)]

21. ('29) AIR 1929 Cal 672 (675).

('32) AIR 1932 Cal 12 (13) : 58 Cal 1222.

('33) AIR 1933 Cal 325 (329) : 60 Cal 87.

('16) AIR 1916 Cal 170 (172). (But see a contrary view in 1891 All W N 132.)

('37) 1937 Mad W N 60 (62).

('27) AIR 1927 Mad 945 (946).

('27) AIR 1927 Mad 301 (304).

('24) AIR 1924 Nag 408 (408).

('30) AIR 1930 Oudh 97 (99) : 5 Luck 658.

('29) AIR 1929 Pat 678 (682) : 0 Pat 599.

('29) AIR 1929 Pat 333 (336) : 0 Pat 118.

22. ('18) AIR 1918 All 81 (83, 84) : 40 All 534 (538, 590).

('84) AIR 1984 Cal 884 (887).

('34) AIR 1934 Nag 33 (34).

and the Court goes into it and decides the question against him, he will of course be bound by it.²³ Where a party claims paramount title in the mortgage suit and causes himself to be dismissed from the suit, he cannot sue subsequently to redeem the mortgage.²⁴

Suit for redemption by mortgagor — Pleas which the mortgagee might and ought to raise. — Where there are two mortgages by A in favour of B, one usufructuary and one simple, and A sues for redemption of the usufructuary mortgage, B need not set up his rights under the simple mortgage also inasmuch as it is not a ground of defence to the suit.²⁵ Where a suit for redemption is decreed, the mortgagee must, on failure of the mortgagor to deposit the mortgage amount within the time fixed, obtain an order for sale; if he does not do so, he will be barred from suing again on the mortgage debt.²⁶ Where a mortgagor sues to cancel a mortgage given in renewal of an earlier mortgage and for possession, the defendant-mortgagee is bound to set up his rights under the earlier mortgage; otherwise he will be barred from subsequently suing to enforce his rights thereon.²⁷

A mortgagee who had purchased the equity of redemption in a portion of the mortgaged property and whose mortgage amount was thus discharged in proportion, filed a suit on the mortgage for recovery of the whole amount denying the fact of his purchase when raised by the defendants. The suit was decreed to the effect that on payment of the whole amount, the whole of the mortgaged properties should be delivered to the defendants. The latter paid up the whole amount. Subsequently the mortgagee filed a suit for a declaration of his title to the property purchased by him. It was held that he was barred by *res judicata* from claiming such relief.²⁸

In a suit for redemption by a puisne mortgagee against the prior mortgagee and his sub-mortgagee, it is not incumbent on the latter to claim payment of the amount due to him and the failure to do so will not preclude him from subsequently suing his mortgagor for recovery of such money.²⁹ Nor need the mortgagee in a redemption suit set up in defence his right to specific performance of an agreement to sell.³⁰

Claim for personal decree in mortgage suits. — Where the mortgagee's right to obtain a personal decree in the event of the sale proceeds proving insufficient is adjudicated upon and decided in favour of the plaintiff, the same is *res judicata* in subsequent proceedings and cannot be challenged in an application under O. 34 R. 6.³¹ See also Note 123, *infra*.

Suit on mortgage against Hindu father impleading the sons. — In the undermentioned case,³² a suit was brought against the father of a Hindu joint family for the enforcement of a mortgage. The sons were also joined as defendants in the suit but the plaintiff did not ask for any relief against their interests in the joint family property but only claimed a personal decree against them. The

23. ('81) AIR 1931 Pat 64 (68) : 10 Pat 234.

('06) 33 Cal 425 (439).

[See also ('33) AIR 1933 Cal 680 (682) : 60 Cal 832].

24. ('86) 12 Cal 414 (421, 422); 12 Ind App 171 (PC).

('20) AIR 1920 Cal 688 (689).

25. ('25) AIR 1925 Lah 516 (516).

26. ('89) 13 Bom 567 (570, 571).

27. ('11) 14 Oudh Cas 117 (123).

[But see ('27) AIR 1927 Nag 83 (84).]

28. ('19) AIR 1919 All 123 (125).

29. ('29) AIR 1929 Oudh 455 (455) : 5 Luck 369.

30. ('30) AIR 1930 Mad 539 (540).

31. ('30) AIR 1930 Oudh 378 (389); 6 Luck 132 (FB).

[But see ('05) 1905 All W N 144 (145, 146) (which was a case under the Transfer of Property Act.)]

32. ('36) AIR 1936 Oudh 139 (141) : 11 Luck 523

personal decree was not granted. Then the plaintiff sought to proceed against the sons' interests in the joint family property. It was held that the granting of such relief to the plaintiff was barred by the principle of constructive *res judicata*.

41. Former suit must have been between the same parties or between parties under whom they or any of them claim. — A person may be a party to a suit or a person *claiming under a party*, or a person *represented* by a party or a complete stranger.¹ The general principle is that a person, not a party nor claiming under, or represented by, a party, to a litigation is not bound by it, the maxim being *Res inter alios acta alteri nocere non debet* — things done between strangers ought not to injure a party. A decision, therefore, in a litigation between A and B will be binding on them and their privies,² but will not operate as *res judicata* (unless it were a judgment *in rem*) in a subsequent litigation between A and C.³ Such a judgment may, however, be *admissible in evidence* to prove that a right or liability had, in a previous suit, been unsuccessfully set up by one of the

Note 41

1. ('82) 6 Bom 703 (709, 710).
2. ('07) 30 Mad 447 (449). (A defendant, in a previous suit, having no right of appeal, may be bound by the decision.)
- ('14) AIR 1914 PC 31 (32): 41 Ind App 247 (PC). (Partition suit by co-sharers ending in decrees — Cosharer who is party to them is bound by them.)
- ('25) AIR 1925 All 663 (663).
- ('24) 5 L R All (Rev) 329 (329).
- ('02) 24 All 112 (116).
- ('92) 14 All 64 (66). (Person who is impleaded in the appeal remains a party to the suit on remand.)
- ('71) 8 Bom H C R A C 241 (243).
- ('11) 12 Ind Cas 464 (479): 38 Cal 639.
- ('76) 25 Suth W R 366 (367).
- ('74) 12 Beng L R 433 (438) (PC).
- ('70) 13 Suth W R 64 (66).
- ('67) 8 Suth W R 366 (367). (A person made defendant only by way of precaution is also bound by the decision.)
- ('23) AIR 1923 Lah 556 (556).
- ('30) AIR 1930 Mad 714 (716).
- ('03) 18 Mad L Jour 576 (578): 31 Mad 485.
- ('69) 4 Mad H C R 235 (236).
- ('63) 1 Mad H C R 245 (246).
- ('29) AIR 1929 Oudh 172 (174): 4 Luck 603 (FB). (Prior suit by transferee of pro-note against executant and assignor dismissed — Second suit by transferee against assignor alone for damages is barred.)
3. ('01) 5 Cal W N 421 (422, 423).
- ('12) 1912 Pun W R No. 105, p. 280.
- ('27) AIR 1927 P C 128 (131): 54 Cal 770: 54 Ind App 238 (PC).
- ('14) AIR 1914 P C 67 (69): 41 Cal 972: 41 Ind App 110 (PC).
- ('32) 13 L R All (Rev) 15 (16).
- ('24) AIR 1924 All 910 (911).
- ('23) AIR 1923 All 232 (232).
- ('22) AIR 1922 All 475 (476).
- ('21) 63 Ind Cas 240 (241) (All).
- ('11) 10 Ind Cas 924 (925): 33 All 453.
- ('11) 33 All 493 (496, 499) (FB).
- ('10) 5 Ind Cas 451 (452): 32 All 119.
- ('99) 23 Bom 597 (598, 601).
- ('81) 5 Bom 496 (498).
- ('64) 1 Bom H C R A C 141 (143).
- ('34) AIR 1934 Cal 788 (792).
- ('28) AIR 1928 Cal 130 (134): 55 Cal 448. (Judgment against creditor who sought to attach property cannot operate as *res judicata* as against judgment-debtor in a suit brought by him against the claimant.)
- ('27) AIR 1927 Cal 97 (98).
- ('23) AIR 1923 Cal 322 (323). (Judgment-debtor not party to previous application for execution can plead bar of limitation.)
- ('21) AIR 1921 Cal 425 (426). (Prior suit under S. 5, Religious Endowments Act — Public not made parties — Second suit by public under S. 92, C. P. Code, not barred.)
- ('20) AIR 1920 Cal 754 (755).
- ('06) 10 Cal W N 1084 (1084).
- ('03) 7 Cal W N 574 (575).
- (1900) 4 Cal W N 63 (65).
- ('83) 9 Cal 945 (948): 10 Ind App 45 (PC).
- ('80) 6 Cal 171 (189) (FB).
- ('71) 16 Suth W R 298 (298).
- ('71) 15 Suth W R 309 (310).
- ('32) AIR 1932 Lah 232 (234).
- ('27) AIR 1927 Lah 900 (902).
- ('19) AIR 1919 Lah 174 (176).
- ('15) AIR 1915 Lah 309 (309).
- ('10) 1910 Pun L R No. 100, p. 286.
- (1900) 1900 Pun L R p. 241 (244): 1900 Pun Re No. 27.
- ('79) 1879 Pun Re No. 59.
- ('79) 1879 Pun Re No. 9. (Previous suit for custody of defendant as plaintiff's wife — Finding that marriage not proved — Subsequent suit by another for custody of same defendant as his wife — Wife not estopped by previous finding.)
- ('68) 1868 Pun Re No. 90.
- ('68) 1868 Pun Re No. 10.
- ('68) 1868 Pun Re No. 3.
- ('66) 1866 Pun Re No. 8.
- ('66) 1866 Pun Re No. 6.

parties in the subsequent suit.⁴ As to what is meant by a "party", see Note 42, *infra*. A party not bound by a previous proceeding between third parties cannot also take advantage of findings in his *favour* in those proceedings.⁵

42. "Same parties," meaning of. — To maintain a plea of *res judicata* it must appear from an inspection of the records that the person whose interest it is sought to bind was in some way a *party* to the suit.¹ A party is a person whose name appears on the record *at the time of the decision*.² The mere omission of his name in the *formal order* by oversight will not however deprive him of his character of a party.³ The following persons have been held not to be really *parties* to a litigation :

- (1) A party whose name is struck off⁴ or who is discharged from the suit⁵ or who dies pending suit but whose name continues on the record erroneously.⁶
- (2) Persons *wrongly* made parties in execution proceedings.⁷
- (3) A person who applied to be made a party but whose application was refused.⁸
- (4) Persons whose names are introduced on the record by fraud and without their knowledge.⁹
- (5) Minor not represented in the suit by any guardian.¹⁰
- (6) A person merely interested in litigation. Such a person is not bound to make himself a party and is not bound by the result of the litigation.¹¹

Where the previous suit is *by A* as trustee of a certain shrine and the second suit is *by the same shrine through A* as trustee, the two suits are *by the same party*.^{11a}

But a party who pleads insanity but who is not adjudged as an insane person continues to be a "party" though not represented by a guardian.¹² Where

('30) AIR 1930 Mad 751 (754). (Observations in a judgment relating to a different matter though connected cannot bind third party.)

('22) AIR 1922 Nag 189 (190).

('22) AIR 1922 Nag 156 (157). (Defendant not represented by his brother in previous suit—Decision against brother does not bind defendant.)

('29) AIR 1929 Oudh 455 (455) : 5 Luck 369. (Omission by sub-mortgagee to claim amount due on sub-mortgage does not bar fresh suit against mortgagor.)

('21) AIR 1921 Oudh 150 (153). (Sale in execution is not binding on persons not parties.)

('20) 7 Oudh L Jour 611 (612).

('16) AIR 1916 Oudh 100 (102) : 19 Oudh Cas 39 (42). (Person not a party to a decree cannot be held bound by an account made therein.)

('06) 9 Oudh Cas 33 (34).

('28) AIR 1928 Pat 116 (117). (Dismissal of application for insolvency is not a bar for making fresh application.)

4. ('21) AIR 1921 Mad 248 (253, 254, 257) : 44 Mad 778 (FB). (Overruling 10 Mad L Tim 450, 36 Mad 141 : 19 Ind Cas 656 and 33 Mad 483 : 6 Ind Cas 229.)

('30) AIR 1930 Lah 237 (237, 238).

('34) AIR 1934 Cal 788 (792).

('33) AIR 1933 Lah 57 (57).

('82) AIR 1932 Pat 105 (112) : 11 Pat 50.

[See ('75) 1875 Pun Re No. 61.

('29) AIR 1928 Pat 615 (625) : 8 Pat 122.]

[But see ('30) AIR 1930 Mad 751 (754).]

5. ('25) AIR 1925 Mad 300 (301).

Note 42

1. ('06) 28 All 1 (17) : 32 Ind App 229 (PC).

2. ('82) 6 Bom 703 (710, 711, 712).

3. ('30) AIR 1930 PC 22 (23) : 57 Ind App 24 (PC).

4. ('72) 18 Suth W R 29 (30).

5. ('26) AIR 1926 Lah 202 (202, 203).

('25) AIR 1925 Oudh 650 (651).

('05) 27 All 59 (61).

('02) 6 Cal W N 314 (317).

[See also ('98) 17 Bom 341 (348) : 20 Ind App 1 (PC). (Irregularly made party for the purpose of discovery.)]

6. The principle of the decision in foot-notes (4) and (5) will apply to this also.

7. ('10) 8 Ind Cas 161 (161) (Mad).

8. ('27) AIR 1927 PC 108 (110) : 54 Ind App 190 : 54 Cal 595 (PC).

9. See ('82) 6 Bom 703 (710, 711, 712).

10. ('22) AIR 1922 All 217 (219) : 44 All 428.

11. ('20) AIR 1920 Nag 184 (186).

11a. ('38) AIR 1938 Mad 257 (258).

12. ('15) AIR 1915 All 265 (267).

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- (3) A person who applied to be made a party but whose application was refused.⁸
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('28) AIR 1928 Pat 116 (117). (Dismissal of application for insolvency is not a bar for making fresh application.)

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('30) AIR 1930 Lah 237 (237, 238).

('34) AIR 1934 Cal 788 (792).

('33) AIR 1933 Lah 57 (57).

('32) AIR 1932 Pat 105 (112) : 11 Pat 50.

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2. ('82) 6 Bom 703 (710, 711, 712).

3. ('30) AIR 1930 PC 22 (23) : 57 Ind App 24 (PO).

4. ('72) 18 Suth W R 29 (30).

5. ('26) AIR 1926 Lah 202 (202, 203).

('25) AIR 1925 Oudh 650 (651).

('05) 27 All 59 (61).

('02) 6 Cal W N 314 (317).

[See also ('98) 17 Bom 341 (348) : 20 Ind App 1 (PO). (Irregularly made party for the purpose of discovery.)]

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9. See ('82) 6 Bom 703 (710, 711, 712).

10. ('22) AIR 1922 All 217 (219) : 44 All 428.

11. ('20) AIR 1920 Nag 184 (186).

11a. ('38) AIR 1938 Mad 257 (258).

12. ('15) AIR 1915 All 265 (267).

already so decided.¹ Thus, where in a rent suit a question of title was raised as between an intervenor and the plaintiff, he will be bound by the decision of that question.² Under the Code of 1859, the two suits had to be on the *same cause of action*³ in order that the principle of *res judicata* may apply and it was held, where an intervenor was added as a party, that the cause of action against him would be different from that against the original defendant, and that, therefore, there could be no bar.⁴ Under the present Code, the requirement as to the cause of action being the same in the two suits has been taken away.

45. Same person as party in different characters.—See Note 70, *infra*.

46. Co-defendants.—As regards parties arrayed on the same side such as co-defendants, an adjudication between them may be *res judicata* in certain circumstances.¹ It will operate as *res judicata* if the following conditions are satisfied :

1. There must be a *conflict of interest* between the defendants concerned.
2. It must be *necessary to decide* the conflict in order to give the relief which the plaintiff claims, and
3. The question between the defendants must have been *finally decided*.²

Note 44

1. ('86) 12 Cal 563 (565). (Previous suit dismissed against intervenor under O. 17, R. 3 for failure of plaintiff to adduce evidence—Subsequent suit against him barred.)
(‘78) 3 Cal 705 (707).
(‘75) 1 Cal 144 (147) : 2 Ind App 283 (PC).
2. ('78) 2 Cal L Rep 33 (39).
(‘78) 3 Cal 145 (147, 148) (FB).
3. See S. 2 of Act VIII of 1859.
4. ('75) 24 Suth W R 248 (249).
[See also ('66) 6 Suth W R (Act X) 38 (39).]

Note 46

1. See also the cases in foot-note (2).
(‘23) AIR 1923 Lah 186 (189).
(‘27) AIR 1927 All 365 (366).
(‘26) AIR 1926 Cal 568 (571).
2. ('31) AIR 1931 P C 114 (117) : 53 All 103 : 58 Ind App 158 (PC).
(‘31) AIR 1931 P C 231 (234) : 61 Mad L Jour 415 (420) (PC).
(‘25) AIR 1925 All 546 (547) : 47 All 778.
(‘24) AIR 1924 All 310 (310, 312) : 46 All 220.
(‘34) AIR 1934 Bom 329 (334, 338). (Latter two conditions not satisfied.)
(‘34) AIR 1934 Bom 313 (316) : 58 Bom 544.
(‘23) AIR 1923 Bom 203 (205) : 47 Bom 534.
(‘15) AIR 1915 Bom 222 (224) : 40 Bom 210.
(‘32) AIR 1932 Cal 271 (272, 273) : 59 Cal 636.
(‘25) AIR 1925 Cal 431 (432) : 51 Cal 997.
(‘17) AIR 1917 Cal 679 (680). (Doctrine of *res judicata* between co-defendants should be applied with great caution.)
(‘09) 1 Ind Cas 913 (922) : 36 Cal 193.
(‘64) 1864 Suth W R 299 (300). (Previous suit not determining any cause of action as between co-defendants—No *res judicata*.)
(‘38) AIR 1938 Lah 227 (231).
(‘35) AIR 1935 Lah 605 (606).
(‘25) AIR 1925 Lah 434 (434).
(‘23) AIR 1923 Lah 186 (189).

- (‘21) 63 Ind Cas 735 (735) (Lah).
(‘15) AIR 1915 Lah 283 (284).
(‘12) 14 Ind Cas 535 (536) (Lah).
(‘38) AIR 1938 Mad 959 (960).
(‘38) 1938 Mad W N 224 (226).
(‘35) AIR 1935 Mad 821 (823).
(‘35) AIR 1935 Mad 649 (650).
(‘29) AIR 1929 Mad 638 (639).
(‘28) AIR 1928 Mad 630 (632).
(‘22) AIR 1922 Mad 452 (453).
(‘19) AIR 1919 Mad 359 (362). (The judgment must define real rights and obligations of the defendants inter se.)
(‘18) AIR 1918 Mad 39 (40, 42). (Finding unnecessary for the suit—Not *res judicata*—But if embodied in the decree it is *res judicata*.)
(‘88) 11 Mad 204 (206).
(‘27) AIR 1927 Nag 369 (369).
(‘24) AIR 1924 Nag 429 (430) : 20 Nag L R 197.
(‘24) AIR 1924 Nag 142 (143, 144). (Decision necessary to decide plaintiff's claim.)
(‘03) 16 C P L R 42 (43, 44).
(‘20) AIR 1920 Oudh 221 (222). (There must be conflict of interest.)
(‘34) AIR 1934 Pat 270 (272). (Plaintiff and defendant in the latter suit were ranged as respondents in the previous appeal—*Held* barred by *res judicata*.)
(‘26) AIR 1926 Pat 478 (480, 481).
(‘17) AIR 1917 Pat 585 (586, 587). (Ex parte decree can operate as *res judicata*, but not decision on issue not necessary to be determined.)
(‘28) AIR 1928 Rang 315 (316) : 6 Rang 575.
(‘25) AIR 1925 Rang 228 (229) : 3 Rang 77.
(‘24) AIR 1924 Rang 279 (281, 282).
(‘07) 1907 Upp Bur Rul Civ. Pro. 5.
(‘31) AIR 1931 Sind 170 (177) : 25 Sind L R 498.
(‘26) AIR 1926 Sind 282 (283). (There must be conflict of interest.)

If *all* the conditions exist the adjudication will operate as *res judicata* between co-defendants.³ But it will not so operate, if either there is no conflict of interest between them⁴ or there is no necessity to decide such conflict for granting

- [See also ('21) AIR 1921 Cal 632 (632). (Co-defendants—Consent-decree—No conflict of interest between co-defendants—Decree is not *res judicata*.) ('20) AIR 1920 Lah 54 (56). ('89) 2 C P L R 52 (53, 54).]
3. ('29) AIR 1929 Mad 638 (640). ('33) AIR 1933 Rang 255 (257). ('35) AIR 1935 P C 139 (142) : 14 Pat 611 : 62 Ind App 224 (P C). ('32) AIR 1932 P C 161 (164, 165) : 59 Ind App 247 : 10 Rang 322 (P C). ('33) AIR 1933 All 206 (208) : 55 All 250. ('32) AIR 1932 All 643 (646). ('32) AIR 1932 All 520 (522, 523). ('20) AIR 1920 All 189 (190). ('20) AIR 1920 All 30 (31) : 18 All L Jour 126 (128). ('19) AIR 1919 All 318 (320) : 17 All L Jour 225 (228, 229). ('13) 11 All L Jour 844 (848). ('11) 10 Ind Cas 324 (325) (All). ('10) 7 Ind Cas 67 (67) (All). (1900) 22 All 386 (390). ('96) 18 All 65 (67, 68). ('82) 4 All 92 (96, 97). ('14) AIR 1914 Bom 134 (136) : 38 Bom 438. ('03) 5 Bom L R 97 (98). ('87) 11 Bom 216 (220). ('07) 5 Cal L Jour 611 (628) : 36 Cal 193. ('88) 9 Cal 120 (124). ('81) 6 Cal 91 (93). ('67) 7 Suth W R 181 (182). ('38) I L R (1938) Lah 75 (78, 79). ('35) AIR 1935 Lah 544 (545). (Person having same interest as plaintiff impleaded as defendant in prior suit — His interest hostile to other co-defendants — Decision operates as *res judicata*.) ('35) AIR 1935 Lah 102 (103). (It is not a condition that the plea of the non-contesting co-defendant should not be identical with that of the plaintiff.) ('33) AIR 1933 Lah 325 (326) : 14 Lah 442. ('33) AIR 1933 Lah 274 (277) : 14 Lah 31. ('27) AIR 1927 Lah 112 (112). ('25) AIR 1925 Lah 434 (434). ('12) 1912 Pun L R No. 188, page 596 : 1912 Pun Re No. 103. ('36) AIR 1936 Mad 252 (255). (Issue as to joint family nature of property decided between co-defendants in suit by another — In suit between co-defendants, issue as to jointness is *res judicata*.) ('35) AIR 1935 Mad 821 (824). (Suit by co-mortgagee—Other co-mortgagee made defendant—Claim of co-mortgagee defendant adjudicated being necessary to grant plaintiff's relief—Subsequent suit by co-mortgagee defendant's transferee for mortgage debt due to his transferor — Co-mortgagee plaintiff in prior suit made party—Decision in first suit operates as *res judicata*.) ('24) AIR 1924 Mad 604 (605). ((1843) 3 Hare 627 Followed.) ('19) AIR 1919 Mad 212 (215). ('13) 21 Ind Cas 15 (16) (Mad). ('11) 11 Ind Cas 17 (17) (Mad). ('10) 5 Ind Cas 760 (760, 761) : 33 Mad 112. ('07) 30 Mad 447 (448, 449). ('06) 29 Mad 515 (517). ('94) 4 Mad L Jour 282 (283) : 18 Mad 164. (Though the previous suit was tried *ex parte* the decision in that suit will be *res-judicata* as between the defendants.) ('92) 15 Mad 264 (265). ('92) 2 Mad L Jour 203 (206). ('91) 14 Mad 324 (327). ('24) AIR 1924 Nag 142 (143, 144). ('26) AIR 1926 Oudh 281 (287) : 29 Oudh Cas 336 ('37) AIR 1937 Pat 27 (30). (*Held*, there was conflict of interest and titles between the co-defendants and *res judicata* operated.) ('33) AIR 1933 Pat 146 (147). ('39) AIR 1939 Pesh 1 (2). ('15) AIR 1915 Low Bur 133 (133) : 8 Low Bur Rul 105. ('31) AIR 1931 Sind 170 (177) : 25 Sind L R 493. [See also ('29) AIR 1929 All 814 (815). ('81) 9 Cal L Rep 365 (368).] [But see ('86) 12 Cal 580 (582) (F B). ('71) 16 Suth W R 128 (129). ('93) 6 C P L R 87 (89).]
4. ('29) AIR 1929 Mad 291 (292). ('28) AIR 1928 Pat 603 (606) : 7 Pat 566. ('37) 1937 All L Jour 1141 (1149, 1150). ('27) AIR 1927 All 865 (866). ('23) AIR 1923 All 169 (170). ('14) AIR 1914 All 398 (399). ('10) 6 Ind Cas 331 (333) (All). ('08) 30 All 394 (398, 399). ('86) 8 All 91 (94). ('81) 3 All 152 (156, 157) (F B). ('29) 117 Ind Cas 100 (102) (All). ('21) AIR 1921 Cal 632 (633). ('20) AIR 1920 Cal 541 (541). (Ex parte decree against joint debtors does not operate as *res judicata* in contribution suit between them.) ('26) 96 Ind Cas 625 (627) (Cal). ('13) 18 Ind Cas 117 (118) (Cal). ('10) 7 Ind Cas 123 (124) (Cal). ('97) 24 Cal 330 (333). ('78) 2 Cal L Rep 406 (407). (Joint decree against A, B and C satisfied by A alone — Subsequent suit by A against B and C for contribution not barred.) ('72) 17 Suth W R 191 (192). (Decision between ryot and body of co-sharers is not binding upon several co-sharers inter se.) ('69) 12 Suth W R 524 (525). ('64) 1 Suth W R 287 (288). ('21) AIR 1921 Lah 47 (47) : 2 Lah 88. (Co-defendant not necessary party—No conflict of interest—Decision not *res judicata*.) ('21) AIR 1921 Lah 25 (25). ('12) 1912 Pun L R No. 231, page 773.)

relief to the plaintiff⁵ or the conflict has not been decided.⁶ It is not, however, necessary that the issue between the co-defendants should have been the *only ground* on which the Court could have decided the suit.⁷ Nor is it necessary that there should have been an *active* contest between the co-defendants. It is only necessary that there must have been a conflict of interest and this conflict may exist notwithstanding that one of the concerned defendants did not contest at all.^{7a} But, where a defendant in a prior suit was *ex parte* and a co-defendant was added as a party *later*, it was held that as the former was not even aware of the claim of the other defendant, no question between the defendants could be said to have been heard and *finally* decided.^{7b}

The decision between the co-defendants can be on a point directly and substantially in issue between them either actually or *constructively*. Thus, in an interpleader suit the several defendants-claimants are *deemed* to be claiming adversely to each other. If one of them puts forward a right as against the others, the latter must contest it on all grounds which might and ought to have been raised by them, and if they do not do so, the point will be deemed to be *constructively* in issue between them and to be *impliedly* decided.⁸

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- (12) 1912 Pun L R No. 154, page 471 : 1912 Pun Re No. 42.
 ('05) 1905 Pun L R No. 102, page 411 : 1905 Pun Re No. 79.
 ('80) 1880 Pun Re No. 121 (F B).
 ('39) AIR 1939 Mad 228 (233).
 ('38) AIR 1938 Mad 959 (960).
 ('32) AIR 1932 Mad 298 (299) : 55 Mad 601.
 ('24) AIR 1924 Mad 711 (712).
 ('22) AIR 1922 Mad 404 (405).
 ('18) AIR 1918 Mad 564 (568).
 ('17) AIR 1917 Mad 997 (1006). (Suit for redemption by puisne mortgagee against prior mortgagee—Mortgagor impleaded.)
 ('03) 26 Mad 337 (338).
 ('95) 18 Mad 374 (377).
 ('93) 16 Mad 61 (63).
 ('37) 20 Nag L Jour 159 (163).
 ('24) AIR 1924 Nag 429(432):20 Nag L R 197.
 ('34) AIR 1934 Oudh 437 (439).
 ('28) AIR 1928 Rang 315 (316) : 6 Rang 575.
 5. ('28) AIR 1928 Mad 630 (632, 635).
 ('27) AIR 1927 Rang 156 (156). (Plaintiff's case dismissed—Issue between co-defendants need not be decided.)
 ('81) AIR 1931 All 695 (698). (Suit by remote reversioner—Suit dismissed as unsustainable—Nearer reversioners as defendants—Finding adverse to them recorded.)
 (1900) 22 All 386 (390).
 ('96) 18 All 65 (68).
 ('23) AIR 1923 Bom 203 (205): 47 Bom 534.
 ('15) AIR 1915 Bom 222(223):40 Bom 210(216).
 ('03) 5 Bom L R 97 (98). (Suit for redemption against mortgagee and his sub-mortgagee—Decree—Subsequent suit for redemption of sub-mortgage barred.)
 ('98) 22 Bom 245 (250).
 ('25) AIR 1925 Cal 996 (1000).
 ('19) AIR 1919 Cal 256 (257).
 ('01) 5 Cal W N 724 (725).
 ('38) AIR 1938 Lah 227 (232).
 ('29) AIR 1929 Lah 294 (295).
 ('38) 1938 Mad W N 224 (226).
 ('35) AIR 1935 Mad 649 (651).
 ('25) AIR 1925 Mad 947 (948). (Finding on question of title neither necessary nor embodied in decree is not res judicata.)
 ('24) AIR 1924 Mad 858(858). (Suit dismissed—Findings in judgment as between co-defendants not embodied nor implied in decree are not res judicata nor appealable.)
 ('24) AIR 1924 Mad 604 (605).
 ('22) AIR 1922 Mad 452 (453).
 ('10) 6 Ind Cas 889 (889) (Mad). (Suit for partition dismissed—Plea of self-acquisition not raised—Plea not barred in subsequent suit.)
 ('30) AIR 1930 Nag 3 (4): 26 Nag L R 121.
 ('24) AIR 1924 Nag 168 (169).
 ('36) 1936 Oudh W N 982 (997, 998).
 ('31) AIR 1931 Oudh 375 (376, 377).
 ('36) AIR 1936 Rang 308 (310).
 ('29) AIR 1929 Rang 162 (163): 7 Rang 80.
 ('26) AIR 1926 Rang 71 (72).
 ('26) 96 Ind Cas 625 (627) (Cal). (Point only incidentally raised.)
 6. ('29) AIR 1929 Mad 291 (292). (Co-defendant withdrawing his plea, hence no finding given.)
 ('27) AIR 1927 Mad 50 (51).
 ('22) AIR 1922 All 19 (21): 44 All 334. (Co-defendant's title not in issue nor determined.)
 ('10) 7 Ind Cas 892 (894) (Cal).
 ('11) 1911 Pun L R No. 71, page 311. (Question of liability of the co-defendants in the previous suit left open by Court.)
 ('23) AIR 1923 Oudh 101 (102).
 ('99) 2 Oudh Cas 303 (306). (Suit for arrears of maintenance—Decree against one of the defendants—Liability of defendants inter se not decided—Suit for contribution not barred.)
 ('16) AIR 1916 Pat 126 (129).
 7. ('25) AIR 1925 All 546 (546, 547): 47 All 778.
 7a. ('35) AIR 1935 Mad 81 (83).
 7b. ('38) 1938 Mad W N 224 (226).
 8. ('28) AIR 1928 Oudh 155 (179, 181).

The doctrine of *res judicata* must, however, be applied to co-defendants with great caution.⁹ In a partition suit where there is a *complete partition* the rights of each party are determined, not only against the plaintiff but as against all the co-defendants and such determination will, therefore, bar a subsequent suit between the co-defendants on the points decided.¹⁰ But whether rights between co-defendants amongst themselves have, or have not, been determined in any particular case, depends on no hard and fast rule. It is necessary to bear in mind in each case the *nature* of the partition suit brought.¹¹ Where the partition is *not a complete* one but only the plaintiff is divided off, it will not be *res judicata* between the defendants *inter se*, as there could, in such a case, be no *conflict* of issues between them.¹²

In the case of a *nominal* or *pro forma* defendant there is really no conflict of interest between him and another defendant and so there can be no *res judicata* between them.¹³

47. Co-plaintiffs. — The same principles of *res judicata* applicable to co-defendants apply also to co-plaintiffs *inter se*. Therefore, if there is a conflict of interest between them and it is necessary to decide that in order to give relief against the defendants and the matter is decided, then it will operate as *res judicata* between the co-plaintiffs.¹ Where there is no such conflict,² or it is not necessary to decide it for the purpose of granting relief against defendants,³ or it is not decided either actually or constructively,⁴ there can be no question of *res judicata* between them.

48. "Parties under whom they or any of them claim." — The whole policy of the Code is that if the proceeding originally instituted is right and proper, any decision obtained therein is binding on all persons on whom the right or interest may devolve.¹ A previous decision, therefore, is binding on all persons who

9. ('25) AIR 1925 Cal 431 (432): 51 Cal 997.

('17) AIR 1917 Cal 679 (679).

('34) AIR 1934 Oudh 437 (439).

10. ('26) AIR 1926 Sind 282 (283, 285).

('10) 32 All 469 (475).

('30) AIR 1930 All 287 (288): 51 All 850.

('29) AIR 1929 All 500 (501).

('01) 8 Bom L R 94 (97).

('78) 3 Cal 551 (552).

('25) AIR 1925 Oudh 566 (566, 567).

('19) AIR 1919 Oudh 105 (108): 22 Oudh Cas 300 (305).

11. ('29) AIR 1929 Oudh 275 (277, 278): 4 Luck 713.

('26) AIR 1926 Sind 282 (285).

12. ('23) AIR 1923 Bom 203 (205): 47 Bom 534.

('25) AIR 1925 All 246 (246). (Proceedings for partition of cosharer village—Rate of profits allowed to out-going co-sharers is not *res judicata* as between parties continuing as co-sharers after partition.)

('32) AIR 1932 All 666 (668): 54 All 742.

('22) AIR 1922 All 19 (21): 44 All 334.

('86) 8 All 91 (94).

13. ('10) 6 Ind Cas 554 (559) (Cal).

('01) 25 Bom 74 (77).

('36) 64 Cal L Jour 3 (5).

('35) 62 Cal 642 (652).

('19) AIR 1919 Cal 596 (597).

('07) 5 Cal L Jour 653 (657).

('38) AIR 1938 Lah 842 (846).

('21) AIR 1921 Lah 47 (47, 48): 2 Lah 88.

('14) AIR 1914 Lah 161 (163).

('32) AIR 1932 Mad 293 (301): 55 Mad 601.

('39) AIR 1939 Pat 225 (228). (Suit by A and B against C—A dying—A's son, D refusing to join the suit as plaintiff and, hence, made *pro forma* defendant—Decision in C's favour not *res judicata* against D.)

('30) AIR 1930 Pat 355 (356).

Note 47

1. ('25) AIR 1925 Mad 645 (650).

('33) AIR 1933 Lah 569 (570).

2. ('21) AIR 1921 Pat 218 (225).

('11) 8 All L Jour 807 (809, 810).

('12) 14 Bom L R 854 (859).

('29) 122 Ind Cas 329 (329, 330) (Oudh).

[But see ('38) AIR 1938 Lah 571 (574).]

3. ('12) 14 Ind Cas 466 (467, 468): 36 Bom 207.

('33) AIR 1933 Bom 287 (289): 57 Bom 488.

4. ('18) AIR 1918 Mad 1030 (1031).

Note 48

1. ('28) AIR 1928 Mad 246 (248).

('26) AIR 1926 Nag 200 (201): 21 Nag L R 159.

('22) AIR 1922 All 19 (20): 44 All 334.

('06) 33 Cal 1001 (1009).

claim under the parties to the decision,² whether they have *notice* of it or not.³ The words "parties under whom they or any of them claim" are very wide but their meaning should be restricted so as to bind a person only in respect of the *interest represented* by the party in the former suit at the time of the suit, the ground of privity for purposes of *res judicata* being *property* and not *personal relationship*.⁴ "Parties under whom they or any of them claim" comprise two classes of persons —

- (1) parties *actually* claiming under a party to the previous suit, and
- (2) parties who were *represented* by a party in the previous suit in respect of a public right or of a private right claimed in common for such person and others. See Explanation VI.

It is necessary for the application of the rule of *res judicata* that the parties to the former suit under whom the parties in the subsequent suit claim, should have been ranged on *opposite sides* or, at least, have had *conflicting interests*.⁵ Where the plaintiff and the defendant in the subsequent suit claim through the *same person* who was a party in the former suit, they cannot be said to claim under the *parties* to the previous litigation and the decision in that suit is, therefore, not *res judicata*.⁶ Even though the defendant in the subsequent suit was a party to the prior suit, the decision in the prior suit will not be *res judicata* between the parties to the subsequent suit, when both of them claim through the other party to the former suit.⁷

49. Parties claiming under parties in previous suit. — A person is said to claim under another when he derives his title through the other by assignment or otherwise.¹ But his title must have arisen *subsequently to the commencement of the first suit*.² Thus, where a person is adjudged an insolvent, any decision obtained against him subsequently thereto will not bind the Official Receiver as his title

2. ('27) AIR 1927 All 39 (41) : 48 All 803.
('69) 13 Moo Ind App 270 (275) (PC).
('11) 33 All 752 (756).
('32) AIR 1932 Bom 15 (18).
('16) AIR 1916 Bom 273 (274) : 40 Bom 606 (612, 613).
('85) 9 Bom 198 (224, 232) (FB). (Judgment against one holder of service vatan lands is *res judicata* as regards a succeeding holder.)
('29) AIR 1929 Cal 121 (130). (Plea taken and abandoned by assignors cannot be taken by assignees in subsequent proceedings.)
('21) 59 Ind Cas 808 (809) (Lah).
('15) AIR 1915 Lah 92 (93).
('24) AIR 1924 Mad 711 (712).
('69) 4 Mad H O R 349 (352).
('18) AIR 1918 Pat 41 (46) : 4 Pat L Jour 213.
[See also ('27) AIR 1927 Mad 1081 (1082).]
3. ('19) AIR 1919 Cal 169 (170).
4. ('10) 5 Ind Cas 732 (733) : 33 Mad 459.
('09) 4 Ind Cas 1091 (1092, 1093) (Mad).
('31) AIR 1931 Nag 183 (183) : 27 Nag L R 127. (Successive holders of a Jaghir).
('37) 1937 Oudh W N 423 (427).
[See also ('31) AIR 1931 All 635 (642) : 54 All 299 (FB).]
5. ('87) 1887 All W N 246 (247).
6. ('25) AIR 1925 Oudh 164 (166).
('03) 30 Cal 556 (564) : 30 Ind App 71 (PC).
7. ('32) AIR 1932 Mad 198 (203) : 55 Mad 40.

Note 49

1. ('07) 29 All 1 (3).
('22) AIR 1922 Pat 63 (67, 68) : 1 Pat 174.
('35) AIR 1935 All 888 (889). (Decision against judgment-debtor — Creditor subsequently attaching property involved in that suit is bound by that decision.)
[See also ('10) 7 Ind Cas 184 (185) (Mad).]
2. ('28) AIR 1928 Mad 635 (636).
('24) AIR 1924 Nag 422 (423, 424).
('93) 15 All 108 (111).
('86) 8 All 324 (337, 338).
('16) AIR 1916 Cal 673 (674).
('05) 32 Cal 357 (361).
('67) 7 Suth W R 103 (103).
('93) 1893 Pun Re No. 26.
('38) AIR 1938 Mad 501 (502). (Title suit against vendor and vendee—Decree holding that vendor had no title—Appeal by vendee impleading plaintiff alone—Vendor not party to appeal—Vendor not appealing—Effect—Finding against vendor not *res judicata* against vendee so as to bar his appeal—(AIR 1937 Mad 228, Reversed).)
('32) AIR 1932 Mad 238 (239).
('25) AIR 1925 Mad 358 (358).
('21) AIR 1921 Mad 30 (36) : 44 Mad 232.
('15) AIR 1915 Mad 502 (503).
('23) 73 Ind Cas 711 (713) (Pesh).
('16) AIR 1916 Low Bur 102 (102).

arose previous to the decision.³ Similarly, a purchaser, mortgagee, lessee or donee of a property is not bound by a decree obtained in a suit against the vendor, mortgagor, lessor or donor commenced after the date of the purchase, mortgage, lease or gift.^{3a} When the predecessor in the previous suit did not fill the same character as that in which the successor claims in the subsequent suit, it cannot be said that the latter is claiming under the predecessor.⁴

50. Hindu son, if claims through father. — A Hindu son gets his right to ancestral property by *birth* and does not claim through his father in respect of such right.¹ Much less can he be said to claim through the father where he actually claims as the heir of a third person.² But a suit brought against the Hindu father may bind the sons where the suit against the former was as *representing his sons' interests also* within the meaning of Explanation VI to Section 11.³ Where, however, it is clearly proved that, as a fact, there was no representation of the plaintiff's interests by his father in the previous suit, he will not, of course, be bound by the decision.⁴ See also Note 61, *infra*.

51. Co-heirs, if claim under each other. — One heir does not claim under another and cannot be barred by *res judicata* by a decision against the former.¹ See also Note 63b, *infra*.

52. Co-owners, if claim under each other. — Nor does one co-owner claim under another co-owner. A judgment rendered against one co-owner does not, therefore, bar a suit against another co-owner.¹

53. Co-tenants. — Ordinarily a decision against one tenant cannot operate as *res judicata* against co-tenants, who were not parties thereto.¹ In suits for rent under the Bengal Rent Act, 1869, where a *registered* tenant is sued for rent and a decree is obtained, the *whole tenure* is saleable under certain circumstances; in such cases, therefore, the other tenants will also be bound thereby.² In other

3. ('24) AIR 1924 Mad 689 (691) : 47 Mad 688.

3a. ('33) AIR 1933 Lah 66 (67).

('35) AIR 1935 All 351 (353).

('35) AIR 1935 Mad 414 (416).

[See also ('32) AIR 1932 Mad 238 (239).]

4. ('94) 1894 Pun Re No. 51.

('32) AIR 1932 Mad 198 (203, 204) : 55 Mad 40.

Note 50

1. ('07) 29 All 1 (3).

('80) AIR 1930 All 727 (729).

('93) 1893 All W N 168 (169).

('88) 10 All 411 (413).

('11) 9 Ind Cas 300 (302) : 1911 Pun Re No. 26 (FB).

('31) AIR 1931 Mad 550 (551).

[See also ('16) AIR 1916 Lah 15 (19) : 1916 Pun Re No. 25.]

2. ('78) 1 All 734 (743).

3. ('30) AIR 1930 Mad 257 (258).

('30) AIR 1930 Mad 206 (208).

('29) AIR 1929 All 726 (730) : 51 All 932.

('29) AIR 1929 Bom 213 (214) : 53 Bom 444.

('12) 15 Ind Cas 657 (658) (Cal).

('06) 1906 Pun L R No. 2, p. 5 : 1905 Pun Re No. 68.

('79) 1879 Pun Re No. 103.

('99) 22 Mad 461 (462, 463).

('89) 12 Mad 235 (237).

('32) AIR 1932 Nag 90 (92). (Failure by joint Hindu father to take possible plea does not entitle son to plead that he was not properly represented.)

('18) AIR 1918 Pat 73 (76) : 2 Pat L Jour 725.

4. ('29) AIR 1929 All 910 (911). (Suit dismissed on ground that a person had no right to continue suit cannot act as *res judicata* against his sons.)

('13) 11 All L Jour 36 (38).

('31) AIR 1931 Mad 550 (551). (At the time of the decree against the father, the son was not born.)

[See also ('87) 1887 All W N 217 (217).]

Note 51

1. ('82) 1882 Pun Re No. 2.

Note 52

1. ('86) 13 Cal 352 (356).

Note 53

1. ('12) 16 Ind Cas 698 (701) (Mad).

('09) 1 Ind Cas 184 (185) (Cal).

2. ('95) 22 Cal 364 (372).

('99) 26 Cal 677 (690, 691).

('05) 32 Cal 1031 (1033).

('98) 25 Cal 396 (398).

[See also ('06) 10 Cal W N 240 (241)].

cases the ordinary rule that only the right, title and interest of the judgment-debtor passes under the sale, will apply and the other tenants will not be bound by the decision in respect of their shares,³ unless the tenant sued actually so represented his tenancy that the decree should be regarded as a decree made in a suit against the tenant in his representative capacity.⁴

54. Transferor and transferee. — In accordance with the principle noted in Note 49 above, a transferee will be a person claiming under the transferor within the meaning of Section 11 if his transfer is subsequent to the institution of the suit by or against the transferor¹ but not otherwise.²

55. Mortgagor and mortgagee. — A mortgagee is a transferee from the mortgagor of an interest in the property mortgaged, and therefore, in respect of the interest transferred, the same principles as have been mentioned in Notes 49 and 54 will apply. That is, the mortgagee will be bound by a decision against his mortgagor in respect of the mortgaged property, if the decision was in a suit which was instituted *prior* to the mortgage¹ but not otherwise.²

In respect of the *proprietary title* to the property mortgaged, the mortgagee is not a representative of the mortgagor and therefore a decision against the former in respect of such title is not *res judicata* against the latter.³

Where a mortgagee sues a *stranger* for possession on the ground that the mortgaged property belonged to the mortgagor, he is really suing in a representative character *on behalf* of the mortgagor also and the decision will therefore operate as a bar in a subsequent suit by the mortgagor for redemption in which the stranger is also a party and tries to raise the same plea against the mortgagor.⁴

A mortgagor cannot be said to be claiming under his co-mortgagor.⁵ But the Oudh Judicial Commissioner's Court has held that a suit for redemption by a co-mortgagor must be deemed to be one brought in a representative capacity

3. ('09) 1 Ind Cas 184 (185) (Cal).

('09) 1 Ind Cas 539 (542) (Cal).

4. ('21) AIR 1921 Cal 584 (590).

Note 54

1. ('16) AIR 1916 Low Bur 102 (102).

('26) AIR 1926 Nag 200 (201) : 21 Nag L R 159. (Case of execution by assignee of a decree.)

('87) 15 Ind App 97 (99) : 15 Cal 756 (PC).

('84) 6 All 506 (509).

('03) 27 Bom 266 (271).

('01) 28 Cal 23 (26).

('88) 15 Cal 94 (99, 100).

('86) 12 Cal 299 (301, 302). (Alienee pendente lite.)

('39) AIR 1939 Mad 94 (95). (Prior suit by Court of Wards in charge of estate—Subsequent suit by purchaser of estate.)

('25) AIR 1925 Nag 132 (134) : 22 Nag L R 110. (Alienee after preliminary but before final decree.)

('21) 59 Ind Cas 808 (809) (Lah).

2. ('25) AIR 1925 Mad 358 (358).

('93) 15 All 108 (111, 112).

('24) AIR 1924 All 474 (475, 476).

('86) 8 All 324 (335, 336, 338).

('11) 35 Bom 297 (300).

('98) 22 Bom 939 (943, 944).

('05) 1 Cal L Jour 337 (345).

('93) 1893 Pun Re No. 26.

('16) AIR 1916 Nag 78 (79) : 13 Nag L R 19.

('16) AIR 1916 Low Bur 102 (102).

Note 55

1. ('14) AIR 1914 All 386 (388).

('12) 13 Ind Cas 641 (641, 642) (All).

('10) 6 Ind Cas 764 (765) : 34 Mad 115.

[See also ('72) 18 Suth W R 206 (207).

('31) AIR 1931 Mad 542 (547, 548)].

2. ('10) 32 All 119 (123).

('86) 8 All 324 (335, 338).

('35) AIR 1935 All 351 (353). (Decision against transferee from mortgagor after mortgage is not *res judicata* against mortgagee.)

('16) AIR 1916 Bom 204 (205) : 40 Bom 679 (684, 686).

('95) 22 Cal 364 (371, 372).

('79) 4 Cal 692 (696).

('69) 12 Suth W R 362 (363).

('35) AIR 1935 Mad 414 (416).

('26) AIR 1926 Oudh 1 (2) : 1 Luck 25.

3. ('18) AIR 1918 Oudh 176 (180).

('01) 4 Oudh Cas 100 (103).

('24) 5 L R Oudh (Rev) 118 (118).

4. ('24) AIR 1924 Bom 299 (299, 300).

5. ('04) 32 Ind App 229 (241, 242) : 28 All 1 : 9 Oudh Cas 7 (P C).

('18) AIR 1918 Oudh 25 (27) : 5 Oudh L Jour 43 (47).

on behalf of all the mortgagors and that, in that view, the decision will bind them all.⁶

56. Judgment-debtor, decree-holder and auction-purchaser. — An auction-purchaser in execution of a *money* decree purchases only the right, title and interest of the judgment-debtor and therefore claims under him and will therefore be bound by a previous decision against him in respect of such property.¹ An auction-purchaser in execution of a *mortgage* decree not only purchases the right, title and interest of the judgment-debtor, namely his equity of redemption, but also the *mortgagee-interest* which was vested in the decree-holder. (See O. 34 R. 5, Note 19.) He thus purchases the whole property which had vested in the mortgagor and mortgagee together. He therefore represents both the mortgagor and the mortgagee in respect of their respective interests.² Whether, in any particular case, he represents the mortgagor or the mortgagee depends upon the particular interest that is in question in the litigation.

The auction-purchaser in execution of a decree on a mortgage is a purchaser of rights *as on the date of the mortgage* and will not be affected by a decision in a suit subsequent to the mortgage, though the auction-purchase itself may be subsequent to the suit.³ A purchaser in execution of a puisne mortgagee's decree against the mortgagor and his sons who has purchased subject to a first mortgage, is not debarred in a suit by the first mortgagee on his mortgage from challenging the validity of the first mortgage as the sons themselves could have done, if the validity of that mortgage was not in question in the former suit.⁴ It has been held in some cases⁵ that even in the case of an auction sale in execution of a *money* decree, the auction-purchaser is a representative of a decree-holder in respect of *his right to sell* the properties of the judgment-debtor in execution of his decree. It is submitted that this view is wrong. A right to sell the judgment-debtor's properties in execution of a money decree is not an *interest in property* which alone is a ground of privity for the purposes of *res judicata*.⁶ See Note 19 to Section 47 for a fuller discussion.

In a *revenue sale* what is sold is not the right, title and interest of the defaulting proprietor but the *whole property* free from incumbrances. The auction-purchaser, in such a case, claims *paramount* title and not through the defaulting proprietor and is therefore not barred by *res judicata* by a previous decision against the defaulting proprietor.⁷

6. ('25) AIR 1925 Oudh 696 (697) : 28 Oudh Cas. 212.

Note 56

1. ('22) AIR 1922 Pat 63 (64, 67, 68); 1 Pat 174. ('97) 24 Cal 62 (74).

('35) AIR 1935 All 888 (889). (Property alleged as belonging to *R* attached by *S* in execution of decree against *R*—Suit by *RS* that it did not belong to *R* and that he was absolute owner.—*R* and *S* impleaded and suit decreed—Subsequent attachment of same property by *B*, another creditor of *R* and purchase of property by *N*—Declaratory suit by *RS*—Decree in original suit is binding on *B* and *N* and as such they cannot call upon *RS* to prove his title again.)

('04) 26 All 447 (460, 464) (F B).

('95) 22 Cal 909 (919) : 22 Ind App 129 (P C).

('33) AIR 1933 Lah 171 (172).

('22) AIR 1922 Nag 81 (82).

('11) 14 Oudh Cas 89 (94).

('26) AIR 1926 Pat 478 (479).

[See also ('28) AIR 1928 Pat 108 (109). (Auction-purchaser not a representative of decree-holder.)]

2. ('29) AIR 1929 Rang 183 (183).

3. ('22) AIR 1922 Mad 390 (390).

('10) 8 Ind Cas 846 (847, 848) (Mad).

4. ('28) AIR 1928 Mad 557 (558).

5. ('95) 18 Mad 13 (18).

See also cases cited in F. N. (8), (9) and (10) of Note 19 to S. 47.

6. See Note 48, *ante*.

7. ('04) 8 Cal W N 676 (680).

('05) 9 Cal W N 383 (385, 386).

('20) AIR 1920 Cal 420 (421).

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In respect of the *proprietary title* to the property mortgaged, the mortgagee is not a representative of the mortgagor and therefore a decision against the former in respect of such title is not *res judicata* against the latter.³

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('21) 59 Ind Cas 808 (809) (Lah).

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('24) AIR 1924 All 474 (475, 476).

('86) 8 All 324 (335, 336, 338).

('11) 35 Bom 297 (300).

('98) 22 Bom 939 (943, 944).

('05) 1 Cal L Jour 337 (345).

('93) 1893 Pun Re No. 26.

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('12) 13 Ind Cas 641 (641, 642) (All).

('10) 6 Ind Cas 764 (765) : 34 Mad 115.

[See also ('72) 18 Suth W R 206 (207).

('31) AIR 1931 Mad 542 (547, 548)].

2. ('10) 32 All 119 (123).

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('35) AIR 1935 All 351 (353). (Decision against transferee from mortgagor after mortgage is *not res judicata* against mortgagee.)

('16) AIR 1916 Bom 204 (205) : 40 Bom 679 (684, 686).

('95) 22 Cal 364 (371, 372).

('79) 4 Cal 692 (696).

('69) 12 Suth W R 362 (363).

('35) AIR 1935 Mad 414 (416).

('26) AIR 1926 Oudh 1 (2) : 1 Luck 25.

3. ('18) AIR 1918 Oudh 176 (180).

('01) 4 Oudh Cas 100 (103).

('24) 5 L R Oudh (Rev) 118 (118).

4. ('24) AIR 1924 Bom 299 (299, 300).

5. ('04) 32 Ind App 229 (241, 242) : 28 All 1 : 9 Oudh Cas 7 (P C).

('18) AIR 1918 Oudh 25 (27) : 5 Oudh L Jour 43 (47).

on behalf of all the mortgagors and that, in that view, the decision will bind them all.⁶

56. Judgment-debtor, decree-holder and auction-purchaser. — An auction-purchaser in execution of a *money* decree purchases only the right, title and interest of the judgment-debtor and therefore claims under him and will therefore be bound by a previous decision against him in respect of such property.¹ An auction-purchaser in execution of a *mortgage* decree not only purchases the right, title and interest of the judgment-debtor, namely his equity of redemption, but also the *mortgagee-interest* which was vested in the decree-holder. (See O. 34 R. 5, Note 19.) He thus purchases the whole property which had vested in the mortgagor and mortgagee together. He therefore represents both the mortgagor and the mortgagee in respect of their respective interests.² Whether, in any particular case, he represents the mortgagor or the mortgagee depends upon the particular interest that is in question in the litigation.

The auction-purchaser in execution of a decree on a mortgage is a purchaser of rights *as on the date of the mortgage* and will not be affected by a decision in a suit subsequent to the mortgage, though the auction-purchase itself may be subsequent to the suit.³ A purchaser in execution of a puisne mortgagee's decree against the mortgagor and his sons who has purchased subject to a first mortgage, is not debarred in a suit by the first mortgagee on his mortgage from challenging the validity of the first mortgage as the sons themselves could have done, if the validity of that mortgage was not in question in the former suit.⁴ It has been held in some cases⁵ that even in the case of an auction sale in execution of a *money* decree, the auction-purchaser is a representative of a decree-holder in respect of *his right to sell* the properties of the judgment-debtor in execution of his decree. It is submitted that this view is wrong. A right to sell the judgment-debtor's properties in execution of a money decree is not an *interest in property* which alone is a ground of privity for the purposes of *res judicata*.⁶ See Note 19 to Section 47 for a fuller discussion.

In a *revenue sale* what is sold is not the right, title and interest of the defaulting proprietor but the *whole property* free from incumbrances. The auction-purchaser, in such a case, claims *paramount* title and not through the defaulting proprietor and is therefore not barred by *res judicata* by a previous decision against the defaulting proprietor.⁷

6. ('25) AIR 1925 Oudh 696 (697) : 28 Oudh Cas 212.

Note 56

1. ('22) AIR 1922 Pat 63 (64, 67, 68); 1 Pat 174. ('97) 24 Cal 62 (74).

('35) AIR 1935 All 888 (889). (Property alleged as belonging to R attached by S in execution of decree against R—Suit by RS that it did not belong to R and that he was absolute owner—R and S impleaded and suit decreed—Subsequent attachment of same property by B, another creditor of R and purchase of property by N—Declaratory suit by RS—Decree in original suit is binding on B and N and as such they cannot call upon RS to prove his title again.)

('04) 26 All 447 (460, 464) (F B).

('95) 22 Cal 909 (919) : 22 Ind App 129 (P C).

('33) AIR 1933 Lah 171 (172).

('22) AIR 1922 Nag 81 (82).

('11) 14 Oudh Cas 89 (94).

('26) AIR 1926 Pat 478 (479).

[See also ('28) AIR 1928 Pat 108 (109).

(Auction-purchaser not a representative of decree-holder.)]

2. ('29) AIR 1929 Rang 183 (183).

3. ('22) AIR 1922 Mad 390 (390).

('10) 8 Ind Cas 846 (847, 848) (Mad).

4. ('28) AIR 1928 Mad 557 (558).

5. ('95) 18 Mad 13 (18).

See also cases cited in F. N. (8), (9) and (10) of Note 19 to S. 47.

6. See Note 48, *ante*.

7. ('04) 8 Cal W N 676 (680).

('05) 9 Cal W N 383 (385, 386).

('20) AIR 1920 Cal 420 (421).

A files a suit against *B* to establish his title to certain property. The suit is dismissed on the ground that the property belongs to *B*. *C* thereafter attaches the property in execution of a decree obtained by him against *B*. *A* prefers a claim under O. 21 R. 58 and on its dismissal sues under O. 21 R. 63, making *B* and *C* both defendants. It has been held by the High Court of Rangoon that *C*, the decree-holder, must be held to claim under *B* and that therefore the previous decision in *A*'s suit would operate as *res judicata* in the latter suit in favour of *C* also.^{7a} See also the following decisions of the Allahabad High Court^{7aa} which proceed on the view that an attaching creditor of *A* is a person claiming under him, in regard to whom a decision passed in favour of or against *A* would operate as *res judicata*. But the judgment-debtor does not claim under the decree-holder. Thus, where *C*, a decree-holder, sues *A*, the claimant under O. 21 R. 63 to establish the title of *B*, the judgment-debtor, to certain properties and the suit is dismissed, the decision will not operate as *res judicata* in a subsequent suit by *B* against *A* on the strength of his title.^{7b} Where *C*, a defeated decree-holder, sued *B*, the judgment-debtor and the claimant, under O. 21 R. 63 to establish the title of *B* to the attached properties, it was held by the High Court of Calcutta that the decision would not operate as a bar in subsequent suit between *B* and *A*.⁸

The Bombay High Court has, in the undermentioned case,⁹ held that an auction-purchaser is the representative of neither the judgment-creditor nor the judgment-debtor. It is submitted that the view cannot be supported on principle.¹⁰

57. Lessor and lessee. — The lessor cannot be said to claim from the lessee and is not bound by the litigation against the lessee.¹ Nor can a lessee be said to claim under the lessor for the purposes of Section 11, unless his title as lessee arises *subsequent to the previous litigation* which is alleged to operate as bar.² A successor of a landholder to whom a special privilege is given under Section 26 clause 3 of the Madras Estates Land Act, 1908, namely, the right to enhance a low rent agreed to by the predecessor is, in respect of the right of enhancement, not a person "claiming under" the landholder.³ Similarly, a transferee from a licensor who is not bound by the license under Section 59 of the Easements Act is also not bound by a previous decision in a suit by the licensor against the licensee.⁴ Similarly, where in a former suit between the landlord and the tenant, the heirs of the grantee of the tenancy set up a remission of rent, and it was held in favour of the heirs, and, subsequently, the heirs transferred the *tenure* and transferees against whom the landlord brought a suit for rent raised the same question of

(12) 15 Ind Cas 869 (870) (Cal).

(07) 34 Cal 868 (871).

(86) 12 Cal 82 (90, 91).

7a. (34) AIR 1934 Rang 206 (207).

7aa. (39) AIR 1939 All 202 (203).

(36) AIR 1936 All 722 (723).

7b. (90) 1890 All W N 177 (177).

(87) 11 Bom 114 (119).

8. (28) AIR 1928 Cal 130 (134) : 55 Cal 448.

9. (11) 35 Bom 275 (277).

10. (95) 22 Cal 909 (919) : 22 Ind App 129 (PC).

Note 57

1. (82) 11 Cal L Rep 122 (124).

(24) AIR 1924 Mad 576 (576, 577).

(27) AIR 1927 Bom 270 (272).

(85) 11 Cal 562 (566).

(75) 24 Suth W R 128 (129).

(21) AIR 1921 Mad 306 (308) : 44 Mad 514.

(35) AIR 1935 Nag 61 (62) : 31 Nag L R 165.

(Decision against Municipality in former suit who was a sort of lessee from Government—Government not bound by decision.)

(35) AIR 1935 Oudh 394 (398) : 11 Luck 209.

2. (24) AIR 1924 Mad 576 (577).

(19) AIR 1919 Cal 782 (785) (S B).

(21) AIR 1921 Mad 708 (708).

[But see (37) AIR 1937 Mad 544 (546). (A lessee is bound by a judgment given against his lessor in the absence of any fraud or collusion on his part—The decision proceeds on the ground that the lessee holds the property subordinately to the landlord.)]

3. (18) AIR 1918 Mad 312 (313, 314).

4. (30) AIR 1930 Oudh 203 (204).

remission of rent, it was held that the former suit did not operate as *res judicata* inasmuch as the transferees were only of the tenure and not of the *exemptions* from rent in which case alone they could be said to claim under the *heirs* for the purposes of Section 11.⁵

58. Miscellaneous.—Where an *inam* was granted to *A* and his male descendants in perpetuity, the successors to the *inam* are representatives of the prior holders for the purposes of Section 11. Each succession of a male heir does not involve a re-grant by the Government.¹

An Official Assignee acting on behalf of creditors cannot be said to be representing the insolvent. A decision, therefore, against the insolvent in a previous proceeding is not binding on the Official Assignee acting on behalf of the creditors in a subsequent proceeding.²

A pre-emptor stands in the shoes of the vendee, and so a decision in a suit between the original vendor and the vendee relating to the pre-empted properties cannot be challenged in a subsequent suit between the original vendor and the pre-emptor.³

A decree for foreclosure obtained against a life estate holder without impleading the remainderman is not binding on the remainderman.⁴

59. Persons represented in prior suits—Representative suits — Explanation VI.—Explanation VI of the Section extends the meaning of the words “under whom they or any of them claim” by enacting that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall be *deemed to claim* under persons so litigating. This Explanation is not confined to cases covered by O. 1 R. 8, *infra* but extends to include any litigation in which, apart from that Rule altogether, parties are entitled to represent interested persons other than themselves.^{1a} In order that a suit might be a representative one under this Explanation, it is essential that —

(1) the party litigating must do so in respect of a *public right* or of a *private right claimed in common for himself and others*, and

(2) the litigation must be conducted *bona fide* in respect of such right.¹

Where these conditions are satisfied, then a decision in such litigation will bind *all persons interested in the right litigated*.²

5. ('08) 7 Cal L Jour 202 (207).

Note 58

1. ('25) AIR 1925 P C 184 (187) : 52 Cal 971: 21 Nag L R 117 : 52 Ind App 294 (P C).

('89) 12 Mad 285 (237). (Decree in a suit by a karnam as such binds his successor in respect of land held on service tenure.)

2. ('25) AIR 1925 Mad 688 (688).

3. ('33) AIR 1933 Lah 529 (530).

4. ('31) AIR 1931 Oudh 358 (362) : 6 Luck 715.

Note 59

1a. ('33) AIR 1933 P C 183 (189) : 56 Mad 657 : 60 Ind App 278 (P C). (AIR 1928 Mad 77, Overruled.)

('37) AIR 1937 Bom 238 (240) : I L R (1937) Bom 326.

('37) AIR 1937 Lah 70 (71).

[See ('31) AIR 1931 Lah 161 (162) : 12 Lah 497.]

1. ('23) AIR 1923 All 838 (339, 340).

('95) 18 Mad 164 (167).

('33) AIR 1933 P C 183 (190) : 56 Mad 657 : 60 Ind App 278 (P C).

('35) AIR 1935 Lah 505 (507). (Suit for declaration of title and possession by one of collaterals for himself and excluding title of others—Decision in it does not operate as *res judicata* in suit by another, but is of evidentiary value.)

('35) AIR 1935 Lah 391 (395) : 17 Lah 20.

('28) AIR 1928 Mad 268 (271). (Fraudulent withdrawal—No *res judicata*.)

('27) AIR 1927 Mad 645 (647). (The word “*bona fide*” in Expl. VI can only apply to a litigation where every attempt is made to bring all the persons in Court.)

2. ('24) AIR 1924 All 178 : (Dispute between

The onus of proving the want of *bona fides* in respect of the previous litigation is on the party seeking to avoid the prior decisions.^{2a} Proof of negligence is not sufficient to establish such want of *bona fides*.^{2b}

The words "public right" have been added in Explanation VI in view of the new Section 91 and to prevent multiplicity of litigation in respect of public rights.³ As regards private rights, there must be a *community of interest* between the parties such as is referred to in O. 1 R. 8 of the Code.⁴ In other words, they must claim under a common *title*.⁵ But, in the case of a public right, such a right necessarily implies that it is claimed by the plaintiff in common with others and the expression in Explanation VI, "claimed in common for themselves and others" would be superfluous in the case of such a right and cannot apply to it.^{5a} Where it does not appear that all the persons intended to be represented are *necessarily interested* in obtaining the relief sought, a suit is not a representative one.⁶ Nor will the Explanation apply where the plaintiff claims a right *for himself*, though the right may be common to others also.⁷ Thus, where *A* sues *B*, a decree-holder, that his property is not liable to attachment in execution of *B*'s decree, *B* cannot be deemed to represent other persons holding other decrees against *A* and seeking to sell the property.⁸

Whether a plaintiff, in a particular case, sues in a representative character or a defendant is sued or defends in a representative character, depends upon the facts of that case. It also depends upon the *substance* and not the *form* of pleadings. Thus, it is not necessary that the *cause title* of the suit or pleading should make it

- Municipality decided against the former—
They cannot in a subsequent suit by the public set up their rights to it.)
(17) AIR 1917 Pat 123 (123, 124).
(29) AIR 1929 All 775 (776) : 52 All 71.
(23) AIR 1923 All 338 (339). (Decision in suit instituted in the interest of the estate binds persons inheriting afterwards.)
(86) AIR 1936 Lah 13 (14). (Public or private right claimed in common with others—Person may litigate *bona fide* and bind by S. 11, Civil P. C., others interested, by findings, though others not named.)
(19) AIR 1919 Lah 172 (173). (Suit on behalf of Mahomedan community.)
(14) AIR 1914 Lah 133 (135).
(27) AIR 1927 Mad 1088 (1089).
(20) AIR 1920 Mad 568 (572, 573) : 43 Mad 487. (Suit for kattubadi against aghaharam-dars.)
(31) AIR 1931 Nag 183 (183, 184) : 27 Nag L R 127. (Jagirdar—Decree against.)
(28) AIR 1928 Oudh 155 (182). (Decision against adoptive mother to the effect that she possessed no authority to adopt binding upon the adopted son.)
(01) 4 Oudh Cas 100 (104).
(34) AIR 1934 Pat 350 (351).
[See also ('33) AIR 1933 Lah 325 (326) : 14 Lah 442. (Expl. VI applies to persons who are not actual parties.)]
- 2a. ('37) AIR 1937 P C 1 (4) : I L R (1937) Mad 263 : 64 Ind App 17 (P C).
(38) AIR 1938 Lah 499 (501).
2b. ('37) AIR 1937 P C 1 (4) : I L R (1937) Mad 263 : 64 Ind App 17 (P C).
3. ('18) AIR 1918 Mad 166 (167).
(33) AIR 1933 P C 183 (189) : 56 Mad 657 : 60 Ind App 278 (P C).
(14) AIR 1914 All 441 (442) : 36 All 424.
4. ('03) 16 C P L R 161 (162).
(11) 9 Ind Cas 819 (820, 821) : 33 All 493.
(81) 6 Cal 31 (33).
(1900) 23 Mad 28 (32).
(23) AIR 1923 Oudh 185 (199) : 26 Oudh Cas 133.
5. ('88) 10 All 411 (412).
(81) 6 Cal 49 (54).
(35) AIR 1935 Oudh 62 (67) : 10 Luck 443. (Person claiming in former suit whole estate for himself and asserting his exclusive title—He cannot be said to be representing interests of others.)
- 5a. ('37) AIR 1937 Lah 425 (428) : I L R (1937) Lah 629. (On appeal from AIR 1937 Lah 70.)
6. ('05) 28 Mad 457 (463) (F B). (Quoting Daniell's Chancery Practice.)
(82) 1882 Pun Re No. 111.
7. ('07) 30 Mad 185 (190) : 34 Ind App 93 (P C).
(27) AIR 1927 Mad 645 (647).
(75) 1 Bom H C R 141 (143).
(69) 12 Suth W R 117 (118).
(35) AIR 1935 Lah 537 (538). (Explanation VI applies only to those suits which are instituted in a representative capacity.)
(27) AIR 1927 Mad 645 (647).
(33) AIR 1933 Nag 169 (170, 171) : 29 Nag L R 246.
[See also ('37) AIR 1937 Lah 425 (427) : I L R (1937) Lah 629.]
8. ('96) 18 All 413 (413).

reliefs not covered by Section 92.⁵ A suit, not under Section 92 of the Code, for declaring certain trust deeds invalid brought without leave obtained under O. 1 R. 8 of the Code, is not a representative suit.⁶

61. Suits by or against manager of a Hindu family. — A suit by or against the manager of a Hindu family where the latter has been *bona fide* acting on behalf of the other members interested, must be taken to be one litigated in a representative capacity and will bind the others so interested as *res judicata*.¹ The question whether a Hindu father, in a particular suit, in which he alone of the family is a party, represents his co-parceners, is a question to be decided with reference to the circumstances of each case.² Thus, a Hindu father making an improper use of a tenure (*e. g.*, construction of a building in an agricultural holding) cannot be allowed to represent his minor sons in a suit for ejectment on account of such use.³

Where a suit is decided against the father as representing the family, a subsequent suit raising the same question between the parties cannot be said to be not *res judicata* merely by reason of the fact that the sons were not added as

5. ('28) AIR 1928 P C 16 (20) : 55 Ind App 96 : 55 Cal 519 (PC). (Reversing A I R 1925 Cal 187.)
 6. ('30) AIR 1930 Cal 787 (797) : 58 Cal 474.
- Note 61**
1. ('27) AIR 1927 P C 56 (57) : 51 Bom 450 : 54 Ind App 122 (PC).
 ('32) AIR 1932 Nag 90 (92).
 ('14) AIR 1914 P C 136 (137) : 36 All 383 : 41 Ind App 216 (PC). (Affirming 38 All 71).
 ('78) 6 Ind App 233 (236, 237) (PC).
 ('72) 14 Moo Ind App 367 (376) (PC).
 ('89) AIR 1939 All 203 (205). (Constructive *res judicata*.)
 ('37) AIR 1937 All 731 (734).
 ('37) AIR 1937 All 108 (111). (Decision binds even minor members.)
 ('37) AIR 1937 All 28 (29). (But where there is a finding in the subsequent suit that the father who was a party to the previous suit was in collusion with the opposite party, S. 11, Explan. VI will not apply.)
 ('29) AIR 1929 All 775 (776) : 52 All 71.
 ('26) AIR 1926 All 201 (201). (Decree binds persons born subsequently.)
 ('25) AIR 1925 All 67 (68).
 ('20) AIR 1920 All 50 (51) : 42 All 359 (361).
 ('12) 17 Ind Cas 290 (290) (All).
 ('10) 33 All 71 (79). (Affirmed on appeal AIR 1914 P C 136.)
 ('38) AIR 1938 Bom 465 (466, 467). (When a Hindu father files a suit for recovery of certain property for the family for the benefit of himself and all his sons and in a representative capacity, and agrees to be bound by a special oath taken by the defendant if such oath is taken, the decree following thereon binds the sons also not only on principles of Hindu law but also under S. 11, C. P. Code, read with Explanation VI thereto.)
 ('29) AIR 1929 Bom 213 (214) : 53 Bom 444. (It was doubted in this case whether it was *res judicata* by virtue of Explanation VI.)
 ('13) 15 Bom L R 36 (40).
 ('10) 34 Bom 354 (357).
 ('90) 14 Bom 597 (602, 603).
 ('83) 7 Bom 467 (472, 473).
 ('81) 5 Bom 685 (687) Note (3).
 ('15) AIR 1915 Cal 464 (470). (But it must be shown that the matter was one in which the member sued was entitled to represent the whole family.)
 ('88) 15 Cal 70 (81, 82) : 14 Ind App 187 (PC).
 ('24) AIR 1924 Lah 26 (27).
 ('15) AIR 1915 Lah 92 (93).
 ('24) AIR 1924 Mad 571 (573).
 ('21) AIR 1921 Nag 52 (53).
 ('14) AIR 1914 Oudh 353 (355).
 ('34) AIR 1934 Pat 617 (617).
 ('28) AIR 1928 Pat 557 (561).
 ('25) AIR 1925 Pat 308 (310).
 ('16) AIR 1916 Pat 269 (270) : 1 Pat L Jour 221.
 [See ('20) AIR 1920 P C 1 (3) : 47 Cal 924 (931) : 47 Ind App 91 (PC).
 ('12) 34 All 572 (575, 576, 577) (FB).
 ('12) 34 All 549 (554, 561, 571) (FB).
 ('32) AIR 1932 Mad 207 (212) : 55 Mad 483. (A brother held not to represent other members of family.)
 [See also ('11) 33 All 272 (276, 277) : 38 Ind App 45 (PC).]
 2. ('07) 17 Mad L Jour 197 (198, 199).
 ('33) AIR 1933 Nag 44 (46) : 29 Nag L R 77.
 ('14) AIR 1914 Bom 113 (114) : 39 Bom 29 (33, 34).
 ('11) 11 Ind Cas 291 (294) (Oudh). (Former suit held not representative.)
 [See ('07) 29 All 1 (3). (Case remanded to ascertain in what capacity the father sued in the former suit.)]
 [See also ('19) AIR 1919 Mad 776 (776, 777). (Suit by a Hindu father to set aside an alienation on the grounds of undue influence and fraud is no bar to a suit by the sons to set it aside on the ground that it is not for a binding family purpose.)]
 3. ('07) 17 Mad L Jour 197 (198, 199).

Hindu widow suing for the benefit of the estate must be taken to be suing in a representative capacity *within the meaning of Explanation VI of Section 11*. The attention of the Court does not, in that case, seem to have been drawn to the decision of the Privy Council referred to above to the effect that it is the *general principle* and not Section 11 that applies to such cases.

Where a decree is passed against the widow on a ground *personal* to herself^{5a} or the litigation is not conducted by her *bona fide* for the benefit of the estate, it binds only her widow's estate and is not binding on the reversioner.⁶ Whether the widow represents the estate in a litigation may be gathered from the nature of the allegations put forward and the issues raised, tried and decided in the former suit. The mere allegation that she did or did not, would be of little value. Was it a claim by or against the widow *personally* or the inheritance which she represented? If the contentions raised are those connected with the inheritance and the trial was with reference to them, the widow must be held to be representing the estate. If not, the litigation must be deemed to be *personal to her and not binding on the reversioners*.⁷ Thus, a suit by a Hindu widow challenging an adoption,⁸ or for recovery of the inheritance,⁹ or for protecting or preserving the inheritance as against strangers,¹⁰ will be one brought by her as representing the estate. If, however, the suit is in relation to anything which she may have done herself to the *prejudice* of the reversionary heirs, she cannot be said to be litigating in respect thereof as representing the estate.¹¹ A decree thus obtained by a mortgagee on the basis of a mortgage *not executed by her for legal necessity* cannot bind the reversioners.¹² If the mortgage was for legal necessity or for the benefit of the estate, the decree against the widow would, of course, be binding on the reversioners.¹³

The "special cause" referred to in the *Shivaganga case*¹⁴ must be *ejusdem generis* with unfairness or irregularity in the proceedings referred to by the Judicial Committee, and does not include a mere failure to implead the reversioner in the

5a. ('88) AIR 1938 PC 254 (256, 258) : I L R (1938) 2 Cal 653; 65 Ind App 365; 32 Sind L R 918 (PC).

('89) AIR 1939 All 197 (202). (Suit by daughters.)

6. ('19) AIR 1919 Bom 146 (148, 150) : 43 Bom 869 (879, 883, 884).

('23) AIR 1923 Cal 204 (206).

('81) AIR 1931 All 407 (411). (Only a judgment of the Court, given in a fair fight between a female heir representing the estate operates as *res judicata*.)

('29) AIR 1929 All 963 (965) : 52 All 178.

('08) 30 All 394 (398).

('85) AIR 1935 Bom 131 (133).

('33) AIR 1933 Bom 126 (128).

('87) 11 Bom 119 (130). (Not *bona fide*.)

('31) AIR 1931 Cal 511 (513).

('81) AIR 1931 Cal 73 (75).

('12) 16 Ind Cas 437 (438) (Cal).

('12) 14 Ind Cas 299 (300) : 39 Cal 925. (Death of widow—Pending suit—Legal representative does not represent full estate.)

('99) 26 Cal 285 (298).

('89) 16 Cal 511 (513). (Decree for arrears of rent.)

('84) 10 Cal 985 (991, 992) : 11 Ind App 66 (PC).

('75) 1 Cal 133 (138, 140) : 2 Ind App 275 (PC).

('98) 1898 Pun Re No 78.

7. ('24) AIR 1924 Mad 301 (307).

('29) AIR 1929 All 963 (965) : 52 All 178.

('93) 20 Cal 906 (924). (Widow not representing estate—No *res judicata*.)

('19) AIR 1919 Oudh 213 (214) : 22 Oudh Cas 156. (Do.)

[See also ('85) 32 All 33 (42, 43).

('06) 9 Oudh Cas 339 (347, 348).]

8. ('25) AIR 1925 All 79 (83) : 46 All 637.

('95) 1895 Pun Re No. 29 (F B).

('15) AIR 1915 Mad 637 (638, 639).

('84) AIR 1934 Pat 696 (698).

9. ('09) 1 Ind Cas 62 (64) (Bom).

('13) 37 Bom 172 (177, 178).

10. ('19) AIR 1919 Oudh 258 (259) : 22 Oudh Cas 260.

('17) AIR 1917 Bom 11 (13) : 42 Bom 69 (79).

('36) AIR 1936 All 422 (430).

('24) AIR 1924 Mad 301 (304).

[But see ('18) AIR 1918 Mad 756 (757).]

11. ('19) AIR 1919 Oudh 258 (259) : 22 Oudh Cas 260.

12. ('25) AIR 1925 Pat 625 (673, 674) : 4 Pat 510.

('19) AIR 1919 Oudh 258 (259) : 22 Oudh Cas 260 (263, 264).

[But see ('18) AIR 1918 Cal 876 (877). (A decree against a widow and the then reversioner binds the whole inheritance.)]

13. ('09) 4 Ind Cas 483 (485) (Cal).

14. ('66) 9 Moo Ind App 539 (604) (PC).

prior proceedings.¹⁵ As to the binding nature of compromises made by the widow out of Court, on the reversioners, see the undermentioned cases.¹⁶

The above principles will apply also to the case of other female heirs with limited estates under the Hindu law.

63a. Suits by Hindu reversioners. — The right to sue a Hindu widow for a declaration that certain alienations made by her are not binding beyond her lifetime, belongs only to the nearest reversioner, except in cases where such reversioner has precluded himself from suing, in some way, by his own act or conduct, when a remote reversioner might sue.¹ During the lifetime of the widow the reversionary right is a mere possibility and is common to all the reversioners, for it cannot be predicated as to who would be the nearest reversioner at the time of her death. Where a suit is brought by the nearest reversioner in the lifetime of the widow that an adoption made by her is not valid or an alienation by her is not binding on the inheritance, it is not brought for his personal benefit, for the object is to remove a *common apprehended injury* to all the reversioners, presumptive and contingent alike. It is a suit brought in a *representative capacity* and on behalf of all the reversioners. The act complained of is to their *common* detriment just as the relief sought for is for their common benefit.² The decision in such a suit affects the reversioners as a body and under Explanation VI to Section 11 bars a fresh suit by another reversioner on the *same cause of action*.³ The principle would apply equally whether it is a decree after contest or on a *bona fide* compromise.⁴

15. ('22) AIR 1922 Mad 233 (234).

16. ('18) AIR 1918 P C 70 (74) : 40 All 487 (496) : 45 Ind App 118 (P C).

('22) AIR 1922 All 217 (219) : 44 All 428.

('24) AIR 1924 P C 56 (58, 59) : 47 Mad 181 : 51 Ind App 145 (P C).

('17) AIR 1917 P C 95 (98) : 45 Cal 590 : 45 Ind App 35 (P C). (Held not binding, as the conditions which make a decree against a limited owner, binding on the estate, were absent in the case.)

('14) AIR 1914 P C 44 (45) (P C).

('25) AIR 1925 Oudh 30 (33).

('68) 9 Suth W R 463 (465).

('38) AIR 1938 Lah 571 (573).

('29) AIR 1929 Lah 295 (305) : 10 Lah 613. (Different alienation and different cause of action—No bar.)

('28) AIR 1928 Lah 371 (373).

('27) AIR 1927 Lah 835 (835).

('25) AIR 1925 Lah 180 (180).

('25) AIR 1925 Lah 89 (90) : 5 Lah 421.

('25) AIR 1925 Mad 1162 (1163).

('25) AIR 1925 Mad 86 (86, 87).

('18) AIR 1918 Mad 659 (661).

('19) AIR 1919 Mad 479 (482) : 49 Ind Cas 268 (271, 272).

('22) AIR 1922 Oudh 236 (242) : 25 Oudh Cas 189.

('20) AIR 1920 Oudh 265 (267) : 7 Oudh L Jour 342 (347).

('31) 135 Ind Cas 505 (506) (Lah).

('26) 98 Ind Cas 505 (505) (All).

[See ('98) 21 Mad 344 (351).]

The following decisions to the contrary are no longer good law:—

('03) 25 All 546 (575).

(1900) 22 All 382 (383).

('05) 32 Cal 62 (67, 71).

('84) 10 Cal 324 (333) : 10 Ind App 150 (P C).

('03) 13 Mad L Jour 359 (361, 362).

4. ('07) 1907 Pun L R No. 120, page 384 : 1907 Pun Re No. 37.

('22) AIR 1922 P C 356 (358) : 1 Pat 741 : 49 Ind App 342 (P C).

('33) AIR 1933 Oudh 322 (326).

Note 63a

1. ('14) AIR 1914 P C 34 (35) : 37 All 45 (P C).

2. ('15) AIR 1915 P C 124 (125) : 38 Mad 406 : 42 Ind App 125 (P C).

('31) AIR 1931 Lah 79 (80) : 12 Lah 275.

3. ('25) AIR 1925 P C 272 (276, 277) : 52 Ind App 398 : 47 All 883 (P C).

('15) AIR 1915 P C 124 (126) : 38 Mad 406 : 42 Ind App 125 (P C).

('25) AIR 1925 All 483 (484) : 47 All 505.

('22) AIR 1922 All 301 (308, 309) : 44 All 19 (F B). (The decisions in AIR 1921 All 237, 22 All 33 and 3 Ind Cas 117 in so far as they are against this decision must be deemed to be overruled by this decision.)

('02) 4 Bom L R 893 (908).

('39) AIR 1939 Cal 135 (140). (AIR 1916 P C 117, Relied on.)

('32) AIR 1932 Cal 271 (274) : 59 Cal 636. (Principle of res judicata in representative suit stated.)

65 Where in the previous suit the plaintiff who sued as a reversioner was held not to be a reversioner, he cannot be said to have represented the reversionary body and, therefore, the decision would not operate as *res judicata* against other reversioners.⁵ Again, where a reversioner sues not in a representative capacity but in a personal one, it will not operate as *res judicata* in a suit by the actual reversioner after the widow's death.⁶

63b. Decree against one only of several legal representatives. — Where one of several legal representatives is sued alone, he sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of fraud or collusion the decree passed in such suit is binding on the estate and on all the other representatives.¹ But where a person is substituted as the legal representative of a deceased party without deciding *whether he was such representative*, the decision in the suit would not bar as *res judicata*, a subsequent suit by such representative for a declaration that the decree is not binding on him.² A suit against a *wrong* person as the legal representative of a deceased person is not *res judicata* in a subsequent suit against the real heir.³ As for *execution proceedings* against wrong representatives, see Section 52, Notes 5 and 6. See also Note 11 to O. 34 R. 1.

64. Suits by or against administrators. — An executor or administrator of a deceased person's estate represents the estate in litigation and a decision against him as such representative is binding on all persons who subsequently succeed to the estate.¹

65. Suits by or against a benamidar or agent. — A *benamidar* in fact represents the real owner and, so far as their relative legal positions are concerned, he is a mere trustee for the real owner and a decision in a litigation by or against him will bind the beneficial owner as *res judicata*.¹ The question may be viewed in another aspect, namely that, in the absence of any evidence to the contrary, it is to be presumed that the *benamidar* has instituted the suit or defends it with the full knowledge of the beneficial owner.² In yet another view the *benamidar* is only *another name* for the real owner and, as such, the real owner himself must be deemed to be a party for purposes of Section 11.³ Where, however, the *benamidar*

5. ('26) AIR 1926 All 573 (573).

('25) AIR 1925 All 585 (586) : 47 All 929.

6. ('80) AIR 1980 All 9 (11).

Note 63b

1. ('02) 26 Mad 230 (234, 235).
('28) AIR 1928 Mad 1199 (1199, 1200).
('11) 10 Ind Cas 32 (33) (Cal).
('18) AIR 1918 Mad 147 (148).
2. ('81) 6 Cal 777 (781).
3. ('28) AIR 1928 Pat 362 (363).

Note 64

1. ('09) 4 Ind Cas 483 (485) (Cal). (Executrix.)
('05) 29 Bom 96 (100). (Administrator.)

Note 65

1. ('18) AIR 1918 P C 140 (143) : 46 Cal 566 :
46 Ind App 1 (P C).
('20) AIR 1920 Nag 184 (185).
('07) 4 All L Jour 689 (691) : 30 All 30 (32).
(Right to redeem not availed of by benamidar
— Subsequent suit by beneficial owner barred.)
('96) 18 All 69 (77).

- ('26) AIR 1926 Bom 115 (115, 116) : 49 Bom
832. (Principle applies even to cases falling
within Dekkhan Agriculturists' Relief Act.)
('93) 22 Bom 672 (679).
('87) 11 Bom 708 (722, 723).
('20) AIR 1920 Cal 425 (426).
('14) AIR 1914 Cal 896 (898).
('13) 20 Ind Cas 499 (500) (Cal).
('92) 15 Mad 267 (268).
('05) 3 Low Bur Rul 18 (19, 20).
('99) P. J. (Low Bur) 512. (Cited in 3 Low
Bur Rul 18 (20).)
2. ('84) 10 Cal 697 (705).
('96) 18 All 69 (77).
('13) 21 Ind Cas 979 (980) (Cal).
('09) 2 Ind Cas 990 (990) (Cal).
3. ('84) 10 Cal 697 (705, 706).
('24) AIR 1924 Lah 702 (705).
('81) 3 All 812 (814).
('18) AIR 1918 Cal 253 (254).
('14) AIR 1914 Cal 323 (324).
('70) 13 Suth W R 157 (159).

protests that he is only a *benamidar* and does not want to carry on the litigation and wants the real owner to be brought on record, but without doing so a decree is obtained against him, it cannot be said that he *represented* the real owner and the latter will therefore not be barred by *res judicata*.⁴ The same principles would apply to a decision against an *agent*. It is binding on the principal inasmuch as he must be deemed to be a party to the suit.⁵

66. Suits by or against joint contractors or wrong-doers. — Where the liability of the joint promisors or wrong-doers is single or undivided, there is only one cause of action and as soon as it is sued upon and a decree obtained, it is satisfied and exhausted.¹ But where the obligation is *joint and several* a decree obtained against one *without satisfaction* is no bar to a suit against the other.²

67. Miscellaneous. — A *creditor* of a party is not a representative of the party for the purposes of Section 11.¹

The *municipal board* represents the public in disputes about wells, etc., vested in them, and a decision against them in respect of such matters will be *res judicata* in a subsequent suit by other persons.² A judgment obtained against the municipal council in a former suit will operate as *res judicata* in a subsequent suit against the chairman of the municipal council.³ The reason is that for the purpose of applying the principle of *res judicata* the municipal council and its chairman cannot be viewed as two independent entities.

The *Official Liquidator* represents the debenture-holders and creditors as well as the company, and if an order is made against him in respect of the company's property, the order is conclusive in the winding-up, on all parties so represented.³

A decree against a *vatan* holder as representing the estate is binding on his successor.⁴ Likewise a decree passed against a *jahgirdar* as representing the estate is binding on his successors.⁵

68. Judgments in rem. — A judgment, as a rule, affects only the parties thereto and their privies. Judgments *in rem* form an exception to this rule, and are valid not only *inter partes* but against all the world. Sections 40 to 44 of the Evidence Act deal with the relevancy of judgments of Courts of Justice. Section 40 enacts that the existence of a judgment, order or decree which, by law, prevents any Court from taking cognisance of a suit or from holding a trial, is a relevant fact when the question is whether such Court ought to take cognisance of such suit or to hold such trial. Section 41 deals with final judgments, decrees or orders of competent Courts *in the exercise of Probate, Matrimonial, Admiralty or Insolvency Jurisdiction*, or what is known as judgments *in rem*, and it states that such judgments, decrees or orders are conclusive proof of the *matters specified in the*

4. ('14) AIR 1914 All 173 (175) : 36 All 446 (450, 451).

5. ('13) 1913 Pun L R No. 104, page 387. ('88) 11 Mad 309 (316). (Decision against manager of party.)

Note 66

1. ('79) 5 Cal 291 (293, 294). ('90) 14 Bom 408 (417). (Joint makers of promissory notes.) ('73) 18 Suth W R 458 (458, 459).
2. (1900) 21 All 301 (307, 308).

('81) 7 Cal 627 (632, 633).

('84) 10 Cal 924 (927).

[See ('01) 25 Bom 378 (386).]

Note 67

1. ('92) 15 Mad 477 (479).
2. ('24) AIR 1924 All 178 (180) : 46 All 110.
- 2a. ('33) AIR 1933 Mad 59 (61).
3. ('20) AIR 1920 P C 56 (58) : 43 Mad 550 : 47 Ind App 38 (PC).
4. ('85) 9 Bom 198 (221) (FB).
5. ('31) AIR 1931 Nag 183 (184) : 27 Nag L R 127.

11 Section, and, by Section 4 of the Evidence Act, evidence cannot be allowed to
-69 disprove the facts established by such judgments.¹ As regards judgments *in rem*,
therefore, strangers are in the same position as the parties themselves.²

As regards judgments which do not fall within Section 41 of the Evidence Act, they can only be evidence if they come under Section 42 or any other relevant Section of that Act,³ but cannot be used for the purpose of preventing the other side from proving facts which he sets up.⁴

A judgment is not a judgment *in rem* because in a suit by *A* for the recovery of an estate from *B*, it has determined an issue raised concerning the *status* of a particular person or family.⁵ As has been said before, the judgment must have been given by the Court in the exercise of its Probate, Matrimonial, Admiralty or Insolvency Jurisdiction.^{6a} The judgment of an Insolvency Court declaring a person to be a creditor of the insolvent does not confer any 'legal character' on him within the meaning of Section 41 of the Evidence Act and hence such a declaration does not operate as a judgment *in rem*.^{6b}

There is a broad distinction between the effect of a judgment *in rem* and a judgment *in personam*. The point adjudicated upon in the former is always as to the status of the *res* and is conclusive against the world *as to that status*; whereas in a judgment *in personam* the point *whatever it may be* which is adjudicated upon is conclusive between the parties or their privies.⁶

69. Decree against minor. — As has been seen in Note 41 *ante*, it is necessary, in order to maintain a plea of *res judicata*, that the person whose interest it is sought to be bound or his predecessor in title should have been properly represented in the former litigation.¹ When a decree is obtained against a minor who was not represented *at all*, or, what is the same thing in effect, represented by a person *incompetent* to act as guardian, the minor is no *party* to the suit and as such the decree is without jurisdiction and not binding on him as

Note 68

1. ('21) AIR 1921 Mad 248 (253, 255) : 44 Mad 778 (FB).
(67) 7 Suth W R 388 (341).
(16) AIR 1916 P C 78 (80) : 43 Cal 694 : 43 Ind App 91 (PC).
(31) AIR 1931 Cal 138 (139, 140).
(26) AIR 1926 Cal 568 (573).
2. ('82) 6 Bom 703 (710, 711).
3. ('96) 20 Bom 53 (57, 58).
(95) 22 Cal 533 (542) : 22 Ind App 60 (PC).
(Admissible under S. 13 of the Evidence Act.)
(88) 10 All 585 (586). (Do.)
(1900) 24 Bom 591 (598, 599). (Do.)
(78) 3 Bom 3 (5). (Do.)
(08) 7 Cal L Jour 384 (386). (Do.)
(08) 7 Cal L Jour 90 (93). (Do.)
(07) 11 Cal W N 380 (388). (Do.)
(02) 29 Cal 343 (354) : 29 Ind App 62 (PC). (Do.)
(1900) 27 Cal 379 (391). (Do.)
(98) 2 Cal W N 172 (173).
(97) 1 Cal W N 120 (120).
(85) 11 Cal 745 (748). (Admissible under S. 13 of the Evidence Act.)
(93) AIR 1933 Lah 553 (554) : 14 Lah 630.
(93) AIR 1933 Lah 57 (57).
(12) 1912 Pun L R No. 142, (pp. 429, 430).
(92) 15 Mad 12 (14). (Admissible under S. 13

of the Evidence Act.)

- [See also ('93) 15 All 261 (268, 269) (PC).
(Affirming 12 All 1 on appeal.)
4. ('21) AIR 1921 Mad 248 (253, 256) : 44 Mad 778.
(07) 31 Bom 143 (158).
(66) 2 Bom H C R 385. (Second edition p. 363 (365).)
(16) AIR 1916 Lah 322 (323).
5. ('66) 9 Moo Ind App 539 (601) (PC).
- 5a. ('28) AIR 1928 All 395 (396). (Judgment that *A* is not the adopted son of *B* is not one in rem.)
(33) AIR 1933 Rang 250 (251) : 11 Rang 198.
(Suit for restitution of conjugal right by *A* against *B* decreed—Declaratory suit by *B* against another that she is the wife of *C*—Former judgment is not one in rem.)
- 5b. ('31) AIR 1931 Mad 441 (445, 448, 451) : 54 Mad 601 (SB).
6. ('28) AIR 1928 Sind 121 (124) : 22 Sind L R 105.

Note 69

1. ('14) AIR 1914 Low Bur 141 (141).
(09) 31 All 572 (582) : 36 Ind App 168 (PC).
(Case of a minor not properly represented in execution proceedings.)
(14) AIR 1914 Bom 113 (113, 114) : 39 Bom 29 (34).
(01) 1901 Pun L R No. 4, p. 11.

res judicata.² Even where the minor was represented by a person *competent to act*, the decision will not operate as *res judicata* against him if his interests were not properly represented owing to *gross negligence* or *fraud* or *collusion* of the guardian.³ As to what amounts to gross negligence such as would vitiate the decision against a minor, see undermentioned cases.⁴

In the absence of *gross negligence* or *fraud* or *collusion* of the guardian, a decree obtained against a minor properly represented is *res judicata*,⁵ even in respect of pleas which might and ought to have been raised but which were not raised by the guardian.⁶ A compromise without the Court's sanction under O. 32 R. 7 is without jurisdiction and cannot operate as *res judicata*.⁷ It was held in the undermentioned case⁸ that where there are several defendants besides the minor defendants, having identical interests, a decision therein is binding on the minors, as the other defendants must be deemed to have litigated on behalf of themselves and of the minors under Explanation VI to Section 11. Where a major is improperly impleaded as a minor but no objection is raised by him in the suit nor any appeal preferred by him against the decree, he cannot have the decree declared not binding on him on the ground that he was a major.⁹

70. Litigation must be under the same title. — The expression "title" in Section 11 refers to the capacity or interest of a party, that is to say, whether he sues or is sued for himself in his *own interest* or for himself as *representing the interest of another*, or as *representing the interest of others along with himself*; it has nothing to do with the particular *cause of action* on which he sues or is sued.¹

2. ('74) 21 Suth WR 109 (109).

('20) AIR 1920 Oudh 84 (87).

('04) 82 Ind App 229 (241) : 28 All 1 : 9 Oudh Cas 7 (PC). (Suit on behalf of minor — Minor not party even on record.)

('14) AIR 1914 Bom 113(113, 114):39 Bom 29.

('97) 1897 Pun Re No. 38.

('73) 1873 Pun Re No. 66.

('29) AIR 1929 Mad 213 (219) : 52 Mad 175.

('27) AIR 1927 Pat 271 (275) : 6 Pat 388.

(Application by guardian ad litem to be discharged on the ground of minor's attaining majority—No notice to minor served.)

3. ('28) AIR 1928 All 447 (448).

('26) AIR 1926 Lah 289 (290) : 7 Lah 129.

('32) AIR 1932 All 293 (300) : 54 All 646.

('19) AIR 1919 All 170(174):41 All 182(195,196).

('95) 19 Bom 571 (576, 577).

('95) 22 Cal 8 (11).

('17) AIR 1917 Lah 83 (84).

('12) 1912 Pun L R No. 15, pp. 43, 44.

('09) 1909 Pun L R No. 25, p. 112.

('98) 1898 Pun Re No. 35.

('33) AIR 1933 Mad 806 (816).

('20) AIR 1920 Mad 895 (897).

('15) 1915 Mad 384 (385).

4. ('26) AIR 1926 All 36 (41) : 48 All 44. (Any act or omission which in the result has brought prejudice to the minor's interest.)

('25) AIR 1925 Mad 258 (259). (Omission to bring to the notice of the Court a previous judgment between the parties for the purpose of raising the plea of *res judicata* is not.)

('03) 5 Bom L R 174(176). (Mere withdrawal by a guardian ad litem from a suit is not.)

('18) AIR 1918 Lah 228 (224) : 1917 Pun Re No. 103. (Not preferring an appeal is not.)

('16) AIR 1916 Oudh 289 (289) : 19 Oudh Cas 119. (Remaining ex parte is not.)

5. ('18) AIR 1918 Lah 250 (257) : 1918 Pun Re No. 13.

('94) 17 Mad 316 (334, 336).

('94) 1894 All W N 141 (142). (Mere negligence not sufficient.)

(1900) 24 Bom 547 (552).

('72) 17 Suth W R 492 (494).

6. ('27) AIR 1927 Oudh 354 (354, 355).

('30) AIR 1930 Lah 654 (655).

('24) AIR 1924 Mad 603 (609) : 47 Mad 476.

[But see ('25) AIR 1925 Oudh 633 (640).]

7. ('17) AIR 1917 P C 146 (151) : 45 Cal 17 : 44 Ind App 229 (PC).

('11) 36 Bom 53 (57).

8. ('29) AIR 1929 All 346 (346).

9. ('06) 28 All 416 (417).

Note 70

1. ('29) AIR 1929 All 400 (402).

('82) 5 Mad 239 (241).

('39) AIR 1939 All 110 (111). (*Res judicata* applies though the causes of action are different.)

('35) AIR 1935 Oudh 121 (128) : 10 Luck 361.

("Same title" in S. 11 means same capacity — When a party occupies different positions in the two suits, the decision in the prior suit will not operate as *res judicata* in the later suit.)

Illustration

On the death of *K*, *A* claimed certain lands as the real owner, on the allegation that *K* was a mere *benamidar* for him, and the suit was dismissed. *A* then sued to recover the same land as the heir of *K*. It was held that, in each case, he was suing only as an individual whether on the basis of a transaction being *benami*, or as the heir of *K* and that, therefore, his title was the same. It would be different if he had brought the second suit as representing all the heirs.²

The following classes of suits will, on the above principles, be suits litigated under the same title :—

(1) First suit for possession as reversioner of *A*. Second suit for the same relief as reversioner of *B*.³ The claim in each case is as an individual and therefore under the same title.^{3a}

(2) First suit as trustee. Second suit also as trustee.⁴ The claim in each case is as representing the persons interested in the trust and therefore under the same title.

(3) First suit against a firm. Second suit against a partner thereof.⁵

(4) First suit litigated as heir of husband. Second suit on the basis of a claim for *dower*.⁶

(5) First suit based on right by purchase. Second suit based on right as heir.⁷

Where in the previous suit, title is asserted as heir under the customary law, the decision in such suit will be *res judicata* in respect of a plea asserting title as heir under the personal law.^{7a} Where the plaintiff in both the suits sues as the reversionary heir in respect of a Hindu widow's estate, the mere fact that in one of the suits the plaintiff professes also to sue in another capacity, viz., that of a donee and owner of the property does not make the second suit one not litigated under the same title.^{7b}

In the former suit, a Hindu father sued his son claiming certain property as his self-acquired property. The second suit was by the father against a creditor of the son and was for declaration that the property was not liable to attachment in execution of a decree held by the creditor against the son. It was held that the creditor claimed under the son litigating under the same title and the bar of *res judicata* arose so far as the question whether the property was the self-acquired property of the father was concerned.^{7c} See also the undermentioned case.^{7d}

The following are examples of suits litigated under different titles :—

(1) First suit in a personal or individual capacity. Second suit in a

(‘38) AIR 1938 Lah 66 (67). (Plaintiff attacked a mortgage in the first suit and a gift in the second suit—Held though subject-matter was different, title litigated was same.)

(‘33) AIR 1933 Oudh 535 (537) : 9 Luck 237.

2. (‘29) AIR 1929 All 400 (402).

3. (‘26) AIR 1926 Mad 234 (234).

3a. [See also (‘09) 4 Ind Cas 241 (242) : 34 Bom 416. (Both suits in personal capacity.)]

4. (‘10) 7 Ind Cas 184 (185) (Mad).

(‘30) AIR 1930 Cal 47 (49) : 57 Cal 258. (Both suits as mutawallis of wakf.)

[See also (‘38) AIR 1938 Mad 257 (258). (First suit by *A* as trustee of shrine—Second suit by shrine through *A* as trustee.)]

5. (‘09) 34 Bom 244 (249).

[But see (‘25) AIR 1925 Cal 1195 (1198).

(The issue in the second suit was not heard and decided in the first suit—The observations as to title are, it is submitted, not correct.)]

6. (‘20) AIR 1920 All 70 (72) : 42 All 290 (294).

(‘27) AIR 1927 Oudh 60 (62).

7. (‘23) AIR 1923 Mad 257 (259) : 46 Mad 135.

7a. (‘35) AIR 1935 Pesh 150 (150).

7b. (‘38) AIR 1938 Nag 401 (405) : I L R (1938) Nag 496.

7c. (‘37) AIR 1937 Mad 651 (652).

7d. (‘38) 42 Cal W N 560 (563). (First suit setting up purchase from defendant alleging that defendant inherited property from grandfather—Second suit alleging that defendant inherited property from father who

representative capacity, such as that of a trustee, and *vice versa*.⁸

(2) First suit as heir of *K*. Second suit as Manager of *Mutt*.⁹

(3) First suit in which *A* is impleaded as *legal representative of a party who died pending suit*. Second suit by *A* in his *personal capacity and vice versa*.¹⁰ In the former case *A* only litigates as *representing* the deceased party and cannot set up pleas open to him in his *personal capacity*.¹¹ See also the undermentioned decisions.^{11a}

The words "between parties under whom they or any of them claim litigating under the same title" cover a case where the litigants in the later suit occupy by succession the same position as the litigants in the former suit. There is no distinction between *forms* of succession.¹²

In the undermentioned cases,¹³ it was held that the person suing in the former litigation was *litigating under a different title* from that in which he was litigating in the later suit. The cases were, however, really decided on other grounds and the observations about the litigation being on different titles, cannot be accepted as correct. See also Note 38 and Note 59, *ante*. *A* applied as a widow of *X* for letters of administration to the estate of *X*. The application was dismissed on the

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| <p>obtained it by deed of gift from grandfather—Plaintiff sues in same capacity in both suits. But question raised in second suit was not in issue in previous suit.)</p> <p>8. ('24) AIR 1924 Lah 275 (276).
 ('27) AIR 1927 Mad 1100 (1100).
 ('27) AIR 1927 P C 128 (130, 131): 54 Ind App 238: 54 Cal 770 (PC). (Confirming AIR 1925 Cal 996 but overruling the contention that where same shebaita sue other shebaita, they both represent the idol.)
 ('36) AIR 1936 All 422 (429).
 ('24) AIR 1924 All 355 (356): 46 All 230.
 ('20) AIR 1920 All 318 (321): 18 All L Jour 150 (156). (Former suit brought to establish personal right—Subsequent suit on behalf of guild.)
 ('11) 36 Bom 29 (36).
 ('98) 22 Bom 216 (220).
 ('86) 10 Bom 24 (27).
 ('79) 4 Bom 37 (39).
 ('39) AIR 1939 Cal 148 (151). (A decision in a prior suit against a party in his personal capacity cannot operate as <i>res judicata</i> against him in a later suit by him as <i>mutawalli</i> of a certain endowment.)
 ('21) AIR 1921 Cal 425 (426). (First suit under S. 5, Religious Endowments Act—Public not made parties—Second suit by public under S. 92.)
 ('20) AIR 1920 Cal 379 (381): 47 Cal 866.
 ('70) 13 Suth W R 52 (55).
 ('33) AIR 1933 Lah 920 (921).
 ('31) AIR 1931 Lah 610 (613): 13 Lah 195. (First suit as owners—Defence in second suit as permanent tenants held not barred.)
 ('31) AIR 1931 Lah 161 (162): 12 Lah 497. (First suit under S. 92—Second suit in individual right.)
 ('30) AIR 1930 Lah 487 (488). (First suit as reversioner—Second suit as owner.)
 ('30) AIR 1930 Lah 284 (284). (Do.)
 ('29) 106 Ind Cas 864 (865) (Lah). (Do.)</p> | <p>('17) AIR 1917 Lah 250 (250).
 ('15) AIR 1915 Lah 122 (123): 1915 Pun Re No. 68.
 ('14) AIR 1914 Lah 288 (288): 1914 Pun Re No. 1. (First suit as guardian of minor—Second suit in his own right.)
 ('86) 1886 Pun Re No. 6. (First suit on joint claim for pre-emption—Second suit for exclusive right.)
 ('92) AIR 1932 Mad 589 (591). (Trustee.)
 ('22) AIR 1922 Mad 394 (396).
 ('15) AIR 1915 Mad 62 (62).
 ('13) 18 Ind Cas 973 (974, 975) (Mad).
 ('36) AIR 1936 Nag 71 (73): 31 Nag L R Sup 202. (Trustee.)
 ('26) AIR 1926 Ondh 578 (583): 1 Luck 489.
 9. ('04) 28 Bom 215 (226) (FB).
 10. ('25) AIR 1925 Mad 59 (59).
 ('29) AIR 1929 All 252 (253).
 ('17) AIR 1917 Cal 667 (668).
 ('26) AIR 1926 Rang 191 (192).
 11. ('25) AIR 1925 Mad 59 (59).
 [But see ('22) AIR 1922 All 463 (464, 465).]
 11a. ('37) AIR 1937 Bom 384 (386): 1 L R (1937) Bom 636.
 ('36) AIR 1936 Cal 585 (589). (Executor impleaded in personal capacity—Decision not <i>res judicata</i> against him in his capacity as executor.)
 ('37) AIR 1937 Mad 153 (155). (First suit by life estate holder claiming property to be trust property—Second suit by remainderman in personal capacity—Widow cannot be said to have litigated under same title.)
 12. ('16) AIR 1916 Bom 273 (275): 40 Bom 606 (613, 614).
 ('24) AIR 1924 Nag 422 (423, 424).
 13. ('14) AIR 1914 All 109 (110). (Issues different.)
 ('34) AIR 1934 Oudh 293 (295).
 ('31) AIR 1931 All 73 (76). (Subject-matter of the two suits different and the matter in issue also.)</p> |
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ground that *X* being the first husband's brother of *A*, her marriage with *X* was void and that therefore she was not the widow of *X*. Subsequently the Deceased Brother's Widow's Marriage Act, 1921 (11 & 12 Geo.V, Ch. 24) was passed by which such marriages were validated retrospectively. *A* thereupon again applied as widow of *X* for letters. The High Court of Patna held that the application was not barred by *res judicata* on the ground that the *whole status* of *A* had changed in the meantime.¹⁴ It is submitted that the decision is not correct. The remedy in such cases can only be by way of *review* and not by way of a fresh application.

71. Nature of title derived from party. — See Note 49 *ante*.

72. Identity of subject-matter and cause of action. — Under the Code of 1859, Section 2, it was enacted as follows: — "The Civil Courts shall not take cognisance of any suit brought on a *cause of action* which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." It was accordingly held in cases coming under that Code that where the *cause of action* in the subsequent suit was different from that in the former suit, the latter suit was not barred even if the *issue* decided was the same.¹ The Codes of 1877, 1882 and the present Code have substituted the words "no Court shall try any *suit or issue* in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit" for the words "the Civil Courts shall not take cognisance of any suit brought on *cause of action* which shall have been heard, etc."

There is, therefore, nothing in the present Section to show that the words "any matter" mean "matter arising out of the same *cause of action*."² Nor is there

- ('81) AIR 1931 All 21 (22). (First suit as heir of *A*—Second suit as heir of *B*—Held to be on different title—Held also that the former decision was by a Court not competent to try the subsequent suit.)
- ('17) AIR 1917 All 261 (262). (Issues not same.)
- ('08) 5 All L Jour 729 (730, 731).
- ('34) AIR 1934 Cal 356 (362); 60 Cal 1406. (Claim in the first suit as heirs to mother disallowed—Subsequent suit as heirs to their father's estate not barred.)
- ('23) AIR 1923 Lah 16 (17). (Not in issue and not between same parties.)
- ('22) AIR 1922 Lah 44 (45). (Issues different.)
- ('16) AIR 1916 Mad 1101 (1101). (Case under S. 10.)
- ('35) AIR 1935 Nag 61 (62); 31 Nag LR 165.
- ('37) AIR 1937 Oudh 165 (167); 12 Luck 516. (In a prior suit lessor held entitled to eject lessees from certain shops—Subsequent suit by lessor to eject the same lessees from other shops—Judgment in prior suit could not operate as *res judicata* in subsequent suit as lessees claimed to hold under different titles.)
- ('12) 14 Ind Cas 12 (14) (Oudh).
- ('18) AIR 1918 Pat 275 (276). (Issues not same.)
- [See also ('37) AIR 1937 Bom 334 (336): I L R (1937) Bom 636.
- ('32) AIR 1932 Bom 456 (458).]
14. ('24) AIR 1924 Pat 624 (627, 628).
- Note 72**
1. ('86) 10 Bom 28 (30).
- ('74) 22 Suth W R 282 (283). (Cause of action same—Second suit barred.)
- ('74) 2 Ind App 283 (285); 1 Cal 144 (146) (P C). ('Cause of action' in S. 2, Act VIII of 1859 to be construed with reference to substance rather than to form of action.)
- ('75) 7 N W P H C R 251 (254).
- ('74) 22 Suth W R 172 (173, 174).
- ('73) 20 Suth W R 450 (452).
- ('73) 20 Suth W R 412 (413).
- ('72) 18 Suth W R 202 (203).
- ('72) 18 Suth W R 19 (20).
- ('71) 16 Suth W R 264 (264).
- ('70) 18 Suth W R 97 (98).
- ('69) 12 Suth W R 79 (80). (Cause of action same—Suit barred.)
- ('69) 11 Suth W R 244 (244, 245).
- ('69) 11 Suth W R 193 (193).
- ('69) 11 Suth W R 149 (149, 150).
- ('68) 10 Suth W R 100 (100).
- ('66) 6 Suth W R 44 (45, 46).
- ('70) 1870 Pun Re No. 59.
- ('72) 7 Mad H O R 160 (166). (Cause of action same—Suit barred.)
- (1893-1900) Low Bur Rul 490.
2. ('04) 6 Bom L R 594 (597, 598).
- ('24) AIR 1924 Pat 265 (266); 2 Pat 771.
- ('29) AIR 1929 Cal 445 (447). (Causes of action different—*Res judicata* should be restricted to question of fact and mixed question of law and fact and not to pure question of law.)
- ('38) AIR 1938 Nag 401 (406); I L R (1938) Nag 496.
- ('28) AIR 1928 Nag 112 (112). (Causes of action arising out of same title—Second suit barred.)

ground that X being the first husband's brother of A, her marriage with X was void and that therefore she was not the widow of X. Subsequently the Deceased Brother's Widow's Marriage Act, 1921 (11 & 12 Geo. V, Ch. 24) was passed by which such marriages were validated retrospectively. A thereupon again applied as widow of X for letters. The High Court of Patna held that the application was not barred by *res judicata* on the ground that the *whole status* of A had changed in the meantime.¹⁴ It is submitted that the decision is not correct. The remedy in such cases can only be by way of *review* and not by way of a fresh application.

71. Nature of title derived from party. — See Note 49 ante.

72. Identity of subject-matter and cause of action. — Under the Code of 1859, Section 2, it was enacted as follows: — "The Civil Courts shall not take cognisance of any suit brought on a *cause of action* which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." It was accordingly held in cases coming under that Code that where the *cause of action* in the subsequent suit was different from that in the former suit, the latter suit was not barred even if the *issue* decided was the same.¹⁵ The Codes of 1877, 1882 and the present Code have substituted the words "no Court shall try any *suit or issue* in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit" for the words "the Civil Courts shall not take cognisance of any suit brought on a *cause of action* which shall have been heard, etc."

There is, therefore, nothing in the present Section to show that the words "any matter" mean "matter arising out of the same *cause of action*."¹⁶ Nor is there

- (131) AIR 1931 All 21 (22). (First suit as heir of A—Second suit as heir of B—*Held* to be on different title—*Held* also that the former decision was by a Court not competent to try the subsequent suit.)
 (17) AIR 1917 All 261 (262). (Issues not same.)
 (108) 5 All 1 Four 729 (730, 731).
 (84) AIR 1934 Cal 356 (362); 60 Cal 1406. (Claim in the first suit as heirs to mother disallowed—Subsequent suit as heirs to their father's estate not barred.)
 (28) AIR 1928 Lah 16 (17). (Not in issue and not between same parties.)
 (22) AIR 1922 Lah 44 (45). (Issues different.)
 (16) AIR 1916 Mad 1101 (1101). (Case under S. 10.)
 (35) AIR 1935 Nag 61 (62); 31 Nag L.R. 165. (37) AIR 1937 Oudh 165 (167); 12 Luck 516. (In a prior suit lessor held entitled to eject lessees from certain shops—Subsequent suit by lessor to eject the same lessees from other shops—Judgment in prior suit could not operate as *res judicata* in subsequent suit as lessees claimed to hold under different titles.)
 (12) 14 Ind Cas 12 (14) (Oudh).
 (18) AIR 1918 Pat 275 (276). (Issues not same.)
 [See also (37) AIR 1937 Bom 334 (336); I.L.R. (1937) Bom 636.
 (32) AIR 1932 Bom 456 (458).]
 14. (24) AIR 1924 Pat 624 (627, 628).
Note 72
 1. (86) 10 Bom 28 (30).
 (74) 22 Subh W.R. 282 (283). (Cause of action same—Second suit barred.)

- (74) 2 Ind App 283 (285); 1 Cal 144 (146). (P.C.). (Cause of action in S. 2, Act VIII of 1859 to be construed with reference to substance rather than form of action.)
 (75) 7 N.W.P.H.C.R. 251 (254).
 (74) 22 Subh W.R. 172 (173, 174).
 (73) 20 Subh W.R. 450 (452).
 (73) 20 Subh W.R. 412 (413).
 (72) 18 Subh W.R. 202 (203).
 (72) 18 Subh W.R. 19 (20).
 (71) 16 Subh W.R. 264 (264).
 (70) 18 Subh W.R. 97 (98).
 (69) 12 Subh W.R. 79 (80). (Cause of action same—Suit barred.)
 (69) 11 Subh W.R. 244 (244, 245).
 (69) 11 Subh W.R. 193 (193).
 (69) 11 Subh W.R. 149 (149, 150).
 (68) 10 Subh W.R. 100 (100).
 (66) 6 Subh W.R. 44 (45, 46).
 (70) 1870 Pun R. No. 59.
 (72) 7 Mad H.C.R. 160 (166). (Cause of action same—Suit barred.)
 (1893-1900) Low Bur Rul 490.
 (24) AIR 1924 Pat 265 (266); 2 Pat 771.
 (29) AIR 1929 Cal 445 (447). (Causes of action different—*Res judicata* should be restricted to question of fact and mixed question of law and fact and not to pure question of law.)
 (38) AIR 1938 Nag 401 (406); I.L.R. (1938) Nag 496.
 (28) AIR 1928 Nag 112 (112). (Causes of action arising out of same title—Second suit barred.)

"which would have had jurisdiction over the matter, in the subsequent suit in which the first decision is given in evidence as conclusive;" in other words, it must be Court of concurrent jurisdiction with that of the Court trying the subsequent suit. This view was, however, negatived in *Ran Bahadur Singh v. Luchoo Kuer*, I. L. R. 6 Calcutta 406. This conflict of view was settled by the Legislature by enacting Section 13 of the Code of 1882, that the Court trying the former suit must have been competent to try "such subsequent suit or the suit in which such issue has been subsequently raised," thus adopting the view of Sir Barnes Peacock, C. J., above referred to as to the necessity of the *concurrency of jurisdiction* between the two Courts. The contrary view that had been expressed in I. L. R. 6 Calcutta 406 was on appeal, overruled by their Lordships of the Privy Council in *Ran Bahadur Singh v. Luchoo Kuer*, I. L. R. 11 Calcutta 301.

Under the Code of 1882 and under the present Code also, it is not necessary that the Court trying the former suit should have been competent to try the *subsequent suit itself*.¹ Otherwise the rule of *res judicata* under the Section will not apply.² Where the Court which tried the former suit is incompetent to try the later suit, the fact that the decree in the prior suit is based on an award made by arbitrators cannot render the matters decided therein *res judicata* in the subsequent suit.^{2a}

The Section does not, in express words, say that the Court trying the former suit should have been competent to try *that* suit. But obviously, such competence is also quite necessary.³ As has been seen in Note 3 to Section 9 *ante*, if a Court

- (38) AIR 1938 Cal 246 (249) : 60 Cal 8.
 (Defendant's plea of adverse possession negatived—Plea that at the date of the later suit defendant had perfected her title by adverse possession is not barred.)
 (29) AIR 1929 Cal 201 (202).
 (81) 6 Cal 559 (563).
 (69) 11 Suth W R 382 (383, 384).
 Note 73
 (28) AIR 1928 Mad 840 (844).
 11 Lab L T 98.
 (87) AIR 1937 All 20 (21). (Mere competency to try the issue raised in the subsequent suit is not enough.)
 (82) AIR 1932 All 483 (483) : 54 All 786.
 (28) AIR 1923 All 113 (115). (Former Court competent, therefore barred.)
 (33) AIR 1933 Bom 398 (401) : 57 Bom 456.
 (38) AIR 1938 Cal 724 (728).
 (35) AIR 1935 Cal 792 (797).
 (26) AIR 1926 Cal 1053 (1054).
 (10) 5 Ind Cas 573 (575, 576) (Cal).
 (08) 35 Cal 353 (358).
 (74) 21 Suth W R 207 (208). (Former Court competent, therefore barred.)
 (68) 10 Suth W R 325 (326). (Do.)
 (91) 4 C P L R 84 (87). (Do.)
 (37) A I R 1937 Lab 346 (347).
 (38) AIR 1938 Lab 551 (552) : 14 Lab 369.
 (33) AIR 1933 Mad 913 (914) : 57 Mad 335.
 (25) AIR 1925 Mad 1167 (1167).
 (99) 9 Mad L Jour 196 (197).
 (95) 18 Mad 257 (263).
 (38) AIR 1938 Cal 353 (358).
 (36) AIR 1936 Cal 353 (358).
 (08) 35 Cal 353 (358).
 (36) AIR 1936 Cal 353 (358).
 (31) AIR 1931 All 454 (458) : 58 All 560.
 (27) AIR 1927 All 297 (298) : 49 All 543.
 (26) AIR 1926 All 34 (35).
 (24) AIR 1924 All 466 (466).
 (23) AIR 1923 All 368 (369).
 (21) L R 3 All (Rev) 156 (157).
 (20) 1920 All 28 (25).
 (13) 11 All L Jour 281 (232).
 (25) AIR 1925 Bom 241 (242, 243) : 49 Bom 44.
 (21) AIR 1921 Bom 434 (435) : 45 Bom 80.
 (38) 67 Cal L Jour 223 (227, 228).
 (36) AIR 1936 Cal 629 (637). (But the finding creates a paramount duty on the part against whom it is given to displace it.)
 (34) AIR 1934 Cal 192 (198).
 (30) AIR 1930 Cal 238 (239).
 (26) AIR 1926 Cal 603 (603).
 (24) AIR 1924 Cal 487 (489). (Former decision by Small Cause Court—Subsequent suit the ordinary Civil Court.)
 (18) AIR 1918 Cal 70 (71).
 (09) 4 Ind Cas 442 (445) (Cal).
 (35) 156 Ind Cas 1081 (1083) (Lab).
 (30) AIR 1930 Lab 501 (503).
 (94) 1894 Pun Re No 146.
 (22) AIR 1922 Mad 394 (396).
 (09) 4 Ind Cas 97 (97) (Mad).
 (34) AIR 1934 Nag 178 (179). (General principles of res judicata cannot be applied to such a case so as to override the specific provision of this Section.)

has no jurisdiction to try a suit, its judgment and orders are mere *nullities* and have no effect either as estoppel or otherwise and therefore cannot operate as *res judicata* in subsequent proceedings.⁴ But a Court has *always jurisdiction* to decide for itself whether it has jurisdiction to try the suit before it and its decision thereon will be as much *res judicata* in a subsequent suit as a decision on any other point.⁵ Where therefore the existence or otherwise of jurisdiction depends upon facts proved or upon facts in the knowledge of the party which he had an opportunity of bringing forward in the Court but which he did not, and the Court expressly or impliedly decides that it has jurisdiction and proceeds with the suit, the decision cannot be challenged on the ground of want of jurisdiction, in subsequent proceedings.⁶ (See also Section 21 Note 8.)

74. "Court," meaning of.—See also Section 2 clause 8 and Notes thereon. In order to found an estoppel under this Section the former decision must have been that of a *Court*. *Administrative* Officers are not 'Courts' within the meaning of this Section, though they may have been invested by the Legislature with certain powers to inquire into and decide certain matters, and though they are

- (1900) 1900 Pun L R No. 105, at p. 435 : 1900 Pun Re No. 39.
 (31) AIR 1931 All 425 (426). (Court has jurisdiction to decide wrong as well as right.)
 (26) AIR 1926 Bom 481 (484).
 (20) AIR 1920 Cal 131 (134) : 47 Cal 770.
 (24) AIR 1924 Mad 716 (717, 720) : 47 Mad 850. (Wrong suit followed by a wrong decree does not bar a correct suit.)
 (08) 2 Low Bur Rui 24 (25, 26).
 4. (83) 7 Bom 408 (410).
 (82) AIR 1932 Oudh 318 (314) : 6 Luck 697.
 (77) 4 Ind App 66 (75) : 2 Cal 827 (PC).
 (31) AIR 1931 All 454 (458) : 53 All 560.
 (31) AIR 1931 All 200 (201).
 (30) AIR 1930 All 681 (685, 686) : 52 All 868.
 (26) AIR 1926 All 650 (652).
 (22) AIR 1922 All 897 (898, 899).
 (10) 6 Ind Cas 98 (100) (All).
 (09) 2 Ind Cas 456 (457, 458) (All).
 (07) 4 All L Jour 117 (120). (Ultra vires order in execution.)
 (75) 1 All 588 (590).
 (75) 7 N W P H C R 99 (100).
 (18) 20 Ind Cas 530 (532) : 37 Bom 563.
 (07) 9 Bom L R 274 (279). (Judgment against a dead person.)
 (1900) 24 Bom 77 (85). (Judgment of foreign Court having no jurisdiction over subject-matter.)
 (88) 1888 Bom F J 383.
 (26) AIR 1926 Cal 991 (992).
 (05) 9 Cal W N 956 (960, 961).
 (81) 7 Cal 739 (744).
 (74) 22 Suth W R 308 (309).
 (29) AIR 1929 Lah 627 (629, 630). (Judgment of foreign Court having no jurisdiction over subject-matter.)
 (23) AIR 1923 Lah 141 (142).
 (03) 1903 Pun Re No. 37.
 (99) 1899 Pun Re No. 2. (Judgment of foreign Court having no jurisdiction over subject-matter.)

- (32) AIR 1932 Mad 233 (233, 234). (Ultra vires order in execution.)
 (28) AIR 1928 Mad 327 (333) : 51 Mad 720. (Judgment of foreign Court having no jurisdiction over subject-matter.)
 (05) 28 Mad 42 (43, 50) : 32 Ind App 45 (PC).
 (35) AIR 1935 Nag 250 (256) : 31 Nag L R Sup 43 (PB).
 (35) AIR 1935 Nag 28 (30).
 (17) AIR 1917 Nag 118 (119). (Incompetent reference under O. 46, R. 1).
 (28) AIR 1928 Oudh 296 (297). (Such finding must be regarded as obiter dictum.)
 (32) AIR 1932 Pat 105 (110) : 11 Pat 50.
 (25) AIR 1925 Pat 807 (810) : 4 Pat 440. (Ultra vires order in execution.)
 (22) AIR 1922 Pat 252 (255) : 6 Pat L Jour 650. (Reference to (38) AIR 1938 Pesh 54 (57). (Companies Act—award which is executable only by District Judge executed by Sub-Judge—Execution is ultra vires—Point decided in such ultra vires proceedings is a nullity and hence cannot be come res judicata.)
 (35) AIR 1935 Rang 517 (520). [See (27) AIR 1927 All 505 (506) : 49 All 918. Re No. 73.]
 (15) AIR 1915 Lah 164 (164) : 1915 Pun [See also (93) 16 Mad 481 (485).]
 5. (03) 1903 Pun L R No. 16, p. 51 : 1902 Pun Re No. 92.
 (37) AIR 1937 Lah 649 (652).
 (35) AIR 1935 Mad 835 (838) : 59 Mad 62. [See (1887) 11 Bom 488 (490).]
 (22) AIR 1922 Pat 322 (333, 334).
 (33) AIR 1933 Pat 104 (106, 107) : 12 Pat 117.
 (26) AIR 1926 All 650 (652).
 (26) AIR 1926 Bom 481 (485, 487).
 (26) AIR 1926 Cal 1101 (1103). (Even erroneous decision of jurisdiction is res judicata.)
 (38) AIR 1938 Mad 257 (262). (Objection as to want of pecuniary or territorial jurisdiction.)

bound to conduct such inquiry in conformity with the principles of natural justice.

75. Where Court deciding former suit is one of exclusive jurisdiction.

—As has been seen already in Note 73, Section 11 requires that the Court trying the former suit must be one of *concurrent* jurisdiction with that of the Court trying the subsequent suit. It does not deal with the effect of the decision of a Court of *exclusive* jurisdiction. Where the former Court is a Court of *exclusive* jurisdiction, matters decided by it will be beyond the competence of a Court trying a subsequent suit, which has no such exclusive jurisdiction. On general principles of *res judicata* the decision of the former Court of exclusive jurisdiction will be conclusive on the matter decided irrespective of the limitation that the former Court must be competent to decide the subsequent suit.¹ Thus, Small Cause Courts and Revenue Courts have been empowered by the Legislature to try particular classes of suits, to the *exclusion* of ordinary Civil Courts² and any decision arrived at by such Courts in the exercise of such exclusive power is conclusive and cannot be questioned by the ordinary Civil Courts.³ In some decisions, however, it has been held that a prior decision by a Small Cause Court

Punjab Civil Code which was then in force.]]

Note 75

1. ('32) AIR 1932 Oudh 199 (203, 204) : 7 Luck

716 (FB).
(26) AIR 1926 Sind 286 (237) : 21 Sind L R

23. (Small Cause Court.)
(37) AIR 1937 Lah 346 (347).

(35) AIR 1935 Lah 826 (827). (Finding by a

Gurdwara Tribunal that property belonged

to the Gurdwara—Subsequent suit in Civil

Court by Gurdwara for possession—Previous

decision operates as res judicata.)
(39) AIR 1939 Oudh 17 (27). (Decision of

Revenue Court of Oudh before 1865 regarding

rights to land operates as res judicata.)
[See also (34) AIR 1934 Sind 112 (113).

2. See for instance S. 16 of the Provincial Small

Cause Courts Act and S. 189 of the Madras

Estates Land Act 1908.
(94) 16 All 464 (472). (Revenue Court.)

(18) AIR 1918 All 49 (50, 51) : 41 All 97 (103)

(Do.)
(27) AIR 1927 All 189 (190). (Do.)

(23) AIR 1923 All 527 (528). (Do.)
(23) AIR 1923 All 437 (438). (Do.)

(19) AIR 1919 All 190 (191) : 41 All 208 (205).

(Do.)
(93) 15 All 387 (390, 392) (FB). (Do.)

(85) 7 All 191 (194). (Do.)
(85) 7 All 148 (151, 152). (Do.)

(83) 5 All 245 (248). (Do.)
(38) AIR 1938 Lah 811 (818) : 1 L R (1939)

Lah 183 (Small Cause Court.)
(37) AIR 1937 Lah 346 (347). (Do.)

(29) AIR 1929 Oudh 362 (363) : 4 Luck 220. (Do.)
(26) AIR 1926 Oudh 348 (349). (Do.)

(26) AIR 1926 Sind 286 (237) : 21 Sind L R

1. ('07) 29 All 519 (533) : 34 Ind App 125 (PC).

(Committee of Oudh Thakdars.)
(06) 30 Bom 220 (224). (Talukdari settlement

officer in Bombay.)
(38) AIR 1938 P C 210 (216) : 13 Luck 508:

32 Sind L R 845 : 65 Ind App 314 (PC).
(Where no objection is raised under S. 111

of U. P. Land Revenue Act, the Collector in

partition proceedings under that Act does

not function as a Civil Court.)
(66) 1 Agre 135 (136). (Settlement officer.)

(04) 1 All L. Jour 9 (13, 14). (Do.)
(29) AIR 1929 Cal 130. (132). (Certificate

officer under the Bengal Public Demand and

Class Recovery Act.)
(06) 3 Cal L. Jour 133 (134, 135).

(01) 28 Cal 471 (473, 474). (Settlement officer.)

(96) 28 Cal 257 (260, 261). (Do.)
(81) 7 Cal 736 (738). (Registrar acting under

the Indian Registration Act.)
(64) 1864 Suth W R (Gap) 26 (27) (FB). (Agent

to the Governor General before Regulation

XIII of 1833.)
(68) 1868 Pun Re No. 6 (Rev).

(38) AIR 1938 Mad 148 (151); ILR (1938) Mad

151 (SB). (Income-tax officer does not con-

stitute a Court.)
(30) AIR 1930 Mad 209 (213) : 53 Mad 420

(FB). (Income-tax officer.)
(39) AIR 1939 Oudh 73 (73). (Findings by

Deputy Commissioner in proceedings under

S. 30-A of the Oudh Rent Act—Not res

judicata.)
(16) AIR 1916 Low Bur 30 (32) : 8 Low Bur

Rul 556 (560). (Orders of revenue officers.)
[See (38) AIR 1938 Lah 369 (418). (See

judgment of Din Mahomed J. regarding

the decision of a Deputy Commissioner in

Punjab, delivered in 1855 according to the

As to *concurrent* jurisdiction of Revenue Courts with the Civil Courts, see Note 77, *infra*.

77. **Concurrent jurisdiction of Revenue, Rent and Settlement Courts and Civil Courts.**—It has been already mentioned that the determination of a question of title is generally the function of a Civil Court. (See Note 76.) But if the Legislature invests a Revenue or Rent or Settlement Court with the power of deciding the question of title in certain cases, it becomes in such cases *pro tanto* a Civil Court of concurrent and competent jurisdiction and when such Court decides a question of title against a party, he is barred by the rule of *res judicata* from re-opening the question of title in a Civil Court.¹

A decision by a Revenue Court in a matter within its competence will, of course, be *res judicata* in a subsequent suit in another Revenue Court, where the other conditions of *res judicata* are satisfied.²

Note 77

1. ('08) 30 All 470 (475).
('11) 33 All 453 (456). (Title decided by Revenue Court under S. 199, Agra Tenancy Act.) ('37) AIR 1937 All 481 (493); I L R (1937) All 628.
('27) AIR 1927 All 717 (718) : 49 All 606. (Title decided by Revenue Court under S. 199, Agra Tenancy Act.) ('23) AIR 1923 All 527 (528). (Under Act XII of 1881.) ('22) AIR 1922 All 95 (97). (Title decided by Revenue Court under S. 199, Agra Tenancy Act.) ('21) AIR 1921 All 348 (349) : 43 All 55. (Do.) ('21) AIR 1921 All 59 (60). (Do.) ('15) AIR 1915 All 282 (282) : 37 All 280(283). (Do.) ('14) AIR 1914 All 488 (484) : 37 All 41 (43). (Do.) ('10) 7 All 4 four 555 (559). (Under S. 167, Agra Tenancy Act.) ('09) 32 All 8 (10, 11). (Title decided by Revenue Court under S. 199, Agra Tenancy Act.) ('07) 29 All 601 (604). (Do.) ('06) 29 All 160 (162). (Do.) ('05) 2 All 4 four 334 (335). (Do.) ('96) 18 All 270 (283) (F B). (Under Act XII of 1881.) ('96) 18 All 59 (62, 63). (Decision under Act IX of 1873.) ('94) 16 All 464 (471, 472). (Do.) ('87) 9 All 388 (391, 392). (Do.) ('83) 5 All 429(430). (Under Act XII of 1881.) ('83) 5 All 280 (284). (Decision under Act IX of 1873.) ('78) 2 All 294 (296). (Decision under Act XIX of 1863.) ('71) 2 N W F H C R 261 (262). (Under S. 23, Ben. Ten. Act, X of 1859.) ('29) AIR 1929 Cal 385 (386). (Under S. 106, Ben. Ten. Act.)
 2. ('23) AIR 1923 Cal 433 (434) : 50 Cal 79. (Do.) ('16) AIR 1916 Cal 738 (739). (Do.) ('15) 80 Ind Gas 944 (944)(Cal). (Under S. 105, Ben. Ten. Act.) ('13) 20 Ind Gas 910 (913) (Cal). (Do.) ('13) 20 Ind Gas 298 (299) (Cal). (But see contra under S. 106 Ben. Ten. Act.) ('10) 7 Ind Gas 71 (73) (Cal). (Under S. 105, Ben. Ten. Act.) ('07) 11 Cal W N 939 (941). (Under S. 107, Ben. Ten. Act.) ('05) 1 Cal 4 four 310 (313). (Do.) ('01) 5 Cal W N 798 (799, 800) : 28 Cal 471. (Under S. 106, Ben. Ten. Act.) ('01) 5 Cal W N CIV (CIV). (Under S. 107, Ben. Ten. Act.) ('00) 27 Cal 167 (168). (Do.) ('98) 2 Cal W N 491 (493). (Under S. 106, Ben. Ten. Act.) ('90) 17 Cal 721 (725, 726). ('84) 10 Cal 507 (509, 510). (Under S. 18, Bengal Act, VIII of 1869.) ('70) 13 Subh W R 417 (418). (Under S. 23, Ben. Ten. Act, X of 1859.) ('65) 3 Subh W R 176 (176). (Under S. 23, Act X of 1859.) ('64) 1 Subh W R 218 (218). (Do.) ('21) 63 Ind Gas 781 (782, 783) (Tab). (Under S. 111, Punjab Land Revenue Act.) ('07) 17 Mad 4 four 557 (558). (Decision of Forest Settlement Officer under Madras Act V of 1882.) ('26) AIR 1926 Oudh 72 (73). ('24) AIR 1924 Oudh 245 (247). ('15) 2 Oudh Cas 351 (354). ('31) AIR 1931 Pat 215 (216) : 10 Pat 337. ('18) AIR 1918 Pat 660 (663) : 3 Pat 4 four 379 (385). (Under S. 105, Ben. Ten. Act.) [See ('78) 2 All 200 (202, 203). (Title decided by Revenue Court under S. 199, Agra Tenancy Act.).] ('90) 13 Mad 287 (291). ('15) 2 Oudh 4 four 63 (64). ('31) AIR 1931 All 462 (466) : 53 All 568. ('76) 25 Subh W R 189 (189).

Illustration

A suit is filed in a Court, the jurisdiction of which is limited to Rs. 5,000 for recovery of interest on a bond for Rs. 12,000. It is contended in defence that the amount actually lent on the bond is only Rs. 4,000 and interest is due only on that amount. The Court finds that the amount lent on the bond is only Rs. 4,000, and awards interest thereon. In a subsequent suit by the plaintiff in the High Court for recovery of Rs. 12,000, the principal due under the bond, the defendant contends again that the amount lent is only Rs. 4,000 and that the question whether of the former Court being limited to Rs. 5,000, it was not a Court competent to try the subsequent suit. *Missor Raghunadral v. Shro Bakhsh, I. L. R. 9 Calcutta 439 : 9 Ind. App. 197 (P.C.).* It has been held by the Madras High Court that the same rule applies to a case where the plea is founded on general principles of *res judicata* apart from the terms of the Section.³

80. Bona fide valuation of plaintiff determines jurisdiction.—A plaintiff cannot get rid of the bar of *res judicata* by including in a subsequent suit a clearly unsustainable and therefore not a *bona fide* claim and bringing it in a Court of higher jurisdiction.⁴ Nor can he evade the rule by deliberately or arbitrarily *overvaluing* the same claim in the subsequent suit.⁵

It has been seen in Note 21, *ante*, that the word "suit" in Section 11 means such a matter as might have formed the subject-matter of a separate suit independent of the several provisions of the Code which enable a person to unite several causes of action in one and the same suit. Accordingly, it has been held that where A institutes a suit in Court X for possession of properties valued at Rs. 1,000 (the jurisdiction of Court X extending only up to Rs. 1,000), the decision therein will operate as *res judicata* in a subsequent suit by A in Court Y (a Court of a higher grade) for possession of the same properties valued at Rs. 1,000 and Rs. 42 mesne profits.⁶ But where the first suit is for *rent* valued at a certain amount and the second suit is for a *declaration of title for possession and for mesne profits* valued *bona fide* at a figure beyond the pecuniary limits of the jurisdiction of the first Court, the second suit is not barred.⁷ Similarly, where by reason of the additional relief which cannot be said to be unnecessary, jurisdiction is given to a superior Court, the earlier decision will not bar the subsequent suit.⁸ See also Note 81, *infra*.

embodied in S. 11, are not part of the general principle of *res judicata*.])

Note 80

1. ('26) AIR 1926 Mad 829 (830). (Addition of an untenable claim.)

(10) 6 Ind Cas 287 (287) (Mad).

(17) AIR 1917 Pat 409 (410).

(28) AIR 1928 All 127 (128).

(97) 10 C P L R 89 (89, 90).

(23) AIR 1923 All 176 (177) : 45 All 59.

(19) AIR 1919 Nag 25 (26) : 16 Nag L R 91.

[See also ('32) AIR 1932 Cal 162 (163). First suit for certain properties—Second suit for those properties as well as other properties under an independent claim.]]

(22) AIR 1922 Cal 138 (139, 140).

(29) AIR 1929 Mad 529 (539). (Addition of a prayer for valuation and consequent increase in valuation.)

- (30) AIR 1930 All 430 (431).
(27) AIR 1927 All 297 (298) : 49 All 548.
(20) AIR 1920 All 23 (25).
(26) AIR 1926 Cal 603 (603, 604). (But judgment of former Court with limited pecuniary jurisdiction is valuable evidence.)
(22) AIR 1922 Cal 138 (139, 140).
(96) 28 Cal 693 (696).
(30) AIR 1930 Lah 501 (503).
(23) AIR 1923 Lah 141 (142).
(19) AIR 1919 Lah 18 (18) : 1919 Pun Re No. 87.
(16) AIR 1916 Lah 322 (323). (But judgment of former Court with limited pecuniary jurisdiction is valuable evidence.)
(07) 1907 Pun W R No. 186, page 830 : 1907 Pun Re No. 111.
(11) 9 Ind Cas 686 (687) (Mad).
(24) AIR 1924 Oudh 147 (149).
(25) AIR 1925 Mad 1270, (1273, 1274).
[But see ('36) AIR 1936 Mad 951 (953). Limitations as to pecuniary jurisdiction]

81. It is not determined by the amount of demand or of the transaction from which the claim has arisen.—It follows from what has been said in Notes 21 and 80, *ante*, that a party who has lost in one Court cannot add causes of action to the original causes of action in the earlier suit for the purpose of swelling the amount of the valuation and then claim that the former Court is not competent to try the subsequent suit. If it were so, any defeated party can, by merely adding another claim, re-agitate the same question in a fresh suit instituted in a higher Court.¹ For the purpose of deciding a question of *res judicata* each cause of action in the subsequent suit should be treated as a separate suit and, if it be found that one of these causes of action was relied upon in the earlier suit, then, although taking all the causes of action together the second suit may be said to be outside the jurisdiction of the former Court, the former decision will operate as *res judicata* in the subsequent suit.²

82. When the first Court is an inferior Court and the second Court a superior Court.—From what has been said in Note 78 above, it will be clear that the decision on an issue by a Court of inferior jurisdiction would not operate as a bar to the trial of that issue by a Court of superior jurisdiction in a subsequent suit, if the latter suit was beyond the jurisdiction of the Court of inferior jurisdiction.¹

Illustration

A sues B for Rs. 55 for rent in a Munsif's Court. The defence is that C and not A is the landlord and C intervenes as a defendant. The Court finds that A is entitled to the rent sued for. C then sues A in the sub-Court for a declaration of title and possession of the properties valuing the claim at about 2 lakhs of rupees. The suit is not barred, for a Munsif's Court has no jurisdiction to entertain the subsequent suit. *Run Bahadur v. Luchko Koer*, I. L. R. 11 Calcutta 801 : 12 Ind. App. 23 (P. C.).

83. Jurisdiction as regards subject-matter.—There must be concurrency of jurisdiction between the two Courts not only as regards pecuniary value but also as regards the *subject-matter*. Certain Courts such as the Small Cause Courts and Revenue Courts, cannot deal with questions of title.¹ Similarly, in suits for rent between landlord and tenant, the Court cannot deal directly with questions of title though it may incidentally do so.² In all such cases, the said Court cannot be said

Note 81

1. (01) 28 Cal 78 (81).
(01) 28 Cal 818 (322).
(28) AIR 1928 All 62 (68, 64).
(35) AIR 1935 Cal 792 (797). (But it appears that his subsequent suit proceeds upon a cause of action which did not exist or of which he could not have availed at the date of the previous suit the bar of *res judicata* will not apply.)
(23) AIR 1923 Rang 239 (241) : 1 Rang 363.
2. See Note 21, *ante*.

(13) 21 Ind. Cas 15 (18) (Mad).
(32) AIR 1932 Cal 162 (162, 163).
(28) AIR 1928 All 714 (716) : 50 All 306.
(24) AIR 1924 All 849 (850).
(85) 7 All 247 (251, 252, 253).
(26) AIR 1926 Cal 1053 (1053, 1054).
(35) AIR 1935 Lah 391 (394) : 17 Lah 20.
(33) AIR 1933 Mad 913 (915, 916) : 57 Mad 335.
(27) AIR 1927 Mad 273 (275).
(15) AIR 1915 Mad 1215 (1217, 1218).
(01) 24 Mad 275 (279).

(85) 8 Mad 83 (86).
(26) AIR 1926 Nag 234 (235).
(34) AIR 1934 Pesh 7 (9).
(38) 67 Cal L Jour 228 (228). (In spite of a large valuation in the subsequent suit there would be *res judicata* at least with regard to so much of the property as was dealt with in the previous suit.) [But see (08) 35 Cal 353 (360).]
Note 82
1. (29) AIR 1929 Lah 781 (781, 782).
(1900) 27 Cal 38 (43).
(30) AIR 1930 All 430 (431).
(20) AIR 1920 Cal 407 (408).
(05) 9 Cal W N 656 (661).
(08) 1908 Pun W R No. 58, p. 219.
(07) 1907 Pun W R No. 186, p. 830 : 1907 Pun Re No. 111.
(96) 16 Mad 456 (458, 459).
Note 83
1. See Notes 75 and 76, *ante*.
(85) 11 Cal 301 (309, 310, 318) : 12 Ind App 23 (PC).

to have concurrent jurisdiction over questions of title, with Civil Courts dealing with questions of title. A decision of such Court therefore upon an issue incidentally arising as to the title of immovable property cannot operate as *res judicata* in any subsequent suit for the determination or enforcement of any right or interest in immovable property.³ The same result will follow even if the small cause suit is transferred to the original side and tried by that Court, since the suit retains its character of a small cause even after transfer.⁴ But if a suit of a small cause nature is decided by a Judge on the original side for want of small cause powers, then a finding as to title will be *res judicata* in a subsequent suit between the parties.⁵

84. Jurisdiction of a special nature.—A mortgagee governed by the Dekhan Agriculturists' Relief Act (Act XVII of 1879) first sued for interest due on the principal amount for certain years. It was decreed on the finding that the principal amount was Rs. 350. Subsequently the mortgagee sued on the mortgage contract for sale of the mortgaged property, a suit which fell within the meaning of Section 3 clause (7) of the Act. It was contended that the former decision as to the amount of the principal sum operated as *res judicata*. It was held by the High Court of Bombay that the subsequent suit was of a special character given to it by a special law, and as Section 12 of the Dekhan Agriculturists' Relief Act directed the Court in such a suit to go into the history of the transaction between the parties from the date of the transaction notwithstanding any admissions of the parties, the former decision did not operate as *res judicata*.¹

85. Proceedings under the Land Acquisition Act.—See Note 28.

86. Proceedings under the Companies Act.—See Note 28.

87. Administration proceedings.—See Note 28.

88. Proceedings under the Dekhan Agriculturists' Relief Act.—See Note 84.

89. Proceedings under the Probate and Administration Act (now the Indian Succession Act).—See Note 28.

90. Proceedings under the Oaths Act.—See Note 28.

91. Proceedings under the Small Cause Courts Act.—See Notes 75 and 83.

92. Proceedings under the Insolvency Acts.—See Note 28.

(115) AIR 1915 Mad 654 (655). (Title to property will not be gone into, in a suit for rent for which alone court-fee is paid.)
8. (78) 2 All 97 (99).
(24) AIR 1924 Bom 454 (454) : 48 Bom 541.
(23) 4 L R All 285 (285).
(07) 4 All L four 517 (518).
(83) 1883 All W N 203 (204).
(24) AIR 1924 Bom 454 (454) : 48 Bom 541. (Same result though the same Judge tries the small cause and the original suit.)
(13) 37 Bom 675 (680, 681) (FB).
(73) 1873 Bom F J 170 (170).
(71) 8 Bom H C R A C 23 (24).

(1900) 4 Cal W N 470 (473). (Reversing 26 Cal 778 on Letters Patent Appeal.)
(69) 12 Suth W R 290 (291).
(27) AIR 1927 Mad 96 (96).
(25) AIR 1925 Mad 357 (357).
(81) 3 Mad 192 (196, 199) (FB).
4. See S. 24, sub-s. 4 of the Code.
[See (14) AIR 1914 All 229 (230).]
5. (18) AIR 1918 All 52 (53) : 41 All 54 (59).
(12) 16 Ind Cas 496 (496) (All).
[But see (22) AIR 1922 All 241 (243).]
Note 84
1. (12) 16 Ind Cas 442 (442, 443) : 36 Bom 548.

93. The Court must have been able to try the whole suit and not merely the issue. — See Note 73.

94. The competency must be of the trial Court in the former suit and not that of the Appellate Court therefrom. — The words "in a Court competent to try such subsequent suit . . ." refer to the competency of the original Court and the fact that the Appellate Court in the previous litigation was competent to try the subsequent suit would not make the earlier decision *res judicata*, if the former trial Court was not competent to try the subsequent suit.¹

95. The Court does not cease to be competent if the inability to try arises, not from incompetence, but from the existence of another Court with preferential jurisdiction. — Under the Small Cause Courts Act, a suit cognisable by a Small Cause Court is not to be instituted and tried by an ordinary Civil Court if, and so long as, within the local limits of its jurisdiction, a Small Cause Court is established competent to take cognisance of such a small cause suit. So that when a former judgment between the parties, of a Court acting on the regular side is relied upon in a small cause suit, the circumstance that the small cause suit could not have been tried by the former Court will not make it a Court of jurisdiction incompetent to try the subsequent suit.¹

Illustration

Defendant had executed to plaintiff three bonds for Rs. 3,000, 250 and 300 respectively. In a suit in the sub-Court on the bond for Rs. 3,000 defendant pleaded payments to the extent of Rs. 4,000 on account of all the bonds. The defence was found true. Subsequently plaintiff filed a suit on the other two bonds in the Small Cause Court. The defendant pleaded the same defence relying on the former judgment and admitted a small balance. Held that the plea of *res judicata* was good on the ground that the inability of the former Court to try the small cause suit arose not from incompetence but from the existence of a Court with preferential jurisdiction. (*Madho Rao v. Anwit Rao*, A. I. R. 1918 Nagpur 163.)

96. The fact that appeals lie or do not lie to different Courts does not affect competency. — Explanation II — Under the Code of 1882, it was held by the Bombay and Madras High Courts and the Punjab Chief Court that a prior decision in which no second appeal lay (as for instance cases under Section 102 of the Code) cannot be pleaded as a bar in a case which was open to second appeal, the reason being that a decision to be *res judicata* must have been given in a previous suit in which the parties, according to the ordinary procedure, were entitled to take the case ultimately to the same or corresponding appellate tribunal to which the subsequent litigation wherein the decision is relied on as conclusive could be carried and that the words 'competent jurisdiction' in the Section admitted of the provisions of law relating to appealability being considered in giving effect to the plea.¹ But the Calcutta High Court maintained the contrary view that the

Note 94

1. (80) 5 Cal 832 (838).
- (96) 28 Cal 415 (419).
- (97) AIR 1937 All 20 (21).
- (92) AIR 1922 All 445 (446) : 44 All 712.
- (25) AIR 1925 Bom 241 (242, 243) : 49 Bom 442.
- (04) 30 Bom 220 (225).
- (36) AIR 1936 Cal 629 (637).
- (11) 11 Ind Cas 389 (392) (Cal).
- (11) 9 Ind Cas 686 (687) (Mad).
- (88) 1 C P L R 92 (97, 98).
- (36) AIR 1936 Oudh 387 (400) : 12 Luck 371.
- (12) 14 Ind Cas 86 (88) (Oudh).

Note 95

1. (02) 27 Mad 63 (64).
- (16) AIR 1916 Mad 578 (574).
- (17) AIR 1917 All 268 (264) : 39 All 717 (719).
- (04) 26 Bom 338 (340).
- (18) AIR 1918 Nag 163 (164) : 14 Nag L R 115 (116).

Note 96

1. (85) 9 Bom 75 (81).
- (91) 16 Bom 104 (105).
- (07) 1907 Pun W R No. 186, p. 829 (830) : 1907 Pun Re No. 111.

Section did not require that the two suits must be open to appeal in the same way. In view of this conflict, Explanation II has been added in the present Code adopting the Calcutta view that it is the competency of the *original Court* that determines *res judicata*, irrespective of any provision as to a right of appeal from the decision of such Court and the fact that appeals do not lie or lie to different Courts is immaterial. The undermentioned cases which had been overruled in later cases under the old Code would now be good law. It has been held by the High Court of Madras and the Punjab Chief Court that the Explanation is not retrospective in operation.⁵

97. The competency must have existed at the date of the former suit.—The words "*in a Court of jurisdiction competent to try such subsequent suit*" must be construed to refer to the jurisdiction of the Court at the time when the first suit was brought,¹ that is to say, if the Court which tried the first suit was competent to try the subsequent suit if then brought, the decision of such Court would be conclusive, although on a subsequent date by a rise in the value of such property² or from any other cause³ the said Court ceases to be the proper Court to take cognisance of the suit relating to that matter. Otherwise, a rise in value being a recurring incident of most properties due either to fortuitous circumstances or to the lapse of time, would knock at the bottom of all finality and lead to absurd results. But it has been held by the Madras High Court that the augmentation of a claim by *accrual of interest* is not similar to a rise in the value of one and the same property⁴ and therefore if a subsequent suit on a pecuniary claim has to be filed in a Court of superior jurisdiction on account of the accumulation of interest, the former decision would not conclude the matter.⁵ The same High Court has, however, held that if the claim for interest is not *bona fide* and is clearly *untenable*, the subsequent suit will be barred.⁶

98. Fraud, if affects competency—Judgment obtained by fraud or collusion.—A decree obtained by fraud or collusion is a nullity and cannot operate

(188) 1888 Pun Re No. 145. (Overruled in 1891

Pun Re No. 20.)

(106) 29 Mad 195 (199, 200). (Overruling 24

Mad 444 and 27 Mad 68.)

(95) 18 Mad 189 (191).

(94) 17 Mad 168 (179).

(92) 15 Mad 111 (120).

(88) 9 Cal 188 (184).

(98) 25 Cal 571 (579).

(101) 28 Cal 78 (81).

8. (18) AIR 1918 All 52 (53, 54): 41 All 54 (59).

(28) AIR 1928 Cal 758 (758).

(27) AIR 1927 All 189 (189, 190).

(12) 16 Ind Cas 496 (496) (All).

(10) 32 All 67 (70).

(24) AIR 1924 Lab 644 (644).

(101) 24 Mad 444 (446, 447).

(104) 27 Mad 63 (64).

(107) 1907 Pun Re No. 111.

(88) 1888 Pun Re No. 145.

(116) AIR 1916 Mad 1035 (1036).

(11) 1911 Pun L R No. 11, p. 103: 1910 Pun

Re No. 97.

Note 97

1. (84) 10 Cal 697 (706, 707).

(98) 2 Cal W N 297 (301): 25 Cal 571.

(37) AIR 1937 All 20 (21).

(33) AIR 1933 Cal 879 (880).

(32) AIR 1932 Cal 271 (272): 59 Cal 636.

(15) AIR 1915 Cal 629 (631).

(31) AIR 1931 Lab 217 (219).

(28) AIR 1928 Lab 929 (930).

(19) AIR 1919 Oudh 111 (112): 22 Oudh Cas

381.

(99) 2 Oudh Cas 261 (267).

1a. (36) AIR 1936 Lab 998 (1000): 1 L R (1937)

Lab 100.

(36) AIR 1936 Mad 951 (952).

2. (85) 11 Cal 153 (157). (Former Court not

competent to try later suit on account of

legislative enactment).

(91) 15 Mad 494 (496). (Do.)

(109) 3 Ind Cas (117) (120) (All). (Do.)

(19) AIR 1919 Mad 236 (237): 42 Mad 702.

(Do.)

3. (106) 29 Mad 65 (67, 68).

4. (26) AIR 1926 Mad 829 (830).

Where a decree is sought to be set aside on the ground of fraud, "the fraud alleged must be *actual, positive* fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of that decree by that contrivance." But when the parties have had the opportunity of putting their respective cases before the Court and the Court has come to a conclusion on the evidence, the rule of *res judicata* comes into operation and it is not open to the defeated party to re-open the matter by merely alleging that the evidence and the averments which the Court believed were untrue." As to

1. (1775) 2 Amb 756, Meadows v. Kingston.
(Per Lord Chief Justice DeGrey. Referred to

1. (1775) 2 Amb 756, Meadows v. Kingston.
(Per Lord Chief Justice DeGrey. Referred to
in 26 Cal 891.)
(738) AIR 1938 Lab 578 (574).
(37) AIR 1937 All 28 (29).
(25) 6 L R All (Rev) 229 (231).
(94) 1894 All W N 141 (142).
(95) 19 Bom 821 (826).
(17) AIR 1917 Oudh 197 (198).
(16) AIR 1916 Oudh 148 (150) : 10 Oudh Cas
384.
(31) AIR 1931 Sind 27 (27).
(93) 16 Mad 198 (200).
(36) AIR 1936 All 422 (429).
(09) 32 All 145 (147).
(19) AIR 1919 Pat 232 (232) : 4 Pat L Jour
205 (206).
(18) AIR 1918 P C 184 (188) (PC).
(24) AIR 1924 Bom 460 (466) : 48 Bom 583.
(82) 6 Bom 703 (711).
(21) AIR 1921 Cal 298 (298) : 48 Cal 298.
(24) AIR 1924 Pat 241 (243).
(17) AIR 1917 Pat 529 (530).
(11) 10 Ind Cas 780 (785) (Low Bur).
(07) 29 All 608 (611, 612).
(34) AIR 1934 Rang 135 (136, 139).
(24) AIR 1924 Pat 769 (770).
(22) AIR 1922 Mad 404 (404).
(581) : 38 Mad 203.
(16) AIR 1916 Mad 364 (365) : 19 Ind Cas 579
8. (34) AIR 1934 Rang 135 (139).
(20) AIR 1920 Pat 741 (741) : 5 Pat L Jour 259.
(23) AIR 1923 Pat 242 (245) : 2 Pat 335.
(24) AIR 1924 Oudh 419 (419, 420).
(94) 21 Cal 612 (619).
(23) AIR 1923 Cal 425 (426).
(41).
(15) AIR 1915 All 400 (401) : 37 All 535 (540,
7. (15) AIR 1915 All 397 (400) : 38 All 7.
(75) 24 Suth W R 217 (217).
(23) AIR 1923 Cal 79 (81).
(29) AIR 1929 Cal 685 (686).
(82) 6 Bom 708 (715).
(94) 1894 All W N 141 (141).
(02) 24 All 242 (246, 247).
(04) 26 All 272 (282).
(99) 26 Cal 891 (919).
6. (1900) 27 Cal 11 (17, 21).
(24) AIR 1924 Pat 241 (242).
App 99 (PC).
5. (02) 6 Cal W N 473 (477) : 29 Cal 395 : 29 Ind
(Mad).
[See also (710) 5 Ind Cas 119 (119, 120)
(21) AIR 1921 Pat 12 (18) : 6 Pat L Jour 1.
(24) AIR 1924 Pat 238 (239) : 2 Pat 833.

shown that the matter was heard and finally decided.¹ In *Genda Lal v. Hazari*

Note 100

1. (97) 24 Cal 616 (626, 627) : 24 Ind App 50

(P.C.).

(92) AIR 1932 Bom 326 (327).

(97) AIR 1937 All 401 (405) : I L R (1937) All

489.

(95) AIR 1935 All 411 (415) : 57 All 797.

(92) AIR 1932 All 45 (46).

(91) AIR 1931 All 99 (100) : 52 All 901.

(99) 21 All 505 (514) : 26 Ind App 175 (P.C.).

(98) AIR 1938 Bom 291 (294).

(92) AIR 1932 Bom 442 (443).

(98) 32 Bom 315 (319).

(97) AIR 1937 Cal 741 (745) : I L R (1938) 1

Cal 187. (Issue raised but not decided — No

res judicata.)

(89) 16 Cal 173 (182) : 15 Ind App 186 (P.C.).

(65) 8 Suth W R 39 (39).

(66) 2 Suth W R 79 (80).

(97) AIR 1937 Lab 265 (266).

(97) AIR 1937 Lab 21 (22).

(88) 1888 Pun Re No. 104.

(98) AIR 1938 Mad 325 (326).

(95) AIR 1935 Mad 977 (982). (Before a mat-

ter can be held to be res judicata the finding

must be certain and it must be clear that the

decree in the previous suit was intended to

be rested on that finding.)

(93) AIR 1933 Mad 868 (869).

(11) 9 Ind Cas 686 (687) (Mad).

(66) 3 Mad H O R 84 (85).

(64) 2 Mad H O R 131 (143, 146).

(91) AIR 1931 Oudh 157 (158).

(97) AIR 1937 Rang 324 (325).

(97) AIR 1937 Rang 204 (205). (Question

raised but not decided — No res judicata.)

(94) AIR 1934 Rang 379 (380). (Decision in

preliminary enquiry in a receiver application,

as to prima facie claim for possession is not

res judicata.)

(94) AIR 1934 Rang 154 (155). (Order strik-

ing out party's name amounting to dismissal)

is barred.)

Cases in which it was held that the matter

was heard and finally decided :—

(88) 15 Cal 756 (761) : 15 Ind App 97 (P.C.).

(90) AIR 1930 P C 224 (226) : 8 Rang 326 : 57

Ind App 208 (P.C.).

(91) AIR 1931 P C 289 (293) : 58 Ind App 381 :

55 Mad 93 (P.C.).

(91) AIR 1931 P C 131 (135) : 23 Oudh Cas

291 (P.C.).

(92) AIR 1931 P C 11 (12) : 48 Cal 499 : 48 Ind

App 187 (P.C.).

(94) AIR 1914 P C 31 (32) : 41 Ind App 247 (P.C.).

(96) AIR 1926 All 420 (420).

(95) AIR 1925 All 417 (418).

(90) AIR 1920 All 298 (300).

(93) 11 All L Jour 937 (940).

(92) 9 All L Jour 165 (169) (P.C.).

(91) 11 Ind Cas 87 (88) (All).

(98) 20 All 370 (374).

(83) 5 All 514 (517, 518).

(75) 7 N W P H C R 17 (23, 28, 29, 31) (F.B.).

(68) 3 Agra 40 (41).

(67) 2 Agra 221 (221).

(90) AIR 1930 Bom 135 (137) : 53 Bom 676.

(97) AIR 1927 Bom 145 (148).

(91) AIR 1921 Bom 427 (429) : 45 Bom 99.

(87) 11 Bom 160n (167n).

(69) 6 Bom H C R A O 109 (113).

(64) 2 Bom H C R 77. (Second Edition 72 (74).)

(99) AIR 1929 Cal 385 (386).

(96) AIR 1926 Cal 369 (370).

(96) AIR 1926 Cal 80 (82).

(95) AIR 1925 Cal 427 (430).

(93) AIR 1923 Cal 361 (361, 362).

(95) AIR 1915 Cal 660 (661).

(12) 13 Ind Cas 688 (688) (Cal).

(12) 13 Ind Cas 40 (42) (Cal).

(10) 8 Ind Cas 945 (945) (Cal).

(07) 11 Cal W N 1100 (1103) : 34 Cal 1020.

(82) 11 Cal L Rep 488 (486).

(73) 19 Suth W R 62 (63).

(72) 18 Suth W R 260 (261).

(72) 17 Suth W R 350 (350, 351).

(69) 12 Suth W R 182 (183).

(68) 10 Suth W R 465 (465, 466).

(67) 7 Suth W R 188 (189).

(66) 6 Suth W R 157 (158).

(65) 3 Suth W R 210 (212).

(64) 1 Suth W R 343 (344).

(99) AIR 1929 Lab 769 (769).

(95) AIR 1925 Lab 596 (597).

(92) 67 Ind Cas 755 (757) (Lab).

(91) AIR 1921 Lab 187 (187).

(91) AIR 1921 Lab 394 (395) : 2 Lab L Jour

678 (680).

(92) 17 Ind Cas 365 (366) (Lab).

(08) 1908 Pun W R No. 116, page 894.

(90) 1890 Pun Re No. 6 (Rev).

(87) 1887 Pun Re No. 79.

(83) 1883 Pun Re No. 95.

(77) 1877 Pun Re No. 77.

(75) 1875 Pun Re No. 70.

(70) 1870 Pun Re No. 60.

(90) AIR 1930 Mad 714 (716).

(96) AIR 1926 Mad 241 (241, 243) : 49 Mad 483.

(95) AIR 1925 Mad 1179 (1181).

(95) AIR 1925 Mad 218 (220).

(94) AIR 1924 Mad 299 (300).

(93) AIR 1923 Mad 88 (89, 91) : 46 Mad 525.

(91) AIR 1921 Mad 701 (704).

(90) 4 Mad L Tim 413 (413).

(94) 14 Mad L Jour 103 (104).

(93) 13 Mad L Jour 485 (487).

(93) 13 Mad L Jour 134 (134).

(91) 11 Mad L Jour 7 (8).

(96) AIR 1916 Nag 1 (2) : 18 Nag L R 76 (78).

(92) AIR 1923 Oudh 275 (278) : 4 Luck 713.

(97) AIR 1927 Oudh 60 (62).

(96) AIR 1926 Oudh 613 (614).

(96) AIR 1926 Oudh 27 (28).

in what cases a decree can be set aside for fraud, see the undermentioned cases.⁹

99. Criminal and Civil Courts.—The finding of a Criminal Court is not conclusive in a Civil Court when the same matter is in issue in the Civil Court and the latter is bound to decide the question for itself.¹ But the judgment of the Criminal Court is a valuable piece of evidence.² A judgment in a civil action also cannot be used as conclusive in a criminal case.³ The decision, however, would be admissible in evidence if the parties are substantially the same and the issues in the two cases are identical.⁴ The decision of a Magistrate in a proceeding under Section 488, Criminal Procedure Code, is binding on the succeeding Magistrate on the general principles of *res judicata*.⁵ As to the applicability of the principle of *res judicata* in Criminal Courts, see the undermentioned cases⁶ and Section 403, Criminal Procedure Code.

100. The matter must have been heard and finally decided.—“*Res judicata*,” said Lord Romilly in *Jenkins v. Robertson*, (1867) L. R. 1 H. L. 117, “by its very words means a matter upon which the Court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly. In my opinion *res judicata* signifies that the Court has, after argument and consideration, come to a decision on a contested matter.”

In other words, in order to support a plea of *res judicata*, it is not enough that the parties are the same and that the same matter is in issue, it must also be

- (14) AIR 1914 Sind 68(64); 8 Sind L R 81(84).
Note 99
 1. (69) 12 Suth W R 477 (478).
 (70) 14 Suth W R 339 (339).
 (82) 4 All 97 (99).
 (68) 9 Suth W R 77 (77).
 (66) 6 Suth W R Civ Ref 26 (26).
 (66) 5 Suth W R 27 (27).
 (66) 5 Suth W R 26 (26).
 (77) 1877 Fnn Re No. 56.
 (99) 21 All 26 (28).
 2. (73) AIR 1933 Lah 461 (461) : 15 Lah 262.
 (Judgment can be used in a suit for damages for malicious prosecution only to establish acquittal of accused.)
 (70) 2 N W P H R 88 (88).
 (73) AIR 1933 Mad 429 (430) : 56 Mad 641.
 (Judgment can be used in a suit for damages for malicious prosecution only to establish acquittal of accused.)
 [But see (68) 10 Suth W R 56 (56).]
 3. (81) 1881 Fnn Re No. 18 (Cr).
 (92) AIR 1932 Mad 254 (255, 256) : 55 Mad 346. (Dismissal of suit for damages for defamtion—Judgment in suit is not admissible in evidence for a prosecution for the same.)
 (81) 5 Bom 387 (390). (Decision as regards possession of a certain land given by the mamlatdar—Decision regarding possession of the same land given by Magistrate—Decision of Magistrate will prevail.)
 4. (96) 23 Cal 610 (618, 619).
 (16) AIR 1916 Bom 163 (163) : 41 Bom 1 (3, 4, 5).
 5. (83) 5 All 224 (226).
 (94) 21 Cal 262 (265).
 (15) AIR 1915 Bom 203 (204) : 40 Bom 97 (101, 102, 103, 104).
 (27) AIR 1927 Sind 10 (15) : 21 Sind L R 1.
 (23) AIR 1923 Rang 82 (82).
 (24) AIR 1924 Rang 119 (122) : 1 Rang 500.
 obtained by the defendant was set aside.)
 served upon the plaintiff—Ex parte decree to by the defendant the summons was never (In consequence of fraudulent trick resorted to by the defendant the summons was never served upon the plaintiff—Ex parte decree obtained by the defendant was set aside.)
 (25) AIR 1925 Rang 200 (200) : 3 Rang 522.
 (18) AIR 1918 Pat 548 (561) : 3 Pat L Jour 522.
 (25) AIR 1925 Mad 640 (644).
 (18) AIR 1918 Lah 140 (141).
 (25) AIR 1925 Lah 357 (358).
 amount to fraud.)
 to inform this fact to the Court does not joining in compromise—Failure of plaintiff aside compromise decree—One defendant not to set (Sut to set (25) AIR 1925 Lah 431 (432). (Sut to set (25) AIR 1923 Cal 569 (569).
 (24) AIR 1924 Cal 395 (395).
 (28) AIR 1928 Bom 379 (380, 381).
 minor was set aside.)
 not appointed—Ex parte decree against the Prior suit against minor—Guardian ad litem vice of summons is no evidence of fraud— (22) AIR 1922 Pat 291 (292). (More non-ser- obtained by the defendant was not set aside.) by the plaintiff not proved—Ex parte decree alleged (25) AIR 1925 Cal 555 (557). (Fraud alleged (34) AIR 1984 Rang 135 (138, 139).
 187 (189).
 (19) AIR 1919 Pat 163 (164) : 4 Pat L Jour (20) AIR 1920 Pat 881 (882).
 (21) AIR 1921 Pat 12 (14) : 6 Pat L Jour 1.
 (28) AIR 1928 Pat 226 (227).
 (19) AIR 1919 Oudh 272 (275) : 22 Oudh Cas 60. No. 98.
 (15) AIR 1915 Lah 153 (154) : 1915 Fnn Re (24) AIR 1924 Bom 100 (101).
 (22) AIR 1922 All 167 (168).

shown that the matter was heard and finally decided. In *Genda Lal v. Hazari*

Note 100

1. (97) 24 Cal 616 (626, 627) : 24 Ind App 50

(P.C.).

(92) AIR 1932 Bom 326 (327).

(97) AIR 1937 All 401 (405) : I L R (1937) All

489.

(95) AIR 1935 All 411 (415) : 57 All 797.

(92) AIR 1932 All 45 (46).

(91) AIR 1931 All 99 (100) : 52 All 901.

(99) 21 All 505 (514) : 26 Ind App 175 (P.C.).

(98) AIR 1938 Bom 291 (294).

(92) AIR 1932 Bom 442 (443).

(98) 32 Bom 315 (319).

(97) AIR 1937 Cal 741 (745) : I L R (1938) 1

Cal 187. (Issue raised but not decided — No

res judicata.)

(89) 16 Cal 173 (182) : 15 Ind App 186 (P.C.).

(65) 3 Subh W R 39 (39).

(65) 2 Subh W R 79 (80).

(97) AIR 1937 Lab 265 (266).

(97) AIR 1937 Lab 21 (22).

(88) 1888 Pun Re No. 104.

(98) AIR 1938 Mad 325 (326).

(95) AIR 1935 Mad 977 (982). (Before a mat-

ter can be held to be res judicata the finding

must be certain and it must be clear that the

decree in the previous suit was intended to

be rested on that finding.)

(93) AIR 1933 Mad 868 (869).

(11) 9 Ind Cas 686 (687) (Mad).

(66) 3 Mad H O R 84 (85).

(64) 2 Mad H O R 131 (143, 146).

(91) AIR 1931 Oudh 157 (158).

(97) AIR 1937 Rang 324 (325).

(97) AIR 1937 Rang 204 (205). (Question

raised but not decided—No res judicata.)

(94) AIR 1934 Rang 379 (380). (Decision in

preliminary enquiry in a receiver application,

as to prima facie claim for possession is not

res judicata.)

(94) AIR 1934 Rang 154 (155). (Order strike-

ing out party's name amounting to dismissal

is barred.)

—No appeal—Subsequent suit for same relief

is barred.)

Cases in which it was held that the matter

was heard and finally decided :—

(88) 15 Cal 756 (761) : 15 Ind App 97 (P.C.).

(90) AIR 1930 P C 224 (226) : 8 Rang 326 : 57

Ind App 208 (P.C.).

(91) AIR 1931 P C 289 (293) : 58 Ind App 381 :

55 Mad 93 (P.C.).

(92) AIR 1931 P C 131 (135) : 23 Oudh Cas

291 (P.C.).

(92) AIR 1931 P C 11 (12) : 48 Cal 499 : 48 Ind

App 187 (P.C.).

(94) AIR 1914 P C 31 (32) : 41 Ind App 247 (P.C.).

(96) AIR 1926 All 420 (420).

(95) AIR 1925 All 663 (663).

(95) AIR 1925 All 417 (418).

(90) AIR 1920 All 298 (300).

(93) 11 All L Jour 937 (940).

(92) 9 All L Jour 165 (169) (P.C.).

(91) 11 Ind Cas 87 (88) (All).

(90) 7 All L Jour 918 (922) : 33 All 143.

(98) 20 All 370 (374).

(83) 5 All 514 (517, 518).

(75) 7 N W P H C R 17 (23, 28, 29, 31) (F.B.).

(68) 3 Agra 40 (41).

(67) 2 Agra 221 (221).

(90) AIR 1930 Bom 135 (137) : 53 Bom 676.

(97) AIR 1927 Bom 145 (148).

(92) AIR 1921 Bom 427 (429) : 45 Bom 99.

(87) 11 Bom 160n (167n).

(69) 6 Bom H C R A C 109 (113).

(64) 2 Bom H C R 77. (Second Edition 72 (74).)

(29) AIR 1929 Cal 385 (386).

(26) AIR 1926 Cal 1228 (1228).

(26) AIR 1926 Cal 369 (370).

(26) AIR 1926 Cal 80 (82).

(25) AIR 1925 Cal 427 (430).

(23) AIR 1923 Cal 361 (361, 362).

(15) AIR 1915 Cal 660 (661).

(12) 13 Ind Cas 688 (688) (Cal).

(13) 13 Ind Cas 40 (42) (Cal).

(10) 8 Ind Cas 945 (945) (Cal).

(07) 11 Cal W N 1100 (1103) : 34 Cal 1020.

(82) 11 Cal L Rep 483 (486).

(73) 19 Subh W R 62 (63).

(72) 18 Subh W R 260 (261).

(72) 17 Subh W R 350 (350, 351).

(69) 12 Subh W R 182 (183).

(68) 10 Subh W R 465 (465, 466).

(67) 7 Subh W R 188 (189).

(66) 6 Subh W R 157 (158).

(65) 3 Subh W R 210 (212).

(64) 1 Subh W R 343 (344).

(29) AIR 1929 Lab 769 (769).

(25) AIR 1925 Lab 596 (597).

(22) 67 Ind Cas 755 (757) (Lab).

(21) AIR 1921 Lab 187 (187).

(21) AIR 1921 Lab 394 (395) : 2 Lab L Jour

678 (680).

(12) 17 Ind Cas 365 (366) (Lab).

(08) 1908 Pun W R No. 116, page 394.

(90) 1890 Pun Re No. 6 (Rev).

(87) 1887 Pun Re No. 79.

(83) 1883 Pun Re No. 95.

(77) 1877 Pun Re No. 77.

(75) 1875 Pun Re No. 70.

(70) 1870 Pun Re No. 60.

(90) AIR 1930 Mad 714 (716).

(26) AIR 1926 Mad 241 (241, 243) : 49 Mad 483.

(25) AIR 1925 Mad 1179 (1181).

(24) AIR 1924 Mad 299 (300).

(23) AIR 1923 Mad 88 (89, 91) : 46 Mad 525.

(21) AIR 1921 Mad 701 (704).

(20) AIR 1920 Mad 449 (451).

(08) 4 Mad L Tm 413 (413).

(04) 14 Mad L Jour 103 (104).

(08) 13 Mad L Jour 485 (487).

(03) 13 Mad L Jour 134 (134).

(01) 11 Mad L Jour 7 (8).

(16) AIR 1916 Nag 1 (2) : 18 Nag L R 76 (78).

(29) AIR 1929 Oudh 275 (278) : 4 Luck 713.

(27) AIR 1927 Oudh 60 (62).

(26) AIR 1926 Oudh 613 (614).

(26) AIR 1926 Oudh 27 (28).

Lal, Is Sulaiman, C. J., observed as follows: "While the suit is pending and the Court is still seized of the case, although it may be that a defendant may not be allowed to reopen a finding which has been recorded on a particular issue, there is nothing to preclude the Court itself from changing its mind and coming to a contrary conclusion, particularly if a new ruling containing a fresh interpretation of some provision of law comes into existence in the meantime." A remark in a judgment which is in the nature of an *obiter dictum* cannot operate as *res judicata*.^{1a} At the same time, the mere fact that the judgment contains observations made *obiter* will not prevent the point which

(25) AIR 1925 Oudh 607 (608). (Question of title heard and decided in former suit—Res judicata.)

(21) AIR 1921 Oudh 46 (46); 24 Oudh Cas 215. (15) 1 Oudh L Jour 745 (746). (30) AIR 1930 Pat 71 (75, 76). (24) AIR 1924 Pat 307 (309). (28) AIR 1928 Rang 82 (82). (19) AIR 1919 Low Bur 38 (38) : 9 Low Bur Rul 273 (274).

(09) 1909 Upp Bur Rul 2nd Quarter C P C 31. (21) 59 Ind Cas 808 (809) (Lab). (12) 15 Ind Cas 685 (686) (All). (Points heard and decided in partition proceedings between parties—Res judicata.)

(82) 5 Mad 239 (241). (Do.) (08) 7 Cal L Jour 563 (577); 55 Cal 701. (Do.) (28) AIR 1928 Cal 758 (758). (Suit under S. 9, Specific Relief Act—Res judicata as to question of dispossession.)

(17) AIR 1917 All 263 (264); 39 All 717. (Do.) Cases in which it was held that the matter was not heard and decided; therefore no res judicata:—

(25) AIR 1925 Bom 181 (183). (30) AIR 1930 P C 45 (50) (P C). (85) AIR 1935 All 457 (457). (24) AIR 1924 All 867 (868). (10) 5 Ind Cas 325 (329) (All). (07) 29 All 287 (289, 290). (01) 23 All 346 (354).

(92) 1892 All W N 238 (238). (29) AIR 1929 Bom 116 (117). (25) AIR 1925 Bom 311 (313). (14) AIR 1914 Bom 312 (315). (03) 5 Bom L R 737 (740).

(1900) 2 Bom L R 871 (871). (97) 21 Bom 563 (566, 567). (94) 1894 Bom P J 12 (13). (90) 14 Bom 327 (330). (73) 10 Bom H C R 369 (372). (85) AIR 1935 Cal 716 (720); 63 Cal 385. (Ap-plication for substitution based on valid ad-option — Application dismissed without considering validity of adoption — Question of validity can be challenged in subsequent suit.)

(31) AIR 1931 Cal 511 (513). (Decree silent as regards certain claim — This does not mean that claimant can never have any claim over that property again.) (18) AIR 1918 Cal 523 (524). (15) AIR 1915 Cal 46 (48). (10) 5 Ind Cas 781 (782) (Cal).

(07) 34 Cal 83 (88, 89). (01) 5 Cal W N 304 (306). (01) 28 Cal 243 (245). (99) 27 Cal 515 (520) : 27 Ind App 39 (PC). (97) 24 Cal 711 (713, 714). (95) 22 Cal 692 (707). (89) 16 Cal 545 (548). (77) 3 Cal 6 (11). (76) 25 Subh W R 208 (209). (71) 15 Subh W R 527 (529). (69) 12 Subh W R 325 (325, 326). (68) 10 Subh W R 486 (486). (68) 10 Subh W R 305 (306). (26) AIR 1926 Lab 178 (178, 179). (24) AIR 1924 Lab 469 (470). (21) AIR 1921 Lab 296 (296). (20) AIR 1920 Lab 54 (55) : 2 Lab L Jour 605 (606, 608, 609). (14) AIR 1914 Lab 76 (78). (13) 1913 Pun W R No. 75, p. 209 (210). (84) 1884 Pun Re No. 25. (82) 1882 Pun Re No. 24. (31) 1931 Mad W N 813 (814). (29) AIR 1929 Mad 687 (688). (29) AIR 1929 Mad 231 (232). (28) AIR 1928 Mad 268 (271). (27) AIR 1927 Mad 1100 (1100). (26) AIR 1926 Mad 162 (163) : 43 Mad 688. (25) AIR 1925 Mad 1107 (1107). (21) AIR 1921 Mad 126 (128). (20) AIR 1920 Mad 710 (710). (11) 9 Ind Cas 613 (614) (Mad). (09) 4 Ind Cas 1117 (1117) (Mad). (66) 8 Mad H C R 120 (123). (31) AIR 1931 Oudh 62 (63). (Order passed in execution proceedings as to the nature of land which is sought to be sold is not a final one and the same cannot operate as res judicata in a later suit.) (27) AIR 1927 Oudh 15 (16). (19) AIR 1919 Oudh 177 (177) : 21 Oudh Cas 324 (325, 326). (01) 4 Oudh Cas 408 (418). (26) AIR 1926 Pat 286 (290) : 5 Pat 276. (24) AIR 1924 Pat 683 (686). (29) AIR 1929 Rang 55 (58) : 6 Rang 691. (15) AIR 1915 Upp Bur 18 (19) : 2 Upp Bur Rul 81. (1900) 1900 Low Bur Rul 544. [But see (25) AIR 1925 Cal 1046 (1047, 1048).] 1a. (36) AIR 1936 All 21 (23) : 58 All 313 (FB). (29) AIR 1929 Lab 225 (226). (24) 11 Oudh L Jour 395 (399). (66) 5 Subh W R 227 (228).

arises in the case and is decided by the Court from operating as *res judicata*.^{1b} It is not necessary that the matter should have been decided in *explicit* terms in the former suit in order to constitute it *res judicata*; it is enough if an adjudication on the matter is necessarily involved in the decision in the prior suit.² Nor is it necessary that the decision should have been appealable.³

It has already been seen in Note 33, *ante*, that a matter *constructively* in issue could not be *actually* decided but could only be *deemed* to be heard and decided, except where the case was not tried upon the merits. A matter could not be said to have been *heard* and decided either actually or constructively, if it was decided behind the back of a party without notice to him.⁴

Where the former suit was tried according to the procedure then in force, the mere fact that such procedure was summary does not affect the finality of the decision.^{4a}

Where a matter has been heard and decided by two or more former decisions, one conflicting with the other, the last of such decisions in order of date will be the one which will operate as *res judicata*.⁵ The basis of this rule is that if a party who could raise the plea of *res judicata* does not do so when an opportunity is given to him, he must be deemed to have waived it.⁶

An application for a rule (revision) and its rejection does not prevent a Court, on a subsequent occasion, if the occasion arises, from granting a rule in the interests of justice.⁷

101. No matter left undecided can be deemed to have been decided.—It has been seen in Note 12 *ante*, that if a matter is *not in issue at all*, there can be no *res judicata*. It cannot be said in such a case that the matter was heard and finally decided.¹ It has also been seen in Note 100, *ante*, that where a

(35) AIR 1985 Lab 96 (97).
(38) AIR 1988 Lab 698 (698) : 14 Lab 365.
(33) AIR 1983 Lab 404 (405).
(32) AIR 1982 Lab 232 (234). (Casual remark.)
(36) AIR 1986 Nag 148 (150) : 1 L R (1986) Nag 188.

(36) AIR 1986 Lab 18 (21).
[See also (35) AIR 1985 Mad 928 (925).]
(Widow of judgment-debtor added in execution proceedings as legal representative—Her application under S. 47 and O. 21, R. 58, Civil P. C., claiming attached property as her own.—Application dismissed on merits—Judge's remark in order advising regular suit—Other party can contend that appeal under S. 47 and not suit is the remedy.]]

1b. (36) 17 Pat L Tm 356 (356).
2. (73) 20 South W R 377 (378, 379) : Ind App Sup Vol 212 (EC).

(38) AIR 1988 Lab 594 (595, 596) : 14 Lab 409.
(36) AIR 1986 Bom 402 (404) : 60 Bom 1008.
(98) 2 Cal W N 254 (256).
(28) AIR 1928 Lab 888 (891).
(14) AIR 1914 Mad 399 (414) : 17 Ind Cas 445 (450) : 37 Mad 70.
3. (39) AIR 1939 Cal 169 (174) : 1 L R (1938) 2 Cal 418.
(38) AIR 1988 Pat 359 (360).

4. (30) AIR 1930 All 699 (700) : 52 All 1024.
4a. (38) AIR 1988 Lab 369 (388) (FB). (Decision of the year 1855 under the Punjab Civil Code, delivered by a Deputy Commissioner in the Punjab is res judicata—Per Full Bench; Din Mahomed, J., dissenting.)
5. (12) 14 Bom L R 854 (859, 860).
(32) AIR 1932 All 520 (521).
(35) AIR 1935 All 645 (647).
(27) AIR 1927 All 717 (718) : 49 All 606.
(24) AIR 1924 All 810 (811) : 46 All 220.
(15) AIR 1915 All 420 (420) : 37 All 531 (534).
(04) 1 All L Jour 416 (418).
(33) AIR 1933 Cal 69 (71) : 59 Cal 518. (Two compromises—Later compromise prevails.)
(29) AIR 1929 Cal 168 (164).
(21) AIR 1921 Mad 612 (615).
(17) AIR 1917 Mad 950 (950).
(35) AIR 1935 Nag 122 (123) : 81 Nag L R 211.
6. (35) AIR 1935 All 645 (647).
7. (36) AIR 1936 Pat 119 (120).
Note 101
(25) AIR 1925 P C 184 (187) : 21 Nag L R 117 : 52 Cal 971 : 52 Ind App 294 (PC).
(97) 19 All 277 (288) : 34 Ind App 10 (PC).
(25) AIR 1925 All 794 (795).
(86) 8 All 396 (401).
(32) AIR 1932 Bom 3 (7).
(69) 12 South W R 525 (527).

matter, though in issue has, as a fact, been not heard and decided, either actually or constructively, it cannot operate as *res judicata*. The same principle will apply where a matter, though *directly raised in issue, is expressly left open and undecided*,² or where the suit has been allowed to be *withdrawn* with liberty to bring a fresh suit in respect of the same matter.³ "It would be a contradiction in terms to say that the Court had finally decided matters which it expressly left untouched and undecided."⁴ But if the Court had no power to leave a matter open,⁵ or the order granting permission is in contravention of O. 23 R. 1 and consequently without jurisdiction, such reservation will not prevent the application of the rule of *res judicata*.⁶

Illustrations

1. A, a landlord, sues B for possession of certain properties with mesne profits on the allegation that B was his *annual tenant*. B pleads *permanent tenancy*. The only issue in the case is whether B is *annual* or a *permanent tenant*. The Court finds against the permanent tenancy and decrees A's claim; B appeals and then applies to the Appellate Court, to the effect that the question of permanent tenancy should be left open to be decided in a subsequent suit, but that, subject to such permission, the appeal may be dismissed. The Appellate Court passes the following order: "The permission asked for is granted. The appeal is dismissed with costs." B then sues A for a declaration that he is a *permanent tenant* of A. The suit is barred. The reason is that the only issue in the case being that of permanent tenancy, and the suit being decreed, the Court had no power to reserve the matter to be decided again in any other suit. It would be different if there were *two* issues one of which is sufficient for the decision and the other is left open.⁷

2. A sues to set aside a gift made by a Hindu widow out of her husband's estate alleging that he is the presumptive heir. The widow dies pending suit and A applies to amend his plaint by setting up a family custom of inheritance and claiming possession of the properties. The application is disallowed and the suit is *dismissed* but liberty is given to A to file a fresh suit for possession. A subsequently sues for possession on the ground of family custom. The suit is barred, since the

- (35) AIR 1935 Mad 456 (458).
 (27) AIR 1927 Mad 431 (432).
 (01) 11 Mad L Jour 10 (17).
 (24) AIR 1924 Nag 124 (124).
 2. (99) 21 All 505 (514) : 26 Ind App 175 (PC).
 (84) 1884 Pun Re No. 25.
 (82) AIR 1932 All 694 (695, 696).
 (25) AIR 1925 All 770 (771) : 48 All 34.
 (06) 28 All 700 (704).
 (78) 2 All 552 (558, 591) (PB).
 (21) AIR 1921 Bom 284 (285) : 45 Bom 1935.
 (90) 14 Bom 81 (89).
 (19) AIR 1919 Cal 809 (811) : 46 Cal 465.
 (19) AIR 1919 Cal 974 (975).
 (15) AIR 1915 Cal 568 (569).
 (84) 10 Cal 856 (860).
 (72) 18 Suth W R 61 (62).
 (35) AIR 1935 Lab 686 (687).
 (17) 1917 Pun L R No. 149, p. 408.
 (81) AIR 1931 Mad 830 (832). (Point left for decision in a fresh suit).
 (31) AIR 1931 Mad 830 (832) : 1931 Mad VN 1008 (1011, 1012).
 (29) AIR 1929 Mad 687 (688).
 (29) AIR 1929 Mad 391 (392).
 (25) AIR 1925 Mad 497 (525) : 48 Mad L. :
 (82) 4 Mad 308 (310).
 (30) AIR 1930 Oudh 124 (128) : 4 Luck 404.
 (Point decided by first Court but left open in appeal).
 (31) AIR 1931 Pat 1 (10, 12).
 (31) AIR 1931 Bom 417 (418).
 (18) AIR 1918 Pat 575 (577) : 8 Pat L Jour 404.
 (16) AIR 1916 Mad 554 (554).
 (25) AIR 1925 Mad 1162 (1165).
 (31) AIR 1931 Mad 268 (269).
 (20) AIR 1920 Pat 63 (64).
 6. (22) AIR 1922 Pat 489 (490, 491) : 1 Pat 228.
 (34) AIR 1934 Mad 68 (70).
 (80) 1880 Pun Re No. 84.
 (04) 6 Bom L R 594 (598).
 (80) 2 All 848 (848, 849) (PB).
 (89) 11 All 187 (190) (PB).
 (31) AIR 1931 Mad 268 (270).
 5. (19) AIR 1919 Lab 72 (74) : 1918 Pun Re No. 70.
 (99) 21 All 505 (514) : 26 Ind App 175 (PC).
 4. (99) 21 All 505 (514) : 26 Ind App 175 (PC).
 (Application to set aside ex parte decree—Withdrawal of application as being defective—Second application not barred.)
 [See also (35) AIR 1935 Oudh 35 (36).]
 (14) AIR 1914 Oudh 234 (235).
 (37) AIR 1937 Rang 421 (424) : 1937 Rang Court).
 (Leave to withdraw granted by Appellate Court).
 (18) AIR 1918 Mad 1287 (1292) : 40 Mad 259.
 (71) 16 Suth W R 276 (276).
 (36) 168 Ind Cas 367 (369) (Cal). (Do.)
 (draw granted by Appellate Court).
 (24) AIR 1924 All 260 (261). (Leave to withdraw).
 (98) 1 Oudh Cas 97 (99).
 9. (11) 1911 Pun W R No. 149, p. 392.
 (26) 96 Ind Cas 302 (302) (Lab).
 I R 136.
 (37) AIR 1937 Rang 421 (424) : 1937 Rang

Court, having dismissed the former suit had no power under O. 23 to give liberty to bring a fresh suit.⁸

3. A files a suit against B. The suit is dismissed on the ground that the plaintiff has failed to produce evidence in support of his case, but his right to bring another suit in respect of the same matter is reserved. A suit subsequently brought by A against B in respect of the same matter, will nevertheless, be barred inasmuch as the reservation of liberty in a decree dismissing a suit for failure of proof, is without jurisdiction.⁹ It would be different where the suit is dismissed on a *preliminary or technical point*, but reserving the plaintiff's right to file a fresh suit.¹⁰ Where, however, an order is made granting leave to withdraw under O. 23 R. 1, the mere fact that it is *erroneous* or is made on *unjustifiable grounds* does not make it an order without jurisdiction, and a subsequent suit in accordance with the liberty given is not barred.¹⁰ Where a matter is decided by the first Court but is left undecided by the Appellate Court on appeal, the result is the same as if the matter was not decided at all. The reason is that when a judgment of a Court of first instance is appealed against, the finality of the decision is destroyed, the matter becoming again *sub judice*; and if the Appellate Court without deciding that issue, disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal.¹¹

102. Reservation of liberty to bring a fresh suit on an issue. — See Note 101.

103. Issues omitted or refused to be decided. — If a matter which has not been heard and decided in a previous suit is not *res judicata*, it is impossible to say that a question not only not decided in the previous suit but expressly refused to be decided, or excluded from the decision in the suit, can be treated as *res judicata*.¹² Nor will the principle of constructive *res judicata* embodied in

8. (25) AIR 1925 P C 55 (58, 59): 47 All 158: 52 Ind App 100: 27 Oudh Gas 334 (PC).
9. (69) 13 All Ind App 160 (171, 172) (PC).
- 9a. (30) AIR 1930 Lah 634 (635). (Suit dismissed on account of formal defect in plaint.)
- (12) 15 Ind Cas 980 (982): 1912 Pun Re No. 56. (Dismissal on ground of no cause of action.)
- (15) AIR 1915 Lah 308 (304). (Relief refused on the ground of want of jurisdiction.)
- (75) 1875 Pun Re No. 55.
- (08) 18 Mad L Jour 198 (199). (Suit for possession dismissed on failure to produce sale certificate.)
10. (21) AIR 1921 Cal 34 (38): 48 Cal 138 (FB). (Overruling AIR 1916 Cal 255: 33 Ind Cas 670.)
- (18) AIR 1918 Mad 1098 (1095).
- (12) 9 All L Jour 378 (379).
11. (97) 24 Cal 616 (627): 24 Ind App 50 (P C).
- (81) 6 Bom 110 (112).
- (17) AIR 1917 P C 201 (203): 44 Ind App 213: 45 Cal 442: 15 All L Jour 889 (892) (PC).
- (25) AIR 1925 All 248 (244).
- (12) 9 All L Jour 67 (69, 70).
- (12) 14 Ind Cas 161 (162) (All).
- (34) AIR 1934 Cal 14 (17).
- (26) AIR 1926 Cal 672 (676).
- (26) AIR 1926 Cal 179 (180).
- (26) AIR 1926 Cal 163 (164).
- (25) AIR 1925 Cal 1195 (1197).
- (09) 3 Ind Cas 87 (87) (Cal).
- (07) 5 Cal L Jour 653 (657).

- (98) 25 Cal 571 (576, 577).
 - (82) 8 Cal 631 (633, 634).
 - (81) 7 Cal 381 (384).
 - (78) 3 Cal L Rep 447 (449, 450).
 - (65) 4 Subh W R 50 (51).
 - (37) AIR 1937 Lah 167 (167).
 - (10) 1910 Pun W R No. 42, page 108.
 - (37) AIR 1937 Mad 709 (711).
 - (21) AIR 1921 Mad 21 (22, 24) (P B).
 - (20) AIR 1920 Mad 77 (80).
 - (08) 4 Nag L R 98 (101, 103).
 - (39) AIR 1939 Oudh 2 (10).
 - (37) AIR 1937 Oudh 246 (247): 13 Luck 186.
 - (18) AIR 1918 Pat 526 (528).
 - (17) AIR 1917 Pat 188 (189). (Appellate Court allowing withdrawal.)
 - (14) AIR 1914 Upp Bur 48 (43).
 - (07) 1 Sind L R 171 (172).
- Note 103
1. (81) 6 Cal 777 (781).
 - (81) 7 Cal 214 (216).
 - (29) AIR 1929 All 252 (253).
 - (87) 14 Cal 323 (343).
 - (84) 10 Cal 507 (509).
 - (13) 18 Ind Cas 787 (789): 1913 Pun Re No. 87.
 - (10) 5 Ind Cas 262 (263) (Mad).
 - (82) 5 Mad 9 (10).
 - (28) AIR 1928 Oudh 101 (102).
 - (1900) 3 Oudh Cas 273 (275).
 - (18) AIR 1918 Pat 618 (619, 620).

109. Plaintiff's suit wholly dismissed — Adverse finding against defendant.— It has been seen in Note 7, *ante*, that an adverse finding against the successful party is not *res judicata* in a subsequent suit between the parties. Thus, where a decree is one of dismissal in favour of the defendant but there is an adverse finding against him on one point, a plea of *res judicata* cannot be founded upon that decision; because the defendant having succeeded on the other plea, had no occasion to go further as to the findings against him.¹

In *Thakur Mangundoo v. Thakur Mahadev Singh*, I.L.R. 18 Calcutta 647, a landlord sued to eject his tenant who defended upon the ground that the tenure was permanent. A previous suit by the plaintiff had been dismissed on the ground that no notice to quit had been served, but the Court held at the same time that the tenure was not permanent. It was held that the previous decision was not *res judicata*, "the decree dismissing the suit being based, not upon the finding adverse to the defendant in that case, but in spite of it."² Where, however, the decree itself embodies the finding, it cannot be said to be not *res judicata* merely because the suit itself was dismissed on another point.³

110. Suit wholly decreed — Adverse finding against plaintiff.— The principles stated in Note 109 apply equally to a case where a plaintiff's suit is entirely decreed in his favour with an adverse finding against him.⁴

(16) AIR 1916 Oudh 6 (7) : 19 Oudh Cas 69.

Note 109

1. (22) AIR 1922 PC 241 (243) : 48 Cal 460 : 48

Ind App 49 (P C).

(33) AIR 1938 Oudh 439 (450) : 8 Luck 602.

(98) AIR 1938 All 491 (497).

(36) AIR 1936 All 21 (23) : 58 All 313 (PB).

(24) I. R. 5 All (Rev) 3 (5).

(23) AIR 1923 All 15 (16, 17).

(99) 1899 All W N 182 (189).

(95) 17 All 174 (193).

(95) 1895 All W N 108 (109).

(85) 7 All 606 (611) (P B).

(37) AIR 1937 Bom 208 (209).

(20) AIR 1920 Bom 335 (336) : 44 Bom 321

(325, 326).

(19) AIR 1919 Bom 81 (83) : 43 Bom 568

(571, 572, 574).

(91) 18 Bom 597 (603).

(83) 7 Bom 464 (466).

(85) AIR 1935 Cal 738 (735).

(30) AIR 1930 Cal 5 (7) : 56 Cal 639.

(23) AIR 1923 Cal 297 (297).

(19) AIR 1919 Cal 500 (501).

(17) AIR 1917 Cal 398 (399).

(12) 15 Ind Cas 458 (454) : 40 Cal 29.

(05) 9 Cal W N 60 (66).

(01) 5 Cal W N 445 (446, 447).

(91) 18 Cal 647 (651).

(86) 13 Cal 17 (20).

(85) 11 Cal 301 (306).

(65) 4 Subh W R 104 (104).

(38) AIR 1938 Lah 179 (180).

(12) 1912 Pun L R No. 154, p. 471 : 1912 Pun

Re No. 42.

(35) AIR 1935 Mad 701 (703).

(32) AIR 1932 Mad 207 (211) : 55 Mad 483.

(25) AIR 1925 Mad 52 (52).

(24) AIR 1924 Mad 469 (470) : 47 Mad 453.

(22) AIR 1922 Mad 514 (517).

(19) AIR 1919 Mad 213 (213).

(16) AIR 1916 Mad 618 (618).

(13) 21 Ind Cas 219 (221) (Mad).

(15) AIR 1915 Mad 294 (295) : 12 Ind Cas 167

(168) : 37 Mad 25.

(84) 7 Mad 145 (149).

(62) 4 Mad 134 (136).

(23) AIR 1923 Nag 189 (189).

(24) AIR 1924 Nag 338 (334).

(18) AIR 1918 Nag 91 (92).

(92) 6 C P L R 87 (89).

(36) AIR 1936 Oudh 189 (191). (Finding

though not *res judicata* still throws heavy

onus on such party in subsequent suit to

prove that finding in prior suit is wrong—

judgment in prior suit is admissible.)

(28) AIR 1928 Cal 706 (708).

[But see (28) AIR 1928 Cal 706 (708).

(32) AIR 1932 Lah 421 (422).

(20) AIR 1920 Mad 622 (624). (Do.)

(19) AIR 1919 Mad 1097 (1099). (Do.)]

1a. See (29) AIR 1929 All 910 (912).

(24) AIR 1924 Mad 626 (632, 633). (Cost to

defendants disallowed as finding on main

issue going against them; such finding is *res*

judicata.)

(16) AIR 1916 Bom 277 (278) : 40 Bom 662.

Note 110

1. (99) 23 Bom 296 (302).

(32) AIR 1932 Mad 541 (541).

as much as a judgment whereby the Court exercises its mind on a contested case; for "a judgment by consent is intended to put a stop to litigation between the parties, just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end." But an estoppel by a consent decree can arise only when the question raised in the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. The question in all such cases would be whether the parties did intend that the question at issue should be finally settled between them by the consent decree and whether the consent decree did actually settle that question.³ In order to effect an estoppel it is also necessary that it should appear on record that the question had been put in issue. Thus, in a prior suit for a certain sum of money on account of cesses, defendants appeared in person, filed no written statement and simply confessed judgment whereupon a decree was passed against them, it was held that the prior decision did not preclude the defendants from disputing in a subsequent suit the right of the plaintiff to levy the cess.⁴

A compromise decree cannot create an estoppel between the parties to it, where the parties have subsequently entered into another compromise which has

- (29) AIR 1929 All 248 (249) : 51 All 575.
(Compromise decree cannot be taken to decide every point that ought to have been pleaded.)
(24) AIR 1924 All 905 (906) : 46 All 820.
(06) 80 Bom 395 (408).
(26) AIR 1926 Cal 672 (675).
(25) AIR 1925 Cal 1011 (1012).
(21) AIR 1921 Cal 202 (206, 207) : 48 Cal 1059.
(07) 5 Cal 1 Jour 611 (636) : 36 Cal 198.
(30) AIR 1930 Lah 487 (488).
(24) AIR 1924 Lah 469 (470).
(29) AIR 1929 Mad 379 (381).
(16) AIR 1916 Mad 411 (411). (Omission to settle a part of the dispute in consent decree—Subsequent suit not barred.)
(12) 17 Ind Cas 434 (435) (Mad).
(11) 11 Ind Cas 834 (835) (Mad).
(11) 9 Ind Cas 875 (881) : 35 Mad 75.
(10) 8 Ind Cas 261 (264) (Mad).
(24) AIR 1924 Mad 88 (89, 90).
(70) 18 Moo Ind App 497 (517, 518) (P O).
(29) AIR 1929 P O 289 (294) (P O).
(15) AIR 1915 All 332 (333) : 38 All 75.
(22) AIR 1922 All 19 (20) : 44 All 334.
(13) 35 All 428 (431, 432).
(36) AIR 1936 Bom 301 (304). (Plea of estoppel will prevail even when the result of giving effect to it will be to sanction what is prohibited by statute unless the consent decree is set aside in a separate suit.)
(28) AIR 1928 Bom 279 (281).
(11) 35 Bom 371 (378).
(11) 12 Ind Cas 535 (535, 536) : 36 Bom 283.
(36) 63 Cal 550 (558).
(36) 63 Cal 454 (463). (The Court, if the matter is in any way challenged, should be careful to see that the decree, if by consent is not vitiated by fraud or otherwise.)
(28) AIR 1928 Cal 852 (853).
(26) AIR 1926 Cal 672 (675).
(15) AIR 1915 Cal 464 (467).
(12) 14 Ind Cas 713 (714) (Cal).

- (07) 5 Cal 1 Jour 15 (17).
(05) 1 Cal 1 Jour 388 (396).
(98) 2 Cal W N 174 (175).
(97) 24 Cal 216 (237).
(17) AIR 1917 Lah 11 (12) : 1917 Pun L R No. 55, page 143.
(04) 1904 Pun Re No. 1.
(11) 12 Ind Cas 817 (820) : 36 Mad 46.
(02) 12 Mad 1 Jour 445 (447).
(99) 22 Mad 508 (514) : 26 Ind App 101 (P O).
(95) 18 Mad 1 (12) : 21 Ind App 128 (P O).
(Affirming 14 Mad 153).
(17) AIR 1917 Nag 37 (39) : 14 Nag L R 35 (40).
(29) AIR 1929 Oudh 63 (64) : 4 Luck 181.
(92) AIR 1922 Oudh 34 (37).
(99) 2 Oudh Cas 112 (114).
(99) 2 Oudh Cas 28 (32).
(24) AIR 1924 Pat 823 (824).
(21) AIR 1921 Pat 131 (134) : 6 Pat L Jour 208.
(17) AIR 1917 Pat 9 (10) : 1 Pat L Jour 208.
(21).
(36) AIR 1936 Sind 99 (101) : 29 Sind L R 455.
(11) 4 Sind L R 271 (275).
(16) AIR 1916 Mad 411 (411).
(34) AIR 1934 Mad 454 (456).
(38) AIR 1938 Mad 225 (226).
(35) AIR 1935 Pat 59 (61).
(20) AIR 1920 Pat 212 (215). (Matter left open by consent decree not res judicata.)
[See (96) 63 Cal 550 (558). (Consent decree operates as estoppel not only with regard to the conclusions but also to the findings on the essential facts on which the judgment on the ultimate conclusion is founded.)
[But see (35) AIR 1935 Lah 487 (488). (Grounds of attack or defence which might and ought to have been raised cannot be re-agitated in subsequent suit.)]
(36) AIR 1936 Sind 99 (101) : 29 Sind L R 455. (Constitutive res judicata—Principle applies to consent decree.)
4. (29) AIR 1929 Mad 694 (696).

been embodied in a decree.¹²

A party to a suit who is not a party to the compromise is not bound by the compromise or the decree based on it and such decree cannot operate as an estoppel against him.¹³

A consent decree can be set aside either by a regular suit or by an application for review of judgment; but not by a rule or motion.¹⁴ It can be set aside on any ground which would justify a cancellation of the agreement on which the decree is based.¹⁵

115. Declaratory decrees.—Where the decree in a prior suit is merely declaratory in its nature and does not give consequential relief, a subsequent suit for working out the rights so declared would not be barred¹ though the decree will be conclusive as to the rights which were declared.² See Note 36, *ante*.

It has been held that apart from the provisions of this Section, a declaratory decree is conclusive between the parties to it under Section 43 of the Specific Relief Act and hence, though in a particular case such a decree may not operate as *res judicata* under this Section, the re-trial of the questions decided by the decree will be barred under the provisions of Section 43 of the Specific Relief Act.³

116. Finality of decrees in redemption suits.—Where in a suit for redemption of a mortgage a decree is passed to the effect that the right to redeem shall be *extinguished* upon the non-payment of the money within the time allowed, a second suit for redemption after the previous decree is allowed to become final by non-payment, is barred by *res judicata*.¹ Where, however, the decree does not provide that the right to redeem shall be extinguished on non-payment of the mortgage money within the time fixed, there will be no such bar.² See Note 40, *ante*. In any case, the findings as to the *amount due* and similar questions, arrived at in the previous suit, cannot be re-opened in the subsequent suit.³

117. Decision need not have been embodied in the decree.—It has been seen in Note 100, *ante*, that all matters *necessarily* involved in the decision will be

4a. (83) AIR 1938 Cal 69 (71) : 59 Cal 513. (The word *res judicata* seems to be loosely used instead of 'estoppel'.)

4b. (89) AIR 1939 Pat 225 (228) : 1939 Pat W N 41 (44).

5. (11) 36 Bom 77 (78).

(83) AIR 1938 Sind 29 (31) : 26 Sind L R 395.

(11) 13 Bom L R 332 (336, 339).

(22) AIR 1922 Cal 493 (497, 499).

(33) AIR 1938 Sind 29 (31) : 26 Sind L R 395.

(12) 31 All 143 (145). (For undue influence.)

(21) AIR 1921 Bom 414 (415). (For mistake.)

(11) 36 Bom 77 (78). (For fraud.)

(35) AIR 1935 Pat 59 (61).

(36) AIR 1936 Sind 99 (101) : 29 Sind L R 455.

Note 115

1. (84) 7 Mad 80 (82).

(21) AIR 1921 Low Bur 22 (24) : 11 Low Bur

Rul 60.

(81) 3 All 297 (302, 303).

(89) 12 Mad 183 (186). (But if prior decree awards consequential relief also, subsequent suit would be barred.)

(27) AIR 1927 Oudh 457 (460).

2. (29) AIR 1929 All 814 (815).

(17) AIR 1917 Lab 446 (447).

(98) 21 Mad 18 (25). (Overruled in 25 Mad 300 (FB) on other point.)

deemed to have been heard and decided. It is not necessary that the decree should expressly refer to such a matter.¹

118. Decision need not be express but may be implied.—As has been seen in Note 100, *ante*, where a question was necessarily decided in *effect*, though not in *express* terms, the decision cannot be re-agitated as between the parties to the suit in any other form in any other suit.¹ But the decision in the former suit must necessarily involve an adjudication in a particular way on the issue raised in the later suit and such adjudication must be *inconsistent* with the claim made in the later suit.² Again, if the matter was not *raised at all* in the previous suit, there can be no question of implied decision in the prior suit.³ See Note 12, *ante*.

119. How to determine what issues were decided—General.—The question whether a matter was raised and then heard and finally decided is one of fact to be decided upon the circumstances of each particular case¹ and the burden of establishing the plea of *res judicata* lies upon the party setting it up.² It cannot be maintained where the decree or order upon which it rested has not been produced.³ Even if the judgment in the prior suit shows clearly enough what the Judge understood to be the questions for decision, the Court cannot give effect to the plea unless it can say for itself that the matters now in issue were in issue in the former proceedings; whether any issues were settled in those proceedings or the points in dispute were otherwise formulated must appear from the record.⁴ The bare wording of the decree is not the sole test of what the Court decided in the prior suit; so that if it is not clear from the decree, the Court may and should look into the judgment and the pleadings in the case.⁵ As the plea of *res judicata* is one in bar of

Note 117

1. ('94) 21 Cal 252 (255).

('91) 15 Bom 89 (92).

('08) 5 All L Jour 48 (51, 52).

('07) 3 Nag L R 35 (40).

('06) 28 All 365 (371, 372).

Note 118

1. ('73) 20 South W R 377 (380) : Ind App Sup

Vol. 212 (PC).

('75) 1 Cal 144 (146).

('04) 6 Bom L R 268 (290).

('91) 15 Bom 89 (92).

('20) AIR 1920 Cal 258 (254).

('02) 29 Cal 252 (256).

('72) 18 South W R 182 (183).

('28) AIR 1928 Lah 888 (891).

('19) AIR 1919 Mad 597 (598).

('15) AIR 1915 Mad 106 (107); 39 Mad 1202 (FB)

('14) AIR 1914 Mad 399 (413, 414) : 17 Ind Cas

445 (452) : 37 Mad 70 (FB). (Overruling 10

Ind Cas 75).

('03) 26 Mad 403 (410).

('26) AIR 1926 Oudh 101 (107).

2. ('14) AIR 1914 Mad 399 (406) : 17 Ind Cas 445

(452) : 37 Mad 70 (FB).

('31) AIR 1931 Cal 353 (357).

3. ('25) AIR 1925 P C 184 (187) : 52 Ind App

294 : 52 Cal 971 (PC).

('18) AIR 1918 Mad 884 (887) (SB).

[See ('32) AIR 1932 Bom 3 (7).]

Note 119

1. ('19) AIR 1919 Bom 81 (82) : 43 Bom 568.

('17) AIR 1917 All 21 (26).

1. ('11) 13 Bom L R 1061 (1071, 1076).
2. ('07) 1907 Pun W R No. 66, p. 383 (FB).
3. ('91) 18 Cal 216 (224) : 17 Ind App 181 (PC).
4. ('97) 1897 Bom F J 67 (69). (See also Note 6, *ante*).
5. ('35) AIR 1935 Cal 792 (796). (Decision of lower Court confirmed on appeal—Judgment of appellate Court not produced).
6. ('06) 33 Cal 116 (127) : 32 Ind App 244 (PC).
7. ('34) AIR 1934 Oudh 265 (270, 271).
8. ('97) 24 Cal 504 (519, 520) : 24 Ind App 33 (PC).
9. ('18) 18 Ind Cas 1007 (1007) (Lah).
10. ('07) 1907 Pun W R No. 66, p. 383 (FB).
11. ('29) AIR 1929 Mad 545 (561). (Should not base its conclusion from stray clauses in the plaint.)
12. ('34) AIR 1934 Oudh 265 (271). (In order to decide question of res judicata, the pleadings, the issues and the decision in the case must be referred to.)
13. ('92) 19 Cal 159 (172).
14. ('87) 1887 All W N 1 (4).
15. ('33) AIR 1933 Cal 222 (230).
16. ('11) 13 Bom L R 162 (171).
17. ('31) AIR 1931 Cal 511 (513). (Decree silent on a point—This by itself no criterion.)
18. ('09) 4 Ind Cas 81 (84) (Cal).
19. ('09) 1 Ind Cas 913 (920) : 36 Cal 100.
20. ('05) 1 Cal L Jour 337 (349).
21. ('18) AIR 1918 Lah 250 (260) : 1018 Pun Ro No. 13.

legal rights, it should be given effect to only on a strict construction of the pleadings and of the decisions in the previous suits." In order to render a prior decision conclusive in a subsequent suit it must appear from the record of the former suit that the particular matter sought to be concluded was necessarily determined. If there be any uncertainty on this head in the record, as for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have been passed, without indicating which of them was thus litigated and upon which the judgment was rendered, the whole subject-matter of the action will be at large.⁷

120. Reference to judgment.—In order to see what was in issue in a suit or what has been heard and decided, the judgment¹ must be looked at. For, the decree, according to the Code, is only to state the relief granted or other determination of suit. The determination may be on various grounds, but the decree would not show the *ground*, and will not afford any information as to matters which were in issue or have been decided.² But if a decree is specific and is at variance with a statement in the judgment, regard must be had to the decree and not to the statement in the judgment.³

121. Reference to pleadings.—See Note 119, *ante*.

122. Extrinsic evidence.—If there is any ambiguity in the record of the prior proceeding as to what matters were decided therein, it will not be open to the parties to adduce extrinsic evidence to show that a particular matter was decided.¹ In such cases the former decision will not operate as *res judicata*.² But if the uncertainty be with regard to the meaning of certain indefinite terms used in the prior decree, the acts of the parties can be taken into consideration in fixing the meaning of such terms.³

123. Relief claimed but not granted—Explanation V—General.

The legal effect of this Explanation is to treat the omission to grant a relief asked for as equivalent to an *express refusal* to grant it.¹ Thus, where in a suit on a security bond, praying for a money decree and in default of payment of money by the defendant for the sale of the secured properties, the Court granted only a money decree, the prayer for the sale of the properties must be deemed to have

(1907) Pun W R No. 66, p. 383 (F.B.).
(194) 1894 Pun R No. 60.
(196) AIR 1936 Mad 469 (470).

(98) 11 C P L R 130 (131, 132).
(98) AIR 1930 Pat 71 (74).
(17) AIR 1917 Pat 653(654): 2 Pat L Jour 159.
(18) AIR 1918 Low Bur 135 (136). (Pleading should be construed in the same way as in the previous suit.)
[But see (82) 4 Mad 134 (136). (Submitted wrong.)]

6. (29) AIR 1929 All 29 (31).
(29) AIR 1929 All 506(508): 51 All 805. (Plea

in bar can be allowed to succeed only where the law expressly provides for it or the implication is so irresistible that its provisions are inconsistent with a contrary hypothesis.)
See also Note 6 *supra*.

7. (04) 14 Mad L Jour 379 (389).
(83) 1883 All W N 190 (192).
(02) 26 Bom 25 (32).
(81) AIR 1931 Mad 381 (396).

Note 123

1. (91) 14 Mad 328 (331).
(94) 21 Cal 252 (254).
(18) AIR 1918 All 339 (341).

Note 122

1. (97) 24 Cal 504(519, 520): 24 Ind App 33 (PC).
(23) AIR 1923 Mad 514 (515).

2. (93) 15 All 3 (5).
[But see (85) 8 Mad 77 (78). (Wrongly decided.)]

(19) AIR 1919 Pat 196 (199).
(04) 31 Cal 95 (101).

(25) AIR 1925 Cal 1116 (1118).
(03) 5 Bom L R 396 (397): 27 Bom 418.
25 Ind App 102 (PC).

(98) 2 Cal W N 337 (340): 21 Mad 344 (350).
1a. (89) 16 Cal 173 (183): 15 Ind App 186 (PC).
1. (99) AIR 1939 Pat 19 (20).

Note 120

been refused and such refusal will operate as *res judicata* in a subsequent suit for sale of the said properties.¹² But it is necessary that a decree should have been *passed* in the suit, a relief claimed in which is omitted to be granted. Where, therefore, the suit did not result in a decree at all, as where it is withdrawn without liberty to bring a fresh suit,² or where no relief is asked for in the plaint, or the Court refuses to grant a relief on the ground that no such relief is claimed in the plaint,³ or where the Court *could* not grant the relief, as where a personal remedy is asked for in the plaint in a mortgage suit, which could not be granted at the time of passing the decree for sale,⁴ the Explanation does not apply. Nor does it apply to consent decrees.⁵ See Note 114, *ante*.

Where a particular relief asked for in a prior suit was not objected to by the other parties, but somehow or other the decree omitted to grant the relief, it cannot be said that a subsequent suit for the same relief is barred by reason of this Explanation.⁶

It is also necessary for the application of the Explanation that the relief claimed must be a *substantive* one, and also such as the Court was *bound* to grant. An *auxiliary* or *discretionary* relief is not within the Explanation. See Notes 124 and 125 below.

It has been held that the Explanation only applies to a relief claimed in the *plaint*. Hence, where in disposing of an application for a personal decree against the mortgagee under O. 34 R. 6 the Court does not expressly grant the prayer for a personal decree, a second application for a personal decree is not barred by *res judicata*.⁷

124. Relief claimed must have been substantive and not auxiliary. — Explanation V of this Section refers to a case where several heads of relief independent of each other are claimed, put in issue and duly controverted and one of them is neither granted nor refused. If a relief is not claimed specifically but simply as the ground for the real and substantial relief or merely as an argumentative step towards the decree sought, the absence of any mention in the decree will not bar

(18) AIR 1918 All 339 (340, 341); 16 All 1, Four

685 (688).

(09) 81 All 19 (20).

(89) 11 All 187 (190) (F B).

(81) 1881 All W N 18 (18, 14).

(01) 25 Bom 115 (120, 122).

(06) 33 Cal 849 (852).

(74) 24 South W R 304 (304).

(86) AIR 1936 Lah 388 (389, 390). (Application

for personal decree under O. 34, R. 6, Civil P. C., is substantive application—Personal

decree not granted—It should be taken to

have been refused—Fresh application is

barred by S. 11, Expt. V.)

(27) AIR 1927 Mad 1131 (1132).

(27) AIR 1927 Pat 395 (395).

(38) AIR 1938 Pesh 68 (69). (Maintenance

suit—Prayer that it should be charged on property not granted—Subsequent suit for

such charge is barred by *res judicata*.)

(92) 1892 Low Bur Rui 311.

[But see (90) 3 O P L R 170 (172). (Wrongly decided.)]

12. (33) AIR 1933 Rang 158 (159).

7. (37) AIR 1937 Lah 204 (206). (Reversing on appeal A I R 1936 Lah 388.)

6. (29) AIR 1929 Bom 328 (325).

(34) AIR 1934 Oudh 298 (294).

5. (30) AIR 1930 All 619 (619).

[See also (16) AIR 1916 Mad 328 (330). (Suit under S. 9, Specific Relief Act—Quies-

tion of mesne profits cannot be gone into.)]

(90) 1890 All W N 142 (143).

upon at the time of decree, it will be barred.)

tract and possession. But if it is adjudicated

bar to suit for specific performance of con-

of suit under S. 77, Registration Act. No

(32) AIR 1932 All 96 (97); 54 All 68. (Failure

(35) AIR 1935 All 411 (414); 57 All 797.

4. (27) AIR 1927 Mad 779 (780, 781).

(25) AIR 1925 Pat 145 (147).

such relief is claimed.)

354 (359). (Refusal on the ground that no

(17) AIR 1917 Oudh 20 (23); 4 Oudh 1, Four

3. (01) 25 Bom 589 (592).

(05) 15 Mad 1, Four 462 (464).

2. (94) 21 Cal 265 (267, 268).

a subsequent suit for that relief.¹ Thus, where a suit was instituted for recovery of possession of certain lands with a prayer for a declaration that the defendant had no title to the properties in question but the suit was dismissed on the ground of limitation, it was held that the declaration claimed was not one under Section 42 of the Specific Relief Act, 1877, but an argumentative step which led up to the main relief claimed in the suit, namely possession; and that therefore the omission to grant the declaration cannot be treated under the Explanation as a refusal to grant the relief.²

125. Relief must have been one which the Court was bound to grant and not one which it has discretion to grant or refuse.—The words 'relief claimed' only apply to something which forms part of the claim strictly so called, i. e., something which the plaintiff may claim as of right, something included in his cause of action and which, if he establishes his cause of action, the Court has no discretion to refuse. They do not apply to reliefs which the Court may, in the exercise of its discretion, grant or refuse.¹ A files a suit for possession and for *past* and *future* mesne profits (i. e., mesne profits before and after the institution of the suit). Here if A establishes his cause of action, he is entitled as of right to get past mesne profits and the Court has no discretion to refuse it. Where therefore the decree omits to grant it, it will be deemed to have been refused under this Explanation.² But A is not entitled, as of right, to get *future* mesne profits, the granting or refusal thereof depending upon the discretion of the Court. It has accordingly been held that the omission to grant future mesne profits is not a bar to a subsequent suit for such profits.³

Section 11 has no application to cases under the Dekkhan Agriculturists' Relief Act where a prayer for the passing of a decree for instalments is refused in the suit; notwithstanding it, the executing Court can grant a prayer for recovery of the amount in instalments.⁴

126. Effect of supersession of decree in appeal or otherwise.—Money recovered under a decree or judgment cannot be recovered back in a fresh suit or

Note 124

1. ('89) 13 Bom 242 (249). (Affirming 12 Bom

444 on this point.)

('81) AIR 1981 All 657 (658). (Application by

defendant before preliminary decree in a

mortgage suit that his property be sold last

rejected—No bar to granting the same relief

in final decree.)

('25) AIR 1925 Cal 1195 (1197, 1198). (Seco-

ndary relief claimed and determined by lower

Court but not by Appellate Court is not res

judicata.)

2. ('25) AIR 1925 Cal 1195 (1197, 1198).

1. (05) 15 Mad L Jour 462 (465).

2. ('94) 21 Cal 252 (254, 255).

3. ('18) AIR 1918 Mad 484 (486) : 41 Mad 188

Mad 1132.)

31) AIR 1931 Cal 788 (789) : 58 Cal 1040.

32) AIR 1932 All 45 (46). (Prior decision

32) AIR 1932 All 169 (171).

constituted as omission—But distinction between past and future mesne profits not apparent.)

('27) AIR 1927 All 446 (448) : 49 All 565.

('18) AIR 1918 All 412 (413) : 40 All 292 (296).

('99) 21 All 425 (438).

('88) AIR 1938 Bom 281 (283) : 11 L R (1938) Bom 655 (F B). (Overruling A I R 1920 Bom 89).

('82) AIR 1982 Bom 222 (223, 224) : 56 Bom 292.

('95) 19 Bom 532 (538, 539).

('29) AIR 1929 Cal 566 (568) : 57 Cal 381.

('05) 32 Cal 118 (122).

('92) 19 Cal 615 (616).

('75) 24 South W R 193 (195) : 2 Ind App 219 (P C).

('37) AIR 1937 Mad 879 (881).

('37) AIR 1937 Mad 46 (49) : 1 L R (1937) Mad 284.

('03) 15 Mad L Jour 462 (464, 465).

('91) 14 Mad 328 (331, 333).

('06) 2 Nag L R 91 (92).

('31) AIR 1931 Pat 13 (13).

('31) AIR 1931 Pat 1 (7, 12).

('15) A I R 1915 U P P Bur 18 (19) : 2 U P P Bur 81 (82).

4. ('08) 32 Bom 391 (393).

action whilst the decree or judgment under which it was recovered remains in force; the reason is that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding.¹ But if it is reversed on an appeal therefrom,² or in an appeal from another proceeding in the same suit,³ or otherwise superseded by a separate suit,⁴ then the prior decision will not operate as *res judicata* in a subsequent suit.

127. Judgments not *res judicata* may be admissible in evidence. — See Notes 2, 41 and 68, *ante*.

128. Withdrawal of suit without permission. — The basic principle of *res judicata* being the existence of a final adjudication on the merits, there can be no bar on the ground of *res judicata* where a suit is *withdrawn* without obtaining liberty to file a fresh suit.¹ But the effect of such a withdrawal will be to bar a fresh suit on the same cause of action under O. 23 R. 1.² See also O. 23 R. 1 and Note 101, *ante*.

129. Wrong decision on a question of *res judicata* — Revision. — See Section 115, Note 13.

12. Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

Synopsis

- | | |
|---|---|
| <p>1. Scope and object of the Section.</p> <p>2. "Precluded by rules."</p> <p>3. "Cause of action." See Section 20.</p> <p>4. "In any Court to which this Code applies."</p> <p>5. "Code." See Section 2 (1).</p> | <p>6. Local extent of Act. See Section 1.</p> <p>7. Application of Code to Revenue Courts. See Section 5.</p> <p>8. Extent of applicability of Code to Provincial Small Cause Courts. See Sections 7 and 8.</p> |
|---|---|

1. Scope and object of the Section. — This Section has been newly added in the Code of 1908 and is necessitated by the transfer of certain of the provisions of the Code of 1882 to Rules.¹

Note 126

1. ('65) 3 South W R 11 (13) (P C).
(98) 20 All 287 (241).
(21) AIR 1921 Cal 761 (761).

2. ('77) 3 Cal 30 (35, 37).
(80) 5 Cal 589 (591, 592).
(12) 17 Ind Cas 205 (206) (Bom).

(29) AIR 1929 Lah 534 (534).
(26) AIR 1926 Lah 534 (534).

3. ('23) AIR 1923 All 456 (457).
(15) AIR 1915 P C 111 (113) : 1915 Pun Re No. 93 (P C).

4. ('16) AIR 1916 Lah 287 (287).
Note 128

1. ('28) AIR 1928 Lah 710 (712).

- Note 126**
1. ('26) AIR 1926 Mad 490 (491).
(28) AIR 1928 All 689 (692).
(1900) 2 Bom L R 871 (871).
(99) 23 Bom 35 (38, 39).
(94) 21 Cal 265 (268).
(11) 1911 Pun L R No. 249, p. 922.
(37) AIR 1937 Mad 718 (719).
(09) 5 Nag L R 88 (91). (But withdrawal after an issue is tried and decided will operate as *res judicata*.)
2. ('18) AIR 1918 Cal 28 (26).
(21) 3 L R All (Rev) 84 (86).
(14) 1914 Pun L R No. 19, p. 65 (66).
(37) AIR 1937 Mad 718 (719).
Section 12 — Note 1
1. See Notes on Clauses appended to the Report of the Special Committee.

2. "Excluded by rules."—"Rules" has been defined in Section 2 (18) as meaning rules and forms contained in the First Schedule and rules made under Section 122 and Section 125. For illustrations of rules barring fresh suits, see the following rules:—

- O. 2 R. 2.—Where plaintiff omits to sue on or relinquishes part of his claim.
- O. 9 R. 9.—Dismissal for default.
- O. 22 R. 9.—Abatement of suit.
- O. 23 R. 1.—Withdrawal without liberty to bring a fresh suit.
- 3. "Cause of action."—See Section 20.
- 4. "In any Court to which this Code applies."—See Notes 2, 17 and 18 to the Preamble.
- 5. "Code."—See Section 2 (1).
- 6. Local extent of Act.—See Section 1.
- 7. Application of Code to Revenue Courts.—See Section 5.
- 8. Extent of applicability of Code to Provincial Small Cause Courts.—See Sections 7 and 8.

13. [S. 14.] A foreign judgment³ shall be conclusive⁸ as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim⁶ litigating under the same title⁷ except—

- (a) where it has not been pronounced by a Court of competent jurisdiction;⁹
- (b) where it has not been given on the merits of the case;¹³
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable;¹⁴
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;¹⁵
- (e) where it has been obtained by fraud;¹⁶
- (f) where it sustains a claim founded on a breach of any law in force in British India.¹⁷

[1877, S. 14; See S. 2, Cls. 5, 6; Explan. to S. 10; S. 29; Ss. 43—45.]

obligation arises to pay that sum on which an action of debt to enforce the judgment can be maintained.³ This is the principle on which Section 13 is based and it declares that a foreign judgment is conclusive as to any matter *directly* adjudicated upon except in the six cases specified.³ In *Mallappa Yellappa Benhur v. Raghavendra Shamrao Deshpande*,^{3a} it was observed as follows: "Now, ordinarily it is not open to the Courts in British India to sit in appeal over a foreign judgment because it proceeds on grounds which would not be adequate in British India, unless it offends against the rules under Section 13." Section 13 applies not only to cases where a foreign judgment is set up as a defence but also to cases in which the plaintiff seeks to obtain a decree in a British Indian Court on a foreign judgment.⁴

3. "Foreign judgment," meaning of.— "Foreign judgment" has been defined in Section 2 (6) as the judgment of a foreign Court. Under Section 2 (5) 'foreign Court' means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council. Thus, the Courts in England,⁵ the Supreme Court of Mauritius,⁶ the French Courts in India,⁷ the Courts in Ceylon,⁸ and the Courts of the Native States⁹ are all foreign Courts. The Privy Council is not a foreign Court as it has *authority within British India*.⁹ See Section 2 (5) for full notes.

The word "judgment" in the expression "foreign judgment" as used in Section 2 (6) *ante*, has the meaning given to it in English law and not the meaning given by Section 2 (9) *ante*. That is, the term "foreign judgment" means the decree or order of a foreign Court.¹⁰

An order which is not a 'judgment' cannot be a foreign judgment.¹¹ Thus a summary order under Section 12 of the Arbitration Act enforcing an award in England is not a *judgment* and cannot be regarded as a foreign judgment for the purposes of this Section.⁷ Similarly an Act of State passed by a State in its sovereign capacity is not a foreign judgment.⁸

- (27) AIR 1927 Sind 160 (161); 23 Sind LR 46.
2. (1845) 13 M & W 628 (633), Williams v. Jones.
- (97) 20 Mad 112 (114).
- (1842) 9 M & W 810 (818, 819), Russell v. Smyth. (Cited in 2 Mad 400).
- 3 Birk Com 163 (164). (Foreign judgment creates an obligation belonging to the class of implied contracts, which are described as arising from the "general implication and intentment of the Court of judicature that every man hath engaged to perform what his duty or justice requires"; Addison on Contracts, 6th Ed., page 40. Law raises an implied contract to pay a sum of money adjudged to be due. Both cited in 6 Bom 292 (294).)
3. (21) AIR 1921 Lah 20 (23); 2 Lah 207.
- (15) AIR 1915 Mad 486 (487); 39 Mad 24 (FB). (The recognition of foreign judgments under S. 13 is not absolute but is subject to certain reservations.)
- 3a. (98) AIR 1938 Bom 173 (177); 1 L R (1938) Bom 16.
4. (28) AIR 1928 Rang 319 (319); 6 Rang 552. (28) AIR 1928 Mad 327 (336); 51 Mad 720.
- Note 3
1. (101) 28 Cal 641 (645).
- (71) 8 Bom H O R O 200 (208). (Call order on contributory of company registered in

- England.)
2. (102) 29 Cal 509 (516).
3. (65) 4 Buth W R 107 (109).
- (81) 6 Bom 292 (295).
- (80) 2 Mad 400 (405).
- (80) 2 Mad 387 (338).
- (74) 8 Mad H O R 14 (16).
4. (109) 3 Ind Cas 190 (192); 32 Mad 469.
- (97) 20 Mad 112 (114). (Court at Kandy in Ceylon.)
- [See also (108) 4 Nag L R 61 (62). In which it was held that in Barar the judgment of the Nagpur Court is a foreign judgment.]
5. (1900) 24 Bom 86 (88, 89).
- (88) 1888 Pun Re No. 191.
- (95) 22 Cal 222 (237); 21 Ind App 171: 1894 Pun Re No. 112 (12) (PC).
6. See (184) 8 Bom 571 (574).
- (93) AIR 1932 Mad 661 (662).
- (93) AIR 1933 Mad 511 (515); 56 Mad 951.
- [See also (95) AIR 1935 Lah 975 (976); 17 Lab 341. (Call order by Liquidation Court in Native State held not a decree and hence not a foreign judgment.)]
- 6b. (77) 1877 Pun Re No. 36.
7. (104) 31 Cal 274 (282).
- (93) 17 Bom 620 (624). (Order of the State office is not a judgment.)

4. Act of State.—See Note 3 above.

5. Judgments of the Courts of Native States.—See Note 3 above and also Note 19 below.

6. "Same parties or between parties under whom they or any of them claim."—See Notes 41 to 67 of Section 11. In a suit for the administration in a foreign Court of a deceased testator's estate, the title of the executors as such was challenged. It was held by the High Court of Bombay that though executors would ordinarily represent the legatees regarding all matters which have necessarily to be decided in a suit to which the executors are parties, they could not, where their title was challenged, be said to have represented the legatees, nor that the latter claimed through the executors, and that under such circumstances, the legatee was not bound by a foreign judgment against the executors.^{1a}

See also the undermentioned case.¹

7. "Litigating under the same title."—See Section 11 Note 70.

8. Foreign judgments, when not conclusive.—A foreign judgment, to be a valid cause of action for a suit upon it in British India, must be *final and conclusive* in the Court in which it is passed. In order to establish that a final and conclusive judgment has been pronounced, it must be shown that, in the Court by which it was pronounced, it conclusively, finally and for ever, established the existence of the right of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties.^{1a} A foreign judgment will not operate as *res judicata* between the same parties or their representatives on any matter *not directly adjudicated upon* by that judgment and also in the six cases specified in clauses (a) to (f).¹ See Notes 9 to 17 below. Further, it is only in *proceedings on a foreign judgment* that the question of the effect of the foreign judgment can properly arise.²

9. Where it has not been pronounced by a Court of competent jurisdiction—Clause (a).—It is a fundamental principle of law that where Court has no jurisdiction over a matter, its judgments and orders are null and void.¹ A judgment, therefore, of a foreign Court will not be conclusive unless it was *competent* to pronounce it. But whether a foreign Court is or is not, of a competent jurisdiction within the meaning of Section 13 (a), has to be determined in accordance with the principles of *international law* and not in accordance with the law of the country in which the foreign Court is situated.² In *Pemberton v. Hughes*,³ Lindley, M. R., observed :

"The jurisdiction which alone is important in these matters is the competence of the Court in an *international* sense, i.e., its *territorial* competence over the subject-matter and over the

Note 6

1a. (38) AIR 1938 Bom 394 (397) : 1 L R (1938)

Bom 529.

1. (80) 2 Mad 337 (338).

Note 8

1a. (35) AIR 1935 Rang 284 (289).

1. (21) AIR 1921 Lah 20 (23, 24) : 2 Lah 207.
(38) AIR 1938 Bom 173 (175) : 1 L R (1938)

Bom 16.

2. (16) AIR 1916 P C 136 (138) (PC).

3. (1899) 1 Ch 781 (791).
sense discussed.)

(38) AIR 1938 Cal 511 (515). (Under what circumstances in a personal action, a foreign Court has jurisdiction in an international

2. (17) AIR 1917 Mad 780 (782) : 39 Mad 738.
(25) AIR 1926 Mad 788 (791).
(38) AIR 1938 Bom 173 (177) : 1 L R (1938)

Note 9

1. See for full discussion as to jurisdiction, Notes to S. 9.

12. Submission to, and waiver of objection as to jurisdiction.—It has been seen in Note 9 above that one of the cases in which foreign Courts are recognized to be internationally of competent jurisdiction is voluntary submission to the jurisdiction of the Court.¹ The reason for this is that having taken a chance of judgment in his favour by submitting to the jurisdiction of the Court, it is not right that he should turn round when the judgment goes against him, and say that the Court had no jurisdiction.² The mere fact that the defendant allowed the suit in the foreign Court to be heard *ex parte* will not amount to his submitting to the jurisdiction of that Court.³ A submission to the jurisdiction of the Court may be in the following ways :

(1) Where there is an *express agreement* to submit to the Court's jurisdiction.—The agreement must, however, be fairly *specific*. The mere fact of entering into a contract of partnership in a foreign country does not involve an agreement that all matters and disputes arising thereunder shall be submitted to the jurisdiction of the Courts of that country.⁴

(2) *Where the party, as a defendant, voluntarily appears in the cause in the foreign Court.*—Where the defendant voluntarily appears in the cause *without any protest* as to jurisdiction or without any such protest until a late stage of the case, his conduct will clearly amount to a submission to the jurisdiction of the Court.⁵ Thus, where the defendant appears in the suit, files a written statement and applies jointly with the plaintiff for adjournment of the case to enable a settlement to take place, it will clearly amount to a submission.^{6a} Where he voluntarily appears and *protests* against jurisdiction but also *pleads on the merits*, it will, nevertheless, amount to a submission to jurisdiction.⁶ Even where he appears and *merely protests* against the jurisdiction, it is conceived, that the appearance will amount to a submission.⁷ In *Boisvire and Co. v. Brockner and Co.*,⁸ Cave, J., said :

"For the defendant it is submitted that as the foundation for the legal obligation is consent, an appearance under protest affords no indication of consent to the jurisdiction. . . . Now no one supposes that when a man appears voluntarily as a defendant in an action before a foreign Court he does so because he likes it ; he appears because, on the whole, he deems it his interest to submit to

Note 12

1. ('37) AIR 1937 Mad 97 (98).
[See also ('17) AIR 1917 Mad 780 (783, 787); 39 Mad 733 (FB).]
Pun Re No. 112 (PC).
(98) 22 Cal 222 (237) : 21 Ind App 171 : 1894
2. (1881) 6 Q B 155 (160), *Schibsky v. Westernholz*.
(80) 2 Mad 407 (412).
(84) 7 Mad 105 (107).
(80) 2 Mad 400 (405).
(78) 8 Mad H C R 14 (16, 17).
3. (1874) 9 Ex 345 (354), *Copin v. Adamson*.
[See (1880) 14 Ch D 351 (371), *Rousillon v. Rousillon*. (Cited in AIR 1917 Mad 780 (FB).)]
4. (1908) 1 K B 302 (308), *Emanuel v. Symon*.
(38) AIR 1933 Mad 112 (113).
(1881) 6 Q B 155 (161), *Schibsky v. Westernholz*.
5. (74) 8 Mad H C R 14 (16).
(24) AIR 1924 All 161 (161) : 46 All 119.
(09) 3 Ind Cas 190 (194) : 32 Mad 469. (Where defendant applied for leave to defend which
6. (1915) 2 K B 580 (587, 588), *Harris v. Taylor*.
(14) AIR 1914 Bom 111 (112) : 39 Bom 84.
(17) AIR 1917 Mad 780 (787) : 39 Mad 733.
(16) AIR 1916 Mad 1097 (1087). (Protest in the Court of first instance not persisted in, on appeal.)
7. (17) AIR 1917 Mad 780 (787) : 39 Mad 733 (FB).
8. (1890) 6 T L R 85. (Cited in A I R 1916 Mad 486.)

have the dispute decided by the foreign tribunal If this is the true source of the obligation, why should it not extend to the case of a man who appears without duress, and therefore voluntarily in one sense, but who accompanies his appearance with a protest and appears not because he is compelled to do so, but because he judges it to be for his interest to do so?"

The mere fact that the defendant employs a pleader in a suit in a foreign Court will not amount to a submission to its jurisdiction if at the hearing the pleader reports that he has no instructions from his client.⁹

Suppose now that a foreign Court passes a judgment in *absentum* against a defendant not resident within its jurisdiction and *subsequent* thereto the defendant applies to that Court to set aside the *ex parte* decree. Does this amount to a submission to jurisdiction so as to make the decree originally passed against him, a valid one? There is a conflict of opinion on the point. The High Court of Madras has held that it does not.¹⁰ The High Court of Lahore¹¹ and the Court of the Judicial Commissioner of Nagpur¹² have held that it does. The Bombay High Court, in the undermentioned case,¹³ has held that if a defendant against whom a judgment in *absentum* has been passed by a foreign Court, allows it to be executed in a British Court without objection, he must be taken to submit to the decree of the foreign Court and cannot seek to set aside the sale in execution proceedings. It is submitted, with respect, that the Madras view is correct. A decree, which when passed is an absolute nullity, cannot, on any principle of law become valid by reason of a *subsequent* submission to the jurisdiction of the Court. Such submission, if anything, will only operate to give jurisdiction to the Court in respect of future orders passed by it. In other words, in order to give jurisdiction and therefore validity to the decree of the foreign Court, there must be submission to the foreign Court before judgment is pronounced.^{13a}

Where a business is carried on within the jurisdiction of a foreign Court by means of an agent resident there and a decree is passed on summons to him or on a pleader authorized to receive summons, the decree is *prima facie* binding on the principal who will be deemed to have submitted to the jurisdiction of the foreign Court.¹⁴

A submission is not *voluntary* if the appearance is made under duress, as for instance where it is made to obtain release of property seized by a foreign tribunal in attachment or other proceedings.¹⁵ But an appearance merely to avoid an inconvenience that might happen in the future does not make it an involuntary appearance. (3). *By conduct, apart from appearance*.—Where in a suit in a foreign Court against a defendant residing in British India, the plaintiff effected an attachment before judgment of moneys belonging to the defendant in the hands of a third person, and the defendant wrote a letter to the plaintiff praying that he might be allowed to collect a portion of the money and stating that the plaintiff might collect the rest of it and the defendant therefore allowed the suit to proceed *ex parte*, it was held in the undermentioned case^{15a} that there was a submission to the jurisdiction of the

9. (95) 18 Mad 327 (330).
10. (95) 18 Mad 327 (330).
- (93) AIR 1933 Mad 398 (394, 395).
- (34) AIR 1934 Mad 434 (434) : 57 Mad 824.
11. (27) AIR 1927 Lah 200 (213) : 8 Lah 54.
12. (26) AIR 1926 Nag 77 (78) : 22 Nag L R 82.
13. (24) AIR 1924 Bom 351 (352).
- 13a. (31) AIR 1931 All 689 (692) : 53 All 747.
14. (14) AIR 1914 Mad 556 (561, 562) : 18 Ind Cas
- 15a. (36) AIR 1936 Mad 552 (555) : 59 Mad 918.
- (15) AIR 1915 Mad 486 (487) : 39 Mad 24 (PB).
- Barett.
15. (1886) 55 L J (N S) Q B 39 (42), Volinet v. App 220 (PC) (Quære.)
- [See also (103) 26 Mad 544 (553) : 30 Ind
- (26) AIR 1926 Mad 259 (259).
- 1925 Mad 155.
- (30) AIR 1930 Bom 511 (515). (Following AIR
- (25) AIR 1925 Mad 155 (156) : 47 Mad 877.

foreign Court and that the defendant could not, at the time of execution, object to the decree as being without jurisdiction.

(4) *By a party himself invoking the aid of the Court.*—A person, by instituting a suit for damages caused by a collision at sea, subjects himself to the jurisdiction of the Court and renders himself liable for damages rendered by the same collision.¹⁶ The mere fact, however, that a party has once appeared before a foreign Court in the character of a plaintiff, cannot be taken to be a submission to the jurisdiction of that Court in regard to all subsequent actions against him in that Court.¹⁷

13. "Where it has not been given on the merits"—Clause (b).—A foreign judgment must, in order to operate as *res judicata*, have been on the merits of the case,¹ and Courts in India have the power to examine the judgment to see whether it has been given on the merits.¹⁸ Under some systems of law prevailing in foreign countries when the defendant commits *default* in appearance, a judgment is given to the plaintiff without any further hearing in the matter. Such a judgment is not a decision on the merits of the case but is a *penalty* for default of appearance, and will not therefore operate as *res judicata*.² Thus, the true test for deciding whether a judgment has been given on the merits or not is to see whether it has been given as penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiffs' case.^{2a} Where, in an action for recovery of money in the King's Bench Division of the High Court in England, the defendant having failed to comply with an order to answer interrogatories, his defence was struck off and judgment was entered for the plaintiff, it was held by the Privy Council that the judgment was not one given on the merits of the case and that no action could be maintained on it in Indian Courts.³ Section 13 (b) refers to cases where the controversy raised in the action has not been, in fact, the subject of direct adjudication by the Court.⁴ Thus, a judgment given in a case in which the defendant puts in no appearance, no evidence is called or considered, and in which judgment is given by default by way of summary procedure, is not a judgment "on the merits."^{5a}

(16. (1966) 4 Bom H C R A C 149 (149).
17. (1987) AIR 1987 Mad 97 (99).
(1986) AIR 1986 Mad 552 (554) : 59 Mad 918.
Note 13

1. (19) AIR 1919 Lah 188 (189) : 1919 Pun Re

No. 14.
(19) 20 Ind Cas 971 (973) : 7 Low Bur Bul 56.

(1900) 24 Bom 86 (87, 88).

(189) 13 Bom 224 (227).

(1900) 24 Bom 86 (87, 88).

(1900) 24 Bom 86 (87, 88).

(1890) 15 App Cas 1 (10, 14, 18), *Gustan Non-*

Vion v. Freeman.

(1858) 2 Bl & Bl 14, *Patrick v. Sheddin*.

1a. (1938) AIR 1938 Bom 173 (177) : 1 L R (1938)

2. (1922) AIR 1922 P C 120 (122) : 45 Mad 496 :

49 Ind App 174 (PC). (A judgment on an

award obtained in England by default.)

(1927) AIR 1927 Mad 265 (270) : 50 Mad 261

(PB). (Overruling AIR 1925 Mad 155 : AIR

1926 Mad 259 is also overruled by the Full

Bench.)

4a. (1935) 62 Cal 682 (684)

44 Ind App 6 (PC).

4. (1916) AIR 1916 P C 121 (123) : 40 Mad 112 :

44 Ind App 6 (PC).

3. (1916) AIR 1916 P C 121 (123) : 40 Mad 112 :

2a. (1932) AIR 1932 Lah 649 (650). 14 Lah 58.

or by way of penalty.]

distinction to decision on a matter of form

(judgment "on merits" is used in contra-

distinction to decision on a matter of form

parties on the merits of the case and cannot

be availed of by the surety to resist his

liability to the creditor.]

(1935) AIR 1935 Lah 396 (400) : 16 Lah 768.

(1935) AIR 1935 Lah 396 (400) : 16 Lah 768.

(1935) AIR 1935 Lah 396 (400) : 16 Lah 768.

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(1935) AIR 1935 Lah 396 (400) : 16 Lah 768.

Where, notwithstanding the non-appearance of the defendant, evidence is taken on behalf of the plaintiff and judgment is given on such evidence, it will be one on the merits.⁵

Similarly, where a suit is adjourned for settlement and the parties agree that if the suit is not settled by the adjourned date, a judgment should be passed in favour of the plaintiff and a judgment is so passed on the adjourned date, there having been no settlement the judgment will be one on the merits of the case.⁶ It has been held in the undermentioned case^{7a} that an *ex parte* decree obtained under the summary procedure of the Court of Ceylon is not one on the merits, is not even a judgment and therefore does not satisfy the requirements of this clause. A wrong view of the legal liability of a party or of the *onus* of proof will not show that the judgment is not one on the merits.⁷ But the dismissal of a suit as being barred by limitation will not be deemed to be on the merits except where that law not only bars the remedy but *extinguishes the right itself*.⁸

14. Where it is against international law or based on non-recognition of British Indian law — Clause (c). — A judgment based upon an incorrect view of international law or a refusal to recognize the law of British India where such law is applicable is not conclusive.¹ But the incorrectness or the refusal must appear on the face of the proceedings.

15. Where the proceedings are opposed to natural justice—Clause (d). — Clause (d) refers to the *procedure* taken for arriving at a judgment rather than to the *merits* of the case.¹ It is a principle of natural justice that a person must be given an opportunity of being heard before an adjudication is made against him. Thus, a judgment obtained *without notice of the suit* to the defendant is contrary to natural justice.² Similarly, a judgment against a party not properly represented in the proceedings, as for instance where no *guardian ad litem* is appointed for a minor defendant,³ or where the interest of the person so appointed is in conflict with that of the minor,^{3a} or where the legal representative of a deceased party is

Note 14

1. ('88) 1888 Pun Re No. 191.
(‘84) AIR 1934 Mad 145 (147).
(‘88) AIR 1938 Bom 173 (179) : I L R (1938) Bom 16.
(‘99) 26 Cal 931 (935). (Legislation giving jurisdiction in cases not recognised by international law — judgment based on is not one in accordance with international law.)

Note 15

1. ('18) AIR 1918 Mad 274 (276) : 41 Mad 205.
(‘02) 29 Cal 509 (516).
(‘01) 28 Cal 641 (643).
(‘85) 9 Bom 346 (351, 352).
(‘80) 5 Bom 223 (232).
(‘71) 8 Bom H C R 200 (207).
(‘95) 22 Cal 222 (238) : 21 Ind App 171 : 1894 Pun Re No. 112 (PC).
(‘71) 15 Suth W R 500 (501).
(‘89) 1889 Pun Re No. 66.
(‘88) 1888 Pun Re No. 191.
(‘90) 13 Mad 496 (499, 501).
3. ('27) AIR 1927 Lah 200 (214) : 8 Lah 54.
3a. ('34) AIR 1934 Bom 390 (397).

5. ('25) AIR 1925 Mad 788 (790).
(‘32) AIR 1932 Lah 649 (650) : 14 Lah 58.
(‘19) AIR 1919 All 228 (229) : 41 All 521.
(When a writ of summons was served on defendant's solicitor who entered appearance, and defendant was absent.)
(‘30) AIR 1930 Bom 511 (515).
(‘20) AIR 1920 Mad 587 (588).
(‘35) AIR 1935 Rang 284 (289).
(‘13) 20 Ind Cas 971 (973) : 7 Low Bur Rui 56.
(Judgment given on consideration of affidavits by parties is one on merits.)
[See also ('35) AIR 1935 Lah 396 (400) : 16 Lah 768. (A case must be taken to have been decided on the merits where the defendant had ample opportunity to raise a defence and voluntarily refrained from raising such defence and the judgment was therefore passed ex parte.)]
6. ('29) AIR 1929 Mad 469 (471) : 52 Mad 503.
6a. ('33) AIR 1933 Mad 544 (547).
7. ('18) AIR 1918 Mad 274 (275) : 41 Mad 205.
8. ('09) 32 Mad 469 (477).
(1879) L R 4 Q B 653 (657, 658), Harris v. Quine.
(1835) 2 Bing N C 202 (213), Huber v. Steiner.

not brought on record,⁴ is contrary to natural justice.

Courts in India will insist on a strict proof of the service of process alleged to have emanated from a foreign Court, before giving effect to a foreign judgment.⁵ But where the foreign Court has held a particular notice to be sufficient, it must, in the absence of any evidence to the contrary, be presumed to be correct.⁶

A foreign judgment based on a second or a third review is opposed to natural justice.⁷ An incorrect view of the law by the foreign Court will not, however, render the judgment one opposed to natural justice.⁸

16. Where it has been obtained by fraud.—It is an established rule that a party to an action can impeach the judgment in it for fraud,¹ for it vitiates the most solemn transactions.² But the fraud must not be merely *constructive*; it must be *actual* fraud consisting of representations designed and intended to mislead; a mere concealment of facts is not sufficient to avoid a foreign judgment.³ Nor will a mere error of law in obtaining a judgment constitute fraud.⁴

17. Where the decree is founded on a breach of British Indian law.—Where a foreign judgment is founded on a breach of any law in force in British India, it will not be enforced even though the defect is not apparent on the face of the proceedings.¹ A foreign judgment on a claim which is barred according to law of British India cannot be said to be based upon a breach of the Indian law² and will be conclusive in a suit upon the judgment in British India.³

18. Effect of foreign judgment.—A foreign judgment has no force or authority as such in British India, but may give a cause of action for a suit to obtain the same relief in British India. It is only in such proceedings that the question of effect of the foreign judgment properly arises.¹ It has been seen that a foreign judgment is conclusive if passed by a competent Court² except in the cases mentioned in clauses (a) to (e) of Section 13. This will be so even though the judgment is subject to appeal and an appeal is actually pending in the foreign country.

4. (1927) AIR 1927 Lah 200 (215) : 8 Lah 54.
5. (1871) Bom 241 (245).
6. (1880) L.R. 14 Ch D 351 (371), Rousillon v. Rousillon.
7. (1925) AIR 1925 Mad 155 (157) : 47 Mad 877.
8. (1862) 2 B. & S. 11 (11), Scott v. Pilkington.
9. (1916) AIR 1916 Lah 380 (382).
10. (1818) AIR 1918 Mad 274 (275, 276) : 41 Mad 205.

Note 16

1. (199) 26 Cal 891 (193).
2. (1890) 25 Q.B.D. 310 (315), Vadaia v. Lawes.
3. (1934) AIR 1934 Bom 390 (393), (Foreign judgment can be impeached for fraud.)
4. (191) 15 Bom 216 (221).
5. (191) 15 Bom 216 (221).
6. (191) 15 Bom 216 (221).
7. (191) 15 Bom 216 (221).
8. (191) 15 Bom 216 (221).
9. (191) 15 Bom 216 (221).
10. (191) 15 Bom 216 (221).
11. (191) 15 Bom 216 (221).
12. (191) 15 Bom 216 (221).
13. (191) 15 Bom 216 (221).
14. (191) 15 Bom 216 (221).
15. (191) 15 Bom 216 (221).
16. (191) 15 Bom 216 (221).
17. (191) 15 Bom 216 (221).
18. (191) 15 Bom 216 (221).
19. (191) 15 Bom 216 (221).
20. (191) 15 Bom 216 (221).
21. (191) 15 Bom 216 (221).
22. (191) 15 Bom 216 (221).
23. (191) 15 Bom 216 (221).
24. (191) 15 Bom 216 (221).
25. (191) 15 Bom 216 (221).
26. (191) 15 Bom 216 (221).
27. (191) 15 Bom 216 (221).
28. (191) 15 Bom 216 (221).
29. (191) 15 Bom 216 (221).
30. (191) 15 Bom 216 (221).
31. (191) 15 Bom 216 (221).
32. (191) 15 Bom 216 (221).
33. (191) 15 Bom 216 (221).
34. (191) 15 Bom 216 (221).
35. (191) 15 Bom 216 (221).
36. (191) 15 Bom 216 (221).
37. (191) 15 Bom 216 (221).
38. (191) 15 Bom 216 (221).
39. (191) 15 Bom 216 (221).
40. (191) 15 Bom 216 (221).
41. (191) 15 Bom 216 (221).
42. (191) 15 Bom 216 (221).
43. (191) 15 Bom 216 (221).
44. (191) 15 Bom 216 (221).
45. (191) 15 Bom 216 (221).
46. (191) 15 Bom 216 (221).
47. (191) 15 Bom 216 (221).
48. (191) 15 Bom 216 (221).
49. (191) 15 Bom 216 (221).
50. (191) 15 Bom 216 (221).
51. (191) 15 Bom 216 (221).
52. (191) 15 Bom 216 (221).
53. (191) 15 Bom 216 (221).
54. (191) 15 Bom 216 (221).
55. (191) 15 Bom 216 (221).
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96. (191) 15 Bom 216 (221).
97. (191) 15 Bom 216 (221).
98. (191) 15 Bom 216 (221).
99. (191) 15 Bom 216 (221).
100. (191) 15 Bom 216 (221).

Note 17

1. (1880) 14 Ch D 351 (371), Rousillon v. Rousillon.
2. (1909) 2 Ind Cas 530 (531) : 33 Bom 479. (But the same rule may not apply to domestic judgments.)
3. (1924) AIR 1924 All 161 (162) : 46 All 119.
4. (1916) AIR 1916 Low Bur 67 (68).
5. (1908) 2 Sind L.R. 51.

Note 18

1. (1916) AIR 1916 P.C. 136 (138) (P.C.).
2. (1916) AIR 1916 P.C. 136 (138) (P.C.).
3. (1916) AIR 1916 P.C. 136 (138) (P.C.).
4. (1916) AIR 1916 P.C. 136 (138) (P.C.).
5. (1916) AIR 1916 P.C. 136 (138) (P.C.).
6. (1916) AIR 1916 P.C. 136 (138) (P.C.).
7. (1916) AIR 1916 P.C. 136 (138) (P.C.).
8. (1916) AIR 1916 P.C. 136 (138) (P.C.).
9. (1916) AIR 1916 P.C. 136 (138) (P.C.).
10. (1916) AIR 1916 P.C. 136 (138) (P.C.).
11. (1916) AIR 1916 P.C. 136 (138) (P.C.).
12. (1916) AIR 1916 P.C. 136 (138) (P.C.).
13. (1916) AIR 1916 P.C. 136 (138) (P.C.).
14. (1916) AIR 1916 P.C. 136 (138) (P.C.).
15. (1916) AIR 1916 P.C. 136 (138) (P.C.).
16. (1916) AIR 1916 P.C. 136 (138) (P.C.).
17. (1916) AIR 1916 P.C. 136 (138) (P.C.).
18. (1916) AIR 1916 P.C. 136 (138) (P.C.).
19. (1916) AIR 1916 P.C. 136 (138) (P.C.).
20. (1916) AIR 1916 P.C. 136 (138) (P.C.).
21. (1916) AIR 1916 P.C. 136 (138) (P.C.).
22. (1916) AIR 1916 P.C. 136 (138) (P.C.).
23. (1916) AIR 1916 P.C. 136 (138) (P.C.).
24. (1916) AIR 1916 P.C. 136 (138) (P.C.).
25. (1916) AIR 1916 P.C. 136 (138) (P.C.).
26. (1916) AIR 1916 P.C. 136 (138) (P.C.).
27. (1916) AIR 1916 P.C. 136 (138) (P.C.).
28. (1916) AIR 1916 P.C. 136 (138) (P.C.).
29. (1916) AIR 1916 P.C. 136 (138) (P.C.).
30. (1916) AIR 1916 P.C. 136 (138) (P.C.).
31. (1916) AIR 1916 P.C. 136 (138) (P.C.).
32. (1916) AIR 1916 P.C. 136 (138) (P.C.).
33. (1916) AIR 1916 P.C. 136 (138) (P.C.).
34. (1916) AIR 1916 P.C. 136 (138) (P.C.).
35. (1916) AIR 1916 P.C. 136 (138) (P.C.).
36. (1916) AIR 1916 P.C. 136 (138) (P.C.).
37. (1916) AIR 1916 P.C. 136 (138) (P.C.).
38. (1916) AIR 1916 P.C. 136 (138) (P.C.).
39. (1916) AIR 1916 P.C. 136 (138) (P.C.).
40. (1916) AIR 1916 P.C. 136 (138) (P.C.).
41. (1916) AIR 1916 P.C. 136 (138) (P.C.).
42. (1916) AIR 1916 P.C. 136 (138) (P.C.).
43. (1916) AIR 1916 P.C. 136 (138) (P.C.).
44. (1916) AIR 1916 P.C. 136 (138) (P.C.).
45. (1916) AIR 1916 P.C. 136 (138) (P.C.).
46. (1916) AIR 1916 P.C. 136 (138) (P.C.).
47. (1916) AIR 1916 P.C. 136 (138) (P.C.).
48. (1916) AIR 1916 P.C. 136 (138) (P.C.).
49. (1916) AIR 1916 P.C. 136 (138) (P.C.).
50. (1916) AIR 1916 P.C. 136 (138) (P.C.).
51. (1916) AIR 1916 P.C. 136 (138) (P.C.).
52. (1916) AIR 1916 P.C. 136 (138) (P.C.).
53. (1916) AIR 1916 P.C. 136 (138) (P.C.).
54. (1916) AIR 1916 P.C. 136 (138) (P.C.).
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57. (1916) AIR 1916 P.C. 136 (138) (P.C.).
58. (1916) AIR 1916 P.C. 136 (138) (P.C.).
59. (1916) AIR 1916 P.C. 136 (138) (P.C.).
60. (1916) AIR 1916 P.C. 136 (138) (P.C.).
61. (1916) AIR 1916 P.C. 136 (138) (P.C.).
62. (1916) AIR 1916 P.C. 136 (138) (P.C.).
63. (1916) AIR 1916 P.C. 136 (138) (P.C.).
64. (1916) AIR 1916 P.C. 136 (138) (P.C.).
65. (1916) AIR 1916 P.C. 136 (138) (P.C.).
66. (1916) AIR 1916 P.C. 136 (138) (P.C.).
67. (1916) AIR 1916 P.C. 136 (138) (P.C.).
68. (1916) AIR 1916 P.C. 136 (138) (P.C.).
69. (1916) AIR 1916 P.C. 136 (138) (P.C.).
70. (1916) AIR 1916 P.C. 136 (138) (P.C.).
71. (1916) AIR 1916 P.C. 136 (138) (P.C.).
72. (1916) AIR 1916 P.C. 136 (138) (P.C.).
73. (1916) AIR 1916 P.C. 136 (138) (P.C.).
74. (1916) AIR 1916 P.C. 136 (138) (P.C.).
75. (1916) AIR 1916 P.C. 136 (138) (P.C.).
76. (1916) AIR 1916 P.C. 136 (138) (P.C.).
77. (1916) AIR 1916 P.C. 136 (138) (P.C.).
78. (1916) AIR 1916 P.C. 136 (138) (P.C.).
79. (1916) AIR 1916 P.C. 136 (138) (P.C.).
80. (1916) AIR 1916 P.C. 136 (138) (P.C.).
81. (1916) AIR 1916 P.C. 136 (138) (P.C.).
82. (1916) AIR 1916 P.C. 136 (138) (P.C.).
83. (1916) AIR 1916 P.C. 136 (138) (P.C.).
84. (1916) AIR 1916 P.C. 136 (138) (P.C.).
85. (1916) AIR 1916 P.C. 136 (138) (P.C.).
86. (1916) AIR 1916 P.C. 136 (138) (P.C.).
87. (1916) AIR 1916 P.C. 136 (138) (P.C.).
88. (1916) AIR 1916 P.C. 136 (138) (P.C.).
89. (1916) AIR 1916 P.C. 136 (138) (P.C.).
90. (1916) AIR 1916 P.C. 136 (138) (P.C.).
91. (1916) AIR 1916 P.C. 136 (138) (P.C.).
92. (1916) AIR 1916 P.C. 136 (138) (P.C.).
93. (1916) AIR 1916 P.C. 136 (138) (P.C.).
94. (1916) AIR 1916 P.C. 136 (138) (P.C.).
95. (1916) AIR 1916 P.C. 136 (138) (P.C.).
96. (1916) AIR 1916 P.C. 136 (138) (P.C.).
97. (1916) AIR 1916 P.C. 136 (138) (P.C.).
98. (1916) AIR 1916 P.C. 136 (138) (P.C.).
99. (1916) AIR 1916 P.C. 136 (138) (P.C.).
100. (1916) AIR 1916 P.C. 136 (138) (P.C.).

subsequent suit for a debt everywhere.)

Where, notwithstanding the non-appearance of the defendant, evidence is taken on behalf of the plaintiff and judgment is given on such evidence, it will be one on the merits.⁶

Similarly, where a suit is adjourned for settlement and the parties agree that if the suit is not settled by the adjourned date, a judgment should be passed in favour of the plaintiff and a judgment is so passed on the merits of the case.⁵ It has been held in the undermentioned case^{6a} that an *ex parte* decree obtained under the summary procedure of the Court of Ceylon is not one on the merits, is not even a judgment and therefore does not satisfy the requirements of this clause. A wrong view of the legal liability of a party or of the *onus* of proof will not show that the judgment is not one on the merits.⁷ But the dismissal of a suit as being barred by limitation will not be deemed to be on the merits except where that law not only bars the remedy but *extinguishes the right itself*.⁸

14. Where it is against international law or based on non-recognition of British Indian law — Clause (c). — A judgment based upon an incorrect view of international law or a refusal to recognize the law of British India where such law is applicable is not conclusive.¹ But the incorrectness or the refusal must appear on the face of the proceedings.

15. Where the proceedings are opposed to natural justice—Clause (d). — Clause (d) refers to the *procedure* taken for arriving at a judgment rather than to the *merits* of the case.¹ It is a principle of natural justice that a person must be given an opportunity of being heard before an adjudication is made against him. Thus, a judgment obtained *without notice of the suit* to the defendant is contrary to natural justice.² Similarly, a judgment against a party not properly represented in the proceedings, as for instance where no *guardian ad litem* is appointed for a minor defendant,³ or where the interest of the person so appointed is in conflict with that of the minor,⁴ or where the legal representative of a deceased party is

5. (25) AIR 1925 Mad 788 (790).
- (32) AIR 1932 Lah 649 (650) : 14 Lab 58.
- (19) AIR 1919 All 226 (229) : 41 All 521.
- (When a writ of summons was served on defendant's solicitor who entered appearance, and defendant was absent.)
- (30) AIR 1930 Bom 511 (515).
- (20) AIR 1920 Mad 587 (588).
- (35) AIR 1935 Rang 284 (289).
- (13) 20 Ind Cas 971 (973) : 7 Low Bur Rui 56.
- (Judgment given on consideration of affidavits by parties is one on merits.)
- (See also (35) AIR 1935 Lah 396 (400) : 16 Lab 768. (A case must be taken to have been decided on the merits where the defendant had ample opportunity to raise a defence and voluntarily refrained from raising such defence and the judgment was therefore passed *ex parte*.)
6. (29) AIR 1929 Mad 469 (471) : 52 Mad 503.
64. (38) AIR 1933 Mad 544 (547).
7. (18) AIR 1918 Mad 274 (275) : 41 Mad 205.
8. (09) 32 Mad 469 (477).
- (1879) L R 4 Q B 653 (657, 658), Harris v. Quine.
- (1885) 2 Bing NC 202 (213), Huber v. Steiner.

1. (18) AIR 1918 Mad 274 (276) : 41 Mad 205.
- (02) 29 Cal 509 (516).
- (01) 28 Cal 641 (643).
- (85) 9 Bom 346 (351, 352).
- (80) 5 Bom 223 (232).
- (71) 8 Bom HC R 200 (207).
- (95) 22 Cal 222 (238) : 21 Ind App 171 : 1894 Fun Re No. 112 (PC).
- (71) 15 South W R 500 (501).
- (89) 1889 Fun Re No. 66.
- (88) 1888 Fun Re No. 191.
- (90) 13 Mad 496 (499, 501).
3. (27) AIR 1927 Lah 200 (214) : 8 Lab 54.
- 3a. (34) AIR 1934 Bom 390 (397).

Note 15

in accordance with international law.)

tional law — Judgment based on is not one-
diction in cases not recognised by interna-
(99) 26 Cal 931 (935). (Legislation giving juris-
Bom 16.

Note 14

1. (88) 1888 Fun Re No. 191.
- (34) AIR 1934 Mad 145 (147).
- (38) AIR 1938 Bom 173 (179) : 11 L R (1938)

in the absence of any evidence to the contrary, be presumed to be correct.

...the judgment of natural justice.

Իրոք, ընդհանուր առմամբ, Երևանի քաղաքում և մարզում ընդհանուր առմամբ չկան խնդիրներ, որոնք կարող են առաջացնել հակամարտություններ:

will be conclusive in a suit upon the judgment in British India.³

mentioned in clauses (a) to (e) of Section 13. This will be so even though the

1. (27) ALR 1927 Loh 200 (211) : 8 Loh 54.
8. (1862) 2 B. & S. 11 (11), Scott v. Pilkington.
(1850) 5 App Cas 655 (607), *Wainwright v. Mineral Society*, (where defendant's counsel, Mr. Wainwright, was counsel for the plaintiff.)

(91) 16 Bom 216 (221).
(71) 8 Bom H C B. O. Q. 200 (208).
the same can be imputed for fraud.)
judgments.)
the same line may not apply to the facts

2. (1928) AIR 1928 P C 33 (1928) 100.

subsequently in French territory for a subsequent suit for a debt owed by her.

where it was given. Even a stay of execution does not affect the finality of the foreign judgment which, nevertheless, can be sued on.³

Where the foreign Court did not decide the issue raised, the British Indian Court is not barred from deciding that issue.⁴ Nor is every issue decided by the foreign Court binding though the relief granted or refused is binding.⁵

There is a distinction between a case in which a defendant relies on a foreign judgment as a bar to a suit and a case in which the plaintiff seeks to enforce a foreign judgment. In the former case, the fair presumption is that the defendant submitted to the jurisdiction of the Court in the foreign country.⁶

In a suit upon a foreign judgment the plaintiff cannot recover anything more than what appears on the face of the judgment.⁷ He cannot, for instance, claim interest when the foreign judgment is silent about it.⁸

19. Enforcement of foreign judgments in British India.—A foreign judgment which is conclusive under Section 13 can be enforced in British India in the following ways—

1. by instituting a *suit* on such foreign judgment, or,
2. in cases of judgments of the Courts of Native States notified under Section 44, *infra*, by *execution* of the decrees of the foreign Court as if they had been passed by the Courts of British India.¹

There was a conflict of opinion at one time whether a judgment of a Court of a Native State in India could be enforced by a suit on the judgment. The High Court of Madras held that it could.² The Bombay High Court held that it could not, on the ground that judicial inquiries in Native States were not conducted with intelligence or integrity.³ In order to remove this conflict, Act VII of 1888 added a clause to Section 14 of the Code of 1882 to the effect that a suit could be brought on such judgment but that the British Indian Court was not precluded from an enquiry into the *merits* of the case in which the judgment was passed.⁴ This clause has now been omitted and the reason was stated by the Special Committee as follows :

"It appears to the committee that it is not possible to maintain this distinction in the case of all Asiatic Courts. The Courts in Japan, for instance, are entitled to be treated on the same footing as European Courts."⁵

There is therefore now no distinction between the judgments of the Courts of Native States and other foreign judgments. A suit can be brought on such judgment, and in such a suit as a general rule the Court cannot institute an enquiry into the *merits* of the original claim or the propriety of the decision.⁷

3. (27) AIR 1927 Lah 200 (207) : 8 Lah 54.
4. (21) AIR 1921 Lah 20 (23, 24) : 2 Lah 207.
5. (28) AIR 1928 Mad 327 (336) : 51 Mad 720.
6. (99) 26 Cal 931 (935).
7. (01) 28 Cal 641 (648).
8. (01) 28 Cal 641 (648).

Note 19

1. (15) AIR 1915 Mad 486 (488) : 39 Mad 24 (FB).
2. (97) 20 Mad 112 (114).
- (92) 15 Mad 82 (83).
- (84) 7 Mad 164 (166).

[See also (1900) 24 Bom 86 (88, 89.)]

3. (84) 8 Bom 598 (595).
- (81) 6 Bom 292 (296).
4. (98) 21 All 17 (19).
- (92) 1892 Pun Re No. 102.
7. (24) AIR 1924 All 161 (162) : 46 All 119.
- Pun Re No. 112 (PC).
- (95) 22 Cal 222 (237) : 21 Ind App 171 : 1894

5. See Notes on Clauses.
6. (67) 8 Suth W R 32 (33).
- (34) AIR 1934 Bom 390 (392).
- (78) 3 Bom 193 (196).
- (71) 15 Suth W R 500 (500).
- (16) AIR 1916 Lah 330 (332).
- (88) 1888 Pun Re No. 191.
- (37) AIR 1937 Mad 97 (98).
- (84) 7 Mad 164 (166).
- [See (38) AIR 1938 Cal 511 (516) : 63 Cal
1038. (No suit can be brought on a judgment by a Court without jurisdiction.)
- (95) 22 Cal 222 (237) : 21 Ind App 171 : 1894

20. Execution proceedings. — See Section 44, *infra*.

21. Foreign judgment on a decree of British Indian Court—Effect of.—

The existence of a foreign judgment on a decree of a British Indian Court is no bar to the execution of the British Indian decree in the British Indian Court.¹ A judgment of a British Indian Court does not entitle the decree-holder to restrain the judgment-debtor from proceeding in a foreign Court.²

22. Suit on foreign judgments. — See also Note 19 above.

A suit upon a foreign judgment cannot be brought against persons other than those against whom the foreign judgment was passed. Thus, where A obtains a decree against B and C in Ceylon, he cannot sue B, C, D and E in a British Indian Court on the foreign judgment on the ground that D and E were *partners* of B and C.¹ Nor can a suit be brought on a foreign judgment unless it is for an *ascertained* sum of money.²

A suit on a foreign judgment is not a small cause and does not lie in a Small Cause Court.³

23. Limitation. — A suit upon a foreign judgment must be brought within six years of the date of the judgment under Article 117 of the Limitation Act.¹

Where a judgment given in a suit in a foreign Court is appealed against and the appeal is dismissed, the 'judgment in that suit' for the purposes of Article 117 of the Limitation Act is the judgment of the Appellate Court and not that of the Court of first instance and therefore time begins to run from the date of the appellate decree.²

PLACE OF SUING

15. [S. 15.] Every suit² shall be instituted³ in the Court of the lowest grade⁴ competent to try it.⁵

[1877, Ss. 15 and 25; 1859, S. 6, Para. 1.]

against B and C in Ceylon, and having obtained part satisfaction by sale of property in Ceylon, brought a suit for balance upon the foreign judgment in British India against B, C, D, E, F and G alleging that all were members in one firm—*Held*, that the suit would not lie against D, E, F and G, upon the foreign judgment.)

2. ('99) 9 Mad L Jour 62 (68).
- ('96) 22 Mad 382 (383).

3. ('88) 1888 Pun Re No. 97.

(‘88) 6 Mad 191 (192).

See also Art. 25 of Sch. II

Small Cause Courts Act

Note 2

1. ('65) 4 Suth W R 107

(‘67) 8 Suth W R 321

2. ('33) AIR 1933 Mad

(Reversing AIR 1932

1. ('83) 6 Mad 273 (276). (A obtained a decree

Note 22

2. See ('16) AIR 1916 P C 136 (138) (PC).

1. ('81) 7 Cal 82 (83, 84).

Note 21

Harding.]

(1861) 9 C B 661, Bank of Australia v.

V. Gray.

[See also (1881) L R 6 Q B 139 (154), Godard

ssae v. Rathlone.

(1861) 6 H & N 301 (307, 308), Decosse Bri-

derson.

(1881) 6 Q B D 288 (289), Henderson v. Hen-

(‘35) AIR 1935 Rang 284 (291).

diction.)

as to right of foreign Court to decide about

right or title to property not within its juris-

(18) AIR 1918 Mad 949 (954). (See discussion

(‘23) AIR 1923 Mad 72 (73, 74); 45 Mad 1014.

(‘81) 6 Bom 292 (296).

(‘84) AIR 1984 Bom 390 (392).

Synopsis

17. Suit to set aside adoption. See Note 7.
18. Suit for removal of karnavan. See Note 7.
19. Suit for cancellation and setting aside of documents. See Note 7.
20. Suit to enforce registration of documents. See Note 7.
21. Suit to remove trustees. See Note 7.
22. Suit between landlord and tenant.
23. Execution and claim cases. See O. 21 R. 68.
24. Suit for restitution of conjugal rights. See Note 7.
- 24a. Suit for dissolution of Mahomedan marriage.
25. Miscellaneous suits.
26. Mode of valuation for appellate jurisdiction. See Note 18 to Section 96.
27. Suits embracing two or more subjects.
28. Objection to jurisdiction. See Section 21.
29. Waiver of objection to jurisdiction. See Note 5 to Section 9.
1. Scope and object of the Section.
2. "Suit." See Section 11, Note 21 on "Suits."
3. "Shall be instituted."
4. "Court of the lowest grade."
5. "Competent to try it"—General.
6. Valuation in plaint determines jurisdiction. See Notes 4 and 5 to Section 6.
7. Cases in which satisfactory valuation is not possible.
8. Effect of improper valuation.
9. Valuation for jurisdiction is different from valuation for court-fees.
10. Mode of valuation.
11. Redemption and mortgage suits.
12. Pre-emption suits.
13. Partition suits.
14. Suit for accounts and administration.
15. Suit for mesne profits. See under Note 6.
16. Declaratory and injunction suits.

Other Topics

- Competence of Court to pass a decree for an amount exceeding its pecuniary limits. See S. 6.
- Effect of instituting a suit in a Court of lower grade when it ought to have been instituted in a Court of higher grade and vice versa. See Note 3.
- Inferior Court can declare decree of a superior Court a nullity. See Note 5.
- Place of suing. See Note 1.
- Suits for establishing occupancy rights. See Note 25, Pt. (1).
- Value of claim proved does not affect jurisdiction nor defendant's plea. See S. 6.
- When once suit is instituted Court cannot transfer it on finding that plaintiff is entitled only to a part of a claim cognisable by a lower Court. See Note 3.

1. Scope and object of the Section.—This and the following Sections up to Section 20 regulate the *forum* for the institution of suits in British India.¹ The rule requiring every suit to be instituted in the Court of the lowest grade is only a rule of procedure and not of jurisdiction. Thus the District Judge and the Subordinate Judge have *jurisdiction* over all original suits cognisable by the Civil Court subject, in its exercise, to a certain *procedure*, namely, that the suits be instituted in the Court of the *lowest* grade competent to try them.² "The object of the Legislature," said Petheram, C. J., "is that the Court of the higher grade shall not be overcrowded with suits."³
- It has been held that this Section does not apply to the High Court in the exercise of its original civil jurisdiction.⁴
2. "Suit."—See Section 11 Note 21 on "Suit."
3. "Shall be instituted."—As has already been seen in Note 1 above, this Section merely lays down a rule of *procedure*. It does not deprive any Court of

Section 15—Note 1

1. (28) AIR 1928 Lah 297 (239) : 9 Lah 455. (They regulate the venue within British India and apply only to those places where the Code is in force.)
2. (85) 7 All 230 (234, 235) (P.B.). (Per O'Connell, J.) (1903) 30 Cal 453 (457). (This section controls S. 144, Ben. Ten. Act.)
3. (85) 7 All 230 (234) (P.B.).
4. (35) AIR 1935 Rang 517 (520).

the jurisdiction which it may otherwise possess under the Acts constituting them.¹ Hence, the institution in a Court of a higher grade, of a suit, which ought to have been instituted in a Court of lower grade, is only an irregularity in procedure covered by Section 99 of the Civil Procedure Code, and does not affect the jurisdiction of the Court.² The contrary view taken in the undermentioned cases³ cannot be accepted as correct. In *Nidhi Lal v. Mazhar Hussain*,³ Petheram, C. J., said :

“The word, ‘shall’ is, in my opinion, imperative on the *suitor*. The word is used for the purpose of protecting the Courts. The *suitor* shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is that the Court of the higher grade shall not be overcrowded with suits. . . . The proviso is for the benefit of the Court of the higher grade and it is not bound to take advantage of it. If it does not wish to try the suit it may refuse to entertain it. If it wishes to retain the suit in its Court it may do so; it is not bound to refuse to entertain it.”

It is thus clear that where a suit which ought to have been instituted in a Court of lower grade is instituted in a Court of a higher grade, the latter cannot be said to have no *jurisdiction* to try the suit though as a matter of procedure the plaintiff ought to be returned for presentation to the proper Court.¹

Where, however, a suit is instituted in a Court of a lower grade than the one which is competent to try it, the proceedings are null and void as being *without jurisdiction*,⁵ and it must be presumed that material prejudice has been caused to the party concerned.^{6a} The willingness of the plaintiff not to claim, out of the sum that might be realised by the sale of the suit property, anything in excess of the pecuniary jurisdiction of the Court cannot confer on the Court jurisdiction to try the suit.⁶

Where A, as a sole plaintiff, can only sue in the Court of the Subordinate Judge as being the Court of the lowest grade competent to try the suit, but B, his

Note 3

- [illegible]

co-plaintiff, can, by virtue of Act XX of 1863, sue only in the District Court, this Section does not prevent *A* and *B* from *together* instituting the suit as co-plaintiffs in the District Court.⁷

Once the *institution* of the suit takes place according to the provisions of this Section its operation is exhausted and the suit should not be transferred merely because it is subsequently found that the plaintiff is entitled only to a part of the claim which would have been cognisable by a lower Court.⁸

4. "Court of the lowest grade."—The following are the several grades of Courts in order, which have been established in British India:

1. *High Courts*.—There are *Chartered High Courts* in Allahabad, Bombay, Calcutta, Lahore, Madras, Patna and Nagpur, Judicial Commissioner's Courts in Peshawar and Sind and a Chief Court in Oudh. All these are "High Courts" for the purpose of the Code. See the General Clauses Act (X of 1897, Section 3 (24).)

2. *District Courts*.—Next below the High Court is the District Court which is the principal Civil Court of original jurisdiction in the district. It is also a Court of appeal from the decrees and orders of Subordinate Courts in certain cases.¹

3. *Courts of the Subordinate Judges (In the Bombay Presidency, Subordinate Judges of the First Class)*.—The jurisdiction of these Subordinate Judges extends to all original suits of any value.²

4. *Courts of the District Munsifs (corresponds to Courts of Subordinate Judges of the Second Class in the Bombay Presidency)*.—These have only a *limited* pecuniary jurisdiction, that of the Second Class Subordinate Judge in Bombay extending up to Rs. 5,000; that of the District Munsif in Madras extending up to Rs. 3,000 and that of the Munsif in Bengal, North-Western Provinces and Assam extending up to Rs. 1,000.³

In each of the Presidency Towns of Bombay, Calcutta and Madras there is also a Small Cause Court with pecuniary jurisdiction up to Rs. 2,000. Clause 12 of the Letters Patent of these High Courts provides that the High Court has no *jurisdiction* over Small Cause suits the value of which is less than Rs. 100.⁴ In suits of a Small Cause nature where the value of the subject-matter exceeds Rs. 100 but does not exceed Rs. 2,000, both the High Court and the Small Cause Court have jurisdiction to try the suits, but as a matter of procedure they should be instituted only in the Small Cause Court as being the Court of the lowest grade.^{5b}

The words "Court of the lowest grade" refer only to Courts to which the Civil Procedure Code applies. The Code does not apply to Village Munsifs' Courts in Madras Presidency and a Small Cause suit therefore which is cognisable both by the Small Cause Court as well as by the Court of the Village Munsif need not be necessarily filed in the latter Court as being the Court of the "lowest grade."⁴

5. "Competent to try it"—General.—As has been observed already in Section 9 *ante*, the jurisdiction of a Court to try a suit is of three kinds, viz., juris-

7. (199) 23 Mad 537 (540).
8. (120) AIR 1920 Nag 47 (48).

Note 4

1, 2, 3. See the Civil Courts Acts of Bombay Act XIV of 1869; Madras Act III of 1873; Bengal N W and Assam Act XII of 1887; The Oudh Court Act XIII of 1879 and IV of 1925; (Agra)

3a. (162) 1 Hyde 272.
3b. (110) 34 Bom 13 (54).
4. (790) 13 Mad 145 (146).
(69) 5 Mad H C R 45 (47).

Tenancy Act III of 1926: Central Provinces Act XVI of 1885; Punjab Act XVIII of 1884; Burma Act VI of 1900; Jhansi Act XVIII

jurisdiction with reference to the nature of the suit, pecuniary jurisdiction and territorial jurisdiction.¹ Thus the exemption of certain suits from the cognisance of Small Cause Courts relates to the jurisdiction of Courts with regard to the *nature* of the suit.^{1a} The prohibition of Presidency Small Cause Courts from entertaining suits of which the value exceeds Rs. 2,000 is an example of *pecuniary* jurisdiction. And the rule that a Court shall not try a suit for immovable property situated beyond certain local limits prescribed as the limits of its jurisdiction is an example of *territorial* jurisdiction.

Where the Court has jurisdiction to try a suit, it has jurisdiction to decide every question arising in the suit and its decree, though it may be wrong, is binding on the parties until it is reversed in some manner provided by law.² But where a suit is instituted in a Court having *no jurisdiction* to try it, the defect is a fatal one^{2a} and cannot be cured by its subsequent transfer to a Court having jurisdiction.³ Once jurisdiction is acquired by a Court over a suit, it continues in all matters in the suit that are brought within its cognisance by the Civil Procedure Code.⁴

An inferior Court has jurisdiction to set aside the decree of a superior Court obtained by fraud provided it is otherwise competent to try the suit.⁵

6. Valuation in plaint determines jurisdiction.—See Notes 4 and 5 to Section 6 ante.

7. Cases in which satisfactory valuation is not possible.—There are many suits which are not capable of satisfactory valuation for purposes of jurisdiction, such as suits for the restitution of conjugal rights and suits for the removal of a trustee. Under Section 9 of the Suits Valuation Act the High Court has power to make rules providing that any such suits may be valued in a specified manner. In the absence of any such rules framed by the High Courts, a conflict of view has arisen as to the right method of valuation of such suits. The Allahabad,¹ Bombay² and Calcutta³ High Courts have held that, in such cases, the plaintiff's valuation should

Note 5

1. (194) 16 All 188 (184).
- (183) 9 Cal 439 (444) : 9 Ind App 197 (P C).
- (A fourth kind of jurisdiction is jurisdiction with reference to persons, e. g., jurisdiction of Courts over foreign princes.)

1a. See Sch. 2 of the Provincial Small Cause Courts Act and S. 19 of the Presidency Small Cause Courts Act. For similar provisions restricting the jurisdiction of the Court with reference to the subject-matter of suits, reference may be made to S. 92, C. P. Code, S. 6, of the Succession Certificate Act, so also under the Tenancy Acts of the various provinces certain classes of suits are exclusively triable by Revenue Courts.

See also the following cases holding that the particular suits in question must be brought in the District Court:—

- (187) 9 All 191 (202); 13 Ind App 184 (P C). (Suit for infringement of patent.)
- (179) 3 Bom 146 (147). (In Bombay Presidency suits against a municipality.)
- (81) 6 Cal 499 (503). (Suit for infringement of copyright.)
- (89) 12 Mad 188 (189). (A suit to dismiss a zamindari karnam.)

[See also (188) 12 Bom 358 (363).]

Privy Council.]]

1. (193) 15 All 378 (379). (Adoption.)
- (106) 28 All 545 (551) (F B). (Restitution of conjugal rights.)
2. (95) 1895 Bom F J 228 (228). (Adoption.)
- (11) 35 Bom 264 (265). (D O.)
3. (10) 37 Cal 860 (862). (To set aside adoption.)
- (107) 34 Cal 852 (856). (Restitution of conjugal rights—Dissenting from the other dictum in 31 Cal 849 and distinguishing 13 Cal 232.)

[But see (91) 18 Cal 378 (381). (Appeal to

Note 7

1. (19) AIR 1919 Mad 228 (224).
2. (18) AIR 1918 Mad 711 (712) : 41 Mad 218.
- (105) 11 Cal W N 579 (581). (It can set it aside as a nullity.)
3. (87) 9 All 191 (202) : 13 Ind App 184 (P C).
- (82) 4 All 478 (480). (But S. 21 of the Code is a qualification to this rule. See notes there-to.)
4. (86) 10 Bom 200 (202).
5. (19) AIR 1919 Sind 53 (54) : 13 Sind L R 144. (Such a suit will lie to set aside a decree on award.)
- (18) AIR 1918 Mad 711 (712) : 41 Mad 218.
- (105) 11 Cal W N 579 (581). (It can set it aside as a nullity.)
- (19) AIR 1919 Mad 228 (224).

be accepted as determining jurisdiction. According to the Madras High Court the principle to be adopted is that where the subject-matter is wholly unrelated to anything which can be readily stated in definite money terms, the plaintiff's own valuation must be accepted, but that where the subject-matter is so related to things which have a real money value and which will be affected by the relief claimed, the *market value of the property affected* will determine jurisdiction.

Illustrations

1. A sues for the restitution of conjugal rights. According to all the High Courts the plaintiff's valuation will determine the jurisdiction.⁵
2. A sues for a declaration of the validity of an adoption or to set aside an adoption. According to the Allahabad, Bombay and Calcutta High Courts the plaintiff's valuation will determine jurisdiction.⁶ According to the Madras High Court the relief claimed affects properties which the person adopted will be entitled to and therefore the *market value of the properties* will determine jurisdiction.⁷
3. A sues for the removal of a *Malabar tarwad* or of a trustee. According to the Madras High Court the value of the suit for purposes of jurisdiction must be guided by the value of the tarwad or trust property.⁸ In Madras, rules have now been framed under S. 9 of the Suits Valuation Act, 1887, for the valuation of suits for removal of *karnavams*. See the Notification referred to below.⁹
4. A sues to set aside a document or to compel the registration of a document. The reliefs claimed are not incapable of valuation and therefore the value of the interest affected by the document is the value for purposes of jurisdiction.⁹

8. Effect of improper valuation.—Although it is the plaintiff's valuation that determines the *form* of a suit, where the value can be correctly ascertained the plaintiff is not at liberty to place an arbitrary value on his suit or to misrepresent its real value so as to have it tried by a Court different from that intended by the Legislature.¹ If it appears to the Court that the allegation in the plaint is falsely

(187) 14 Cal 351 (352). (Appeal to High

4. (27) AIR 1927 Mad 563 (565) : 50 Mad 646. [See (35) AIR 1935 Mad 874 (875). (Suit for declaration that a will is not valid—A valuation grossly in excess of the value of the property covered by the will and which was not a bona fide valuation not accepted though the suit properties being proper—ties set apart for charitable purposes—Market value is not the correct basis.)]

5. (106) 28 All 545 (551) (F B). (186) 19 Cal 232 (236). (109) 4 Ind Cas 836 (836) : 34 Bom 236. (107) 34 Cal 352 (356). See also the cases cited in footnotes (2) and (4) above which bear out the principle involved.

6. (93) 15 All 378 (379). (195) 1895 Bom F J 228 (228). (110) 37 Cal 860 (862). (127) AIR 1927 Mad 563 (565) : 50 Mad 646. [See also (124) AIR 1924 Mad 84 (85). (83) 6 Mad 192 (196).]

(10) 8 Ind Cas 545 (545) (Mad). (88) 8 Mad 516 (518). (88) 11 Mad 266 (267, 268). (But if the value put by the parties is bona fide it may be accepted.)

[But see (91) 14 Mad 78 (79).] 8a. Notification of 26-2-1903, Fort St. George Gazette of 3-3-1903, Part II, page 368, R. I.

(Suit for removal of *karnavams*, etc., should be valued at one third of the amount at which the same would be valued under the Court-fees Act if the suit were one brought by a stranger for the recovery of the whole property possessed by the Tarwad or *Illoms* to which the suit relates.)

9. (108) 31 Mad 89 (93) (F B). (Suit to enforce registration.) (90) 13 Mad 56 (59). (Do.) (24) AIR 1924 Mad 84 (84, 85). (Suit to set aside award.) (92) 15 Mad 294 (295). (To set aside an instrument.)

Note 8

1. (32) AIR 1932 All 413 (414). (Suit for dissolution of partnership—Assets over-valued.) (103) 6 Oudh Cas 255 (260). (Pre-emption suit.) (84) 8 Bom 31 (33, 34). (13) 21 Ind Cas 771 (772) (Cal). (12) 17 Ind Cas 162 (163) : 40 Cal 245. (Suit for partition.) (10) 11 Cal WN 705 (711). (06) 3 Cal L Jour 143 (154). (Per Mukerjee J.) (90) 17 Cal 680 (683). (85) 8 Mad 384 (388). (Suit for payment of annual emoluments.) [See also (107) 31 Bom 73 (78). (76) 25 South W R 76 (76). (Plaintiff may be punished by saddling him with costs, but suit should not be dismissed.)]

made for the purpose of avoiding the jurisdiction of the proper Court, the Court may require the plaintiff to prove that the valuation is proper.² Where however a decree is passed in the suit, the Appellate Court has no power to entertain any objection to the jurisdiction of the trial Court on the ground of overvaluation or undervaluation, unless the objection was taken in the trial Court at or before the framing of the issues or unless the Appellate Court is satisfied that, on account of the overvaluation or undervaluation, the decision of the suit on the merits has been prejudiced.³ The mere change in the *form* consequent on the overvaluation or undervaluation of a suit will not be considered as affecting the disposal of the suit on the merits.⁴ But it has been held by the Calcutta High Court that where, owing to the undervaluation of a suit, the appeal from the decree is heard and decided by a District Court instead of by the High Court, the decree passed by the District Court is a nullity.⁵

9. Valuation for jurisdiction is different from valuation for court-fees.

— The special rules applicable to valuation for court-fees are not to be taken as necessarily a guide in determining the value of the subject-matter of a suit for purposes of jurisdiction.¹ Thus, where a notional value different from the real value is placed upon the property for the purpose of the court-fees, such notional value cannot displace the real value for the purpose of jurisdiction.² The Suits Valuation Act and the Court-Fees Act are purely fiscal enactments and they have no bearing on the question as to which is the proper Court for the institution of the suit, having regard to the property involved in the suit.³ See the Suits Valuation Act, 1887.

10. Mode of valuation.

— The mode of valuation of suits for purposes of jurisdiction is laid down in the Suits Valuation Act, 1887. Generally the amount of the claim or the actual value of the property claimed determines jurisdiction, except in certain cases in which the value for purposes of jurisdiction has been declared by Section 8 of the Suits Valuation Act, 1887, to be the same as the value for purposes of court-fees under the Court-Fees Act, 1870. In such cases the value for court-fees must be fixed first and the same must be afterwards adopted for jurisdiction.⁴

- (73) 19 Suth W R 20 (22).
 (72) 17 Suth W R 248 (23).
 (14) AIR 1914 Lah 214 (216) : 1918 Pun Re No. 111 (F B).
 (25) AIR 1925 Rang 278 (278).
 [But see (13) 18 Ind Cas 363 (363) (Mad) (F B)].
 (01) 24 Mad 158 (159).
 (24) AIR 1924 All 652 (656) : 46 All 553.
 of his valuation.)
 (97) 24 Cal 661 (667). (The plaint should be returned to proper Court.)
 (70) 13 Suth W R 826 (827). (If a question of proper valuation is raised the Court must decide it.)
 (15) AIR 1915 Mad 444 (445).
 [See (82) 8 Cal 975 (977). (The question of valuation ought to be the preliminary question which a Court should decide.)]

3. See S. 11, Suits Valuation Act, 7 of 1887.
 (01) 24 Mad 427 (429).
 (33) AIR 1933 All 249 (252) : 55 All 816 (F B).
 (97) 24 Cal 661 (667).
 (29) AIR 1929 Lah 509 (511) : 11 Lah 15.
 4. (18) AIR 1918 Mad 590 (591).

- (97) 24 Cal 661 (664).
 (10) 20 Mad L Jour 726 (728).
 (11) 12 Ind Cas 464 (476, 477) : 38 Cal 639. [See also (60) 5 Cal 188 (191)].

Note 9

1. (87) 11 Bom 591 (595). (Per Birdwood, J.)
 (80) 4 Bom 515 (527) (F B).
 (07) 31 Bom 73 (77). (But see Section 8, Suits Valuation Act, 7 of 1887).
 (77) 1 Bom 548 (547).
 (77) 1 Bom 538 (541).
 (82) 8 Cal 757 (759).
 (80) 5 Cal 489 (492).
 (76) 25 Suth W R 39 (39).
 (73) 20 Suth W R 33 (35).
 (72) 18 Suth W R 109 (110).
 (83) 6 Mad H O R 151 (162).
 (1900) 1 Low Bur Rui 96 (97).
 2. (18) AIR 1918 P O 188 (191) : 48 Bom 507 : 46 Ind App 24 (P O).
 (92) AIR 1932 All 418 (414).
 (92) AIR 1932 All 418 (414).
 3. (92) AIR 1932 All 418 (414).

Note 10

1. See (66) 3 Mad H O R 170 (172).
 2. (21) AIR 1921 Cal 84 (85).

be accepted as determining jurisdiction. According to the Madras High Court⁴ the principle to be adopted is that where the subject-matter is wholly unrelated to anything which can be readily stated in definite money terms, the plaintiff's own valuation must be accepted, but that where the subject-matter is so related to things which have a real money value and which will be affected by the relief claimed, the market value of the property affected will determine jurisdiction.

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5. (106) 28 All 545 (551) (F B).

(186) 18 Cal 232 (236).

(109) 4 Ind Cas 886 (836) : 84 Bom 236.

(107) 34 Cal 352 (356).

See also the cases cited in footnotes (2) and (4) above which bear out the principle involved.

6. (193) 15 All 378 (379).

(95) 1895 Bom F J 228 (228).

(110) 37 Cal 860 (862).

(127) AIR 1927 Mad 563 (565) : 50 Mad 646.

[See also (24) AIR 1924 Mad 84 (85).

(83) 6 Mad 192 (196).]

(10) 8 Ind Cas 545 (545) (Mad).

(85) 8 Mad 516 (518).

(188) 11 Mad 266 (267, 268). (But if the value put by the parties is bona fide it may be accepted.)

[But see (91) 14 Mad 78 (79).]

8a. Notification of 26-2-1903, Fort St. George Gazette of 3-3-1903, Part II, page 368, R. I.

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(192) 15 Mad 294 (295). (To set aside an instrument.)

Note 8

1. (32) AIR 1932 All 413 (414). (Suit for dissolution of partnership—Assets over-valued.)

(103) 6 Oudh Cas 255 (260). (Pre-emption suit.)

(84) 8 Bom 31 (33, 34).

(113) 21 Ind Cas 771 (772) (Cal).

(12) 17 Ind Cas 162 (163) : 40 Cal 245. (Suit for partition.)

(10) 11 Cal W N 705 (711).

(106) 3 Cal L Jour 143 (154). (Per Mukerjee J.)

(90) 17 Cal 680 (683).

(85) 8 Mad 384 (388). (Suit for payment of annual emoluments.)

[See also (107) 31 Bom 73 (78).

(176) 25 South W R 76 (76). (Plaintiff may be punished by saddling him with costs, but suit should not be dismissed.)

11. Redemption and mortgage suits.—A suit for the recovery of money due on a mortgage is a suit for money and the value of such a suit for the purpose of court-fees is the amount claimed as due, under Section 7 (1) of the Court-Fees Act, 1870. The same will determine the value for purposes of jurisdiction under Section 8 of the Suits Valuation Act, 1887.¹

In suits for redemption and for foreclosure, the mode of valuation for jurisdiction is not prescribed by statute, as Section 8 of the Suits Valuation Act, 1887, expressly excepts such suits from its operation. There has consequently been a difference of opinion on the point. The Madras and Allahabad High Courts have held that it is the *principal amount* of the mortgage that will determine the jurisdiction,² while the Bombay,³ Calcutta,⁴ and Lahore⁵ High Courts and the Judicial Commissioner's Court of Nagpur⁶ hold that the amount due on the mortgage will determine jurisdiction.

12. Pre-emption suits.—The valuation for jurisdiction of this class of suits also has not been provided by the Suits Valuation Act, 1887. But under Section 3 of that Act, however, the Local Government may make rules for valuing such suits. Rules have been framed in the Punjab.¹ Where the property sold is a revenue-paying land, the value of the suit is 30 times the *jama*² and where it is a house, then the market-value thereof, as given by the plaintiff.³ In Bengal, under the Bengal Civil Courts Act (VI of 1871) the value of the *subject-matter of pre-emption* determines the jurisdiction.⁴ In Madras under Section 14 of the Madras Civil Courts Act, 1873, the value is that fixed under Section 7 (v) of the Court-Fees Act for a suit for possession of the land sought to be pre-empted.⁵ It has been held in Oudh that the value of the property as stated in the plaint determines the jurisdiction.⁶

13. Partition suits.—Where a suit is brought for partition and *separate possession* of the plaintiff's share, the plaintiff being out of possession, it should be valued for purposes of jurisdiction on the *share* claimed by the plaintiff.¹ Where the suit is merely to enforce a right to share in a joint family property, the plaintiff can value it as he pleases, for the purposes of jurisdiction and court-fees under

Note 11

1. ('94) 18 Bom 696 (698). (Including the interest.)
2. ('80) 2 All 698 (704). (Value of the property is immaterial.)
3. ('09) 81 All 44 (45). (Not the value of the property.)

4. ('83) 5 All 332 (333) (Do.)
5. ('86) 8 All 438 (442, 443). (P.B.) (Redemption of share—Share of principal money determined jurisdiction.)
6. ('81) 3 All 822 (824). (Further incumbrance on the property with a bond is not to be considered.)

7. ('79) 1 All 620 (622). (When the question is whether the property and the right to redeem belongs to the plaintiff the question of jurisdiction depends on the value of the property.)
8. ('16) AIR 1916 Mad 631 (631) : 39 Mad 447.

9. ('82) 5 Mad 287n (289n).
10. ('87) 11 Bom 591 (594).
11. ('90) 14 Bom 19 (23).
12. ('24) AIR 1924 Cal 783 (785) : 51 Cal 737.
13. ('26) AIR 1926 Lab 376 (378) : 1 Lab 570 (P.B.).

Note 13

1. ('91) 14 Mad 183 (184).
2. ('92) 15 Mad 69 (70).
3. ('08) 25 All 277 (279).
4. ('02) 24 All 381 (382).
5. ('90) 12 All 506 (509).
6. ('11) 9 Ind Gas 414 (414) (Oudh). (1 Ind Gas 687, Not followed.)
7. ('19) AIR 1919 Mad 1062 (1063) : 41 Mad 721.
8. ('86) 13 Cal 255 (256).
9. ('69) 3 Beng L R (App) 143 (144).
10. ('02) 24 All 218 (225, 226). (Indigo factory buildings to be valued as 'house' and not as 'land'.)
11. ('00) 1900 Pun Re No. 101.
12. ('08) 1908 Pun Re No. 16 (P.B.).
13. ('08) 1908 Pun Re No. 46.
14. See Rules & Orders, Vol. 3, p. 88.

Note 12

1. ('13) 21 Ind Gas 918 (919) : 9 Nag L R 161.
2. (Note:—In (1900) 1 Low Bur Rui 96 (97) it has been held that the value of the land mortgaged will govern jurisdiction in suits for redemption.)

Section 8 of the Suits Valuation Act read with Section 7 (iv) (b) of the Court-Fees Act. If the suit is by a plaintiff tenant-in-common in joint possession of the property for partition of his share, the value of the suit for purposes of jurisdiction will be the value of the *entire* property and not merely the share of the plaintiff.

14. Suit for accounts and administration.—Suits for accounts fall within Section 7 (iv) (f) of the Court-Fees Act, 1870, and the plaintiff can put his own valuation for the purpose of court-fees. The same will also be the valuation for purposes of jurisdiction under Section 8 of the Suits Valuation Act, 1887.

15. Suit for mesne profits.—See under Note 6, *supra*.

16. Declaratory and injunction suits.—A suit for a declaration and injunction is a suit for a declaration with consequential relief within the scope of the Court-Fees Act, Section 7 clause (iv) (c) and hence, by virtue of Section 8 of the Suits Valuation Act the value of the suit depends on the amount at which the plaintiff values his relief in the plaint. But in a suit for a bare declaration, the value of the property likely to be affected is the value of the suit. Although in cases coming under the Court-Fees Act, Section 7 (iv) (c) and (d), the value fixed by the plaintiff determines jurisdiction, the Calcutta High Court has held that when a question as to the proper valuation is raised the Court can and should decide it. The High Court of Madras has, on the other hand, held that the Court is bound by the plaintiff's valuation in the plaint.

- (198) 22 Bom 315 (316).
 (184) 8 Bom 31 (34).
 (190) 17 Cal 680 (683).
 (182) 8 Cal 126 (128).
 (115) AIR 1915 Lah 131 (132).
 (188) 1888 Pun Re No. 110 (F B).
 (198) 21 Mad 234 (236).
 (197) 20 Mad 289 (292).
 (196) 19 Mad 56 (59). (Following 14 Mad 183.)
 (190) 11 Mad 25 (27).
 (188) 11 Mad 140 (141).
 (188) AIR 1938 Oudh 547 (549) : 9 Luck 219.
 [See also (109) 38 Bom 658 (663).]
 [But see (83) 18 Cal L Rep 258 (253). (The value will be the difference between the value of the plaintiff's share and the value of the same not partitioned.)]
 (85) 8 Mad 235 (236).
 (19) 18 Ind Cas 363 (363) (F B) (Mad).
 (25) AIR 1925 Cal 320 (320) : 52 Cal 128.
 (106) 3 Cal L Jour 257 (258).
 (106) 3 Cal L Jour 197 (198).
 (106) 4 Cal L Jour 509 (509).
Note 14
 (118) AIR 1918 Cal 883 (886) : 44 Cal 890.
 (82) AIR 1932 Bom 111 (112) : 56 Bom 28.
 (15) AIR 1915 Bom 59 (60) : 39 Bom 545.
 (14) 22 Ind Cas 71 (72) (Bom).
 (95) 19 Bom 198 (201).
 (94) 18 Bom 40 (42).
 (89) 13 Bom 517 (519).
 (88) 12 Bom 675 (677).
 (85) 9 Bom 22 (24).
 (95) 22 Cal 692 (708).
 (14) AIR 1914 Lah 490 (491) : 1914 Pun Re No. 100.
 (14) AIR 1914 Oudh 1 (18).

- Note 16**
 (113) 21 Ind Cas 404 (405) : 40 Cal 615.
 (107) 6 Cal L Jour 427 (431).
 (118) AIR 1918 P C 135 (136) : 43 Bom 376 : 46 Ind App 15 (PC). (Both for court-fee and jurisdiction.)
 (20) AIR 1920 Bom 105 (106, 107) : 44 Bom 331. (Do.)
 (94) 18 Bom 100 (103). (Do.)
 (12) 17 Ind Cas 163 (163) : 40 Cal 245.
 (105) 32 Cal 734 (739). (Both for court-fee and jurisdiction.)
 (12) 17 Ind Cas 44 (45) : 6 Sind LR 114. (Suit for rent, declaration of title and injunction.) [See also (88) 1888 Pun Re No. 163. (Suit for the removal of certain dams.)]
 (87) 1887 Pun Re No. 26. (Suit for removal of wall—Value of wall and land on which it stands—Punjab Courts Act S. 40, Cl. (a).)
 (87) 1887 Pun Re No. 5. (Suit for closing doorway—Value held to be difference in selling price of plaintiff's premises before and after the door was opened—Punjab Courts Act, S. 40, Cl. (a).]
 (107) 30 Mad 18 (21).
 (87) 10 Mad 371 (373).
 (96) 20 Bom 736 (742). (A suit for setting aside a decree is a suit for declaration.)
 (92) 15 Mad 501 (502).
 (89) 12 Mad 223 (225).
 [See also (14) AIR 1914 Lah 95 (95) : 1914 Pun Re No. 54. (Suit by occupancy tenant against his landlord.)]
 (92) 1892 Pun Re No. 145. [But see (97) 1897 Pun Re No. 18.]
 (107) 6 Cal L Jour 427 (434).
 (16) AIR 1915 Mad 948 (950) : 38 Mad 922 (F B).
 30PC, 19.

17. Suit to set aside adoption. — See Note 7, *supra*.
 18. Suit for removal of karnayan. — See Note 7, *supra*.
 19. Suit for cancellation and setting aside of documents. — See Note 7, *supra*.

20. Suit to enforce registration of documents. — See Note 7, *supra*.

21. Suit to remove trustees. — See Note 7, *supra*.

22. Suit between landlord and tenant. — In a suit for rent against a tenant, the amount claimed will determine jurisdiction also.¹ In a suit for recovery of the property leased from the tenant, the amount of the rent payable for one year next before the date of presenting the plaint will determine jurisdiction.²

23. Execution and claim cases. — See O. 21 R. 63.

24. Suit for restitution of conjugal rights. — See Note 7, *supra*.

- 24a. Suit for dissolution of Mahomedan marriage. — In *Burhan Mircha v. Mt. Khodaja Bibi*,¹ the question was raised as to whether a suit for the dissolution of a Mahomedan marriage could be instituted only in the Court of the District Judge (the principal Court of civil jurisdiction) corresponding to the chief kazi under the Mahomedan law, or whether the rule contained in this Section applies also to such a suit so that it can be instituted in the Court of the lowest grade within whose jurisdiction the valuation of the suit falls. In holding that the rule contained in this Section applies also to such suits, the Calcutta High Court observed as follows :

"It appears to us that the idea or notion that the principal Court of original jurisdiction under the British Government in India is vested generally speaking with the powers exercised by the kazi has been derived from cases relating to wakfs under Section 92, Civil Procedure Code, or to cases of granting of leases of wakf property. . . . The wakf cases must therefore be kept apart when we are considering the question of the forum regarding matrimonial matters where the parties are Mahomedans. . . . With regard to matrimonial disputes amongst the Mahomedans, however, the Civil Courts have taken the place of the kazis. . . . The question of jurisdiction is a question of procedure and not of substantive law. The substantive law has been saved to Moslems, but the procedure is to be of our British Indian Courts."

25. Miscellaneous suits. — The value of a suit for establishing a right of occupancy *wajyat* in a garden and for possession thereof is that of the interest claimed and not that of the entire interest in the land.¹ A suit by one shareholder to set aside a sale of the property held by several shareholders must be valued according to the value of the entire property, although the plaintiff asks for possession of his share alone.² The value of a suit to establish the validity of a charge upon a property is the amount of the charge or the value of the property, whichever is less.³

(13) 24 Mad L. Jour 233 (235). (Following 27

Note 22

1. See S. 7 (i) of the Court-fees Act, 1870, and S. 8 of the Suits Valuation Act.

[See also (103) 30 Cal 453 (457).]

2. See S. 7 (xi) (cc) of the Court-fees Act and S. 8 of the Suits Valuation Act.

3 (82) 4 Mad 339 (341).

2. (74) 21 South W R 68 (70).

1. (14) AIR 1914 Cal 530 (530).

Note 25

Court.)

1000—Suit can be instituted in Munsif's median marriage—Value of suit less than Rs.

2 Cal 79 (SB). (Suit for dissolution of Mahomedan marriage—Value of suit less than Rs.

1. (37) AIR 1937 Cal 189 (190, 191) : I.L.R. (1937)

Note 24a

26. Mode of valuation for appellate jurisdiction.—See Note 18 to S. 96.

27. Suits embracing two or more subjects.—In such cases the aggregate value of the different subjects included in the suit constitutes the value of the suit.¹

28. Objection to jurisdiction:—See Section 21.

29. Waiver of objection to jurisdiction.—See Note 5 to Section 9.

16. [S. 16.] Subject to the pecuniary or other limitations prescribed by any law,³ suits to be instituted where subject-matter situate.—suits —

(a) for the recovery⁴ of immovable property⁵ with or without rent or profits,

(b) for the partition of immovable property,⁶

(c) for foreclosure, sale or redemption⁷ in the case of a mortgage of or charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property,⁸

(e) for compensation for wrong to immovable property,⁹

(f) for the recovery of moveable property actually under distraint or attachment,¹⁰

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant¹² may, where the relief sought can be entirely obtained through his personal obedience,¹¹ be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides,¹⁴ or carries on business,¹⁵ or personally works for gain.¹⁶

Explanation.—In this section “property” means property situate in British India.

[1877, S. 16; 1859, S. 5.]

Note 27

1. (93) 16 Mad 328 (329). (Suit to redeem a kanom and for arrears of rent.)

(12) 16 Ind Cas 1005 (1007) : 36 Bom 628.

(81) 6 Cal 6 (8). (Whether claims are cumulative or alternative is immaterial.)

Synopsis

1. Legislative changes.
 2. Scope and object of the Section.
 3. Subject to the pecuniary and other limitations prescribed by law.
 4. Immovable property.
 5. Suits for the recovery of immovable property—Clause (a).
 6. Suits for partition of immovable property—Clause (b).
 7. Suits for foreclosure, sale or redemption—Clause (c).
 8. Suits for the determination of any other right to or interest in immovable property—Clause (d).
 9. Suits for compensation for wrong done to immovable property—Clause (e).
- Other Topics:* Suit to obtain relief respecting immovable property. See Note 7.
10. Suits for the recovery of moveable property actually under restraint or attachment—Clause (f).
 11. "Where the relief sought can be entirely obtained through his personal obedience"—Proviso.
 12. "Held by or on behalf of the defendant."
 13. Suits for specific performance of an agreement.
 14. "Actually and voluntarily resides." See S. 20, Note 3.
 15. "Carries on business." See S. 20, Note 8.
 16. "Personally works for gain." See S. 20, Note 11.
 17. Chartered High Courts.
 18. Explanation. See Notes 2, 5, 6, 9, 10 and 11.

1. Legislative changes.—The words "with or without rents or profits" have been added in clause (a). According to the report of the Select Committee the insertion of these words is intended "to remove any difficulty, there may be, where the defendant does not reside within the local limits of the Court within whose jurisdiction the property is situated." The word "sale" has been newly added in clause (c).

2. Scope and object of the Section.—This Section deals with local or territorial jurisdiction. Suits for the recovery of immovable property, or for the determination of any other right or interest in immovable property or for the recovery of immovable property actually under attachment must, under this Section, be instituted in the Court within the local limits of whose jurisdiction the property is situated.¹ The object of the Section is to limit the territorial jurisdiction of Courts in regard to the property that they are entitled to deal with.² As a rule therefore, Courts have no power to decide on rights and interests in property lying outside their local jurisdiction.³ The Explanation to the Section makes it also clear that Courts of this country have no power to entertain suits in respect of property situated outside British India.⁴

But the Section does not preclude the Courts from trying any question in respect of property lying outside their territorial jurisdiction where such question arises *incidentally*.⁵ Nor is the Section confined to suits involving *only* immovable

Section 16—Note 2

1. (90) 17 Cal 699 (703) (FB).
- (28) AIR 1928 Mad 1272 (1277). (Suit to set aside decision of Board under Madras Religious Endowments Act in respect of a temple of which the temple is situate.)
- [See (85) 12 Cal 225 (237, 238) : 12 Ind App 215 (PC). (High Court, by remanding suit to a Court not having jurisdiction over property cannot confer jurisdiction.)]
2. (90) 17 Cal 699 (703) (FB).
- (99) 23 Bom 22 (31).
3. (99) 23 Bom 22 (31). (Interest in respect of property lying in a Native State.)

- (90) 17 Cal 699 (703) (FB). (Do.)
4. (81) 3 All 668 (572). (Property within the family domain of the Maharaja of Benares.)
- (18) AIR 1918 Nag 151 (152). (Suit for recovery of joshpan income—Suit relating to immovable property.)
- (35) AIR 1935 Nag 250 (255) : 31 Nag L R Sup 43 (FB). (Barrat is foreign territory.)
- (35) AIR 1935 Nag 192 (193) : 31 Nag L R 357. (Courts in British India have no jurisdiction to pass decrees in respect of property in Barrat which is a foreign territory.)
- (31) AIR 1931 Sind 47 (48) : 25 Sind L R 204. (Application to file an award covering immovable property outside local jurisdiction.)
5. (80) 5 Cal 928 (931).

property. It applies to suits for the recovery of immovable property as well as moveable property provided the immovable property is situate, wholly or in part within the Court's local jurisdiction.⁶

3. Subject to the pecuniary and other limitations prescribed by law.—For pecuniary limitations, see Section 15, *ante*. For instances of other limitations, see the following—

1. A suit under Section 92 of the Code must be instituted in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government.
2. A suit regarding an infringement of copyright must, under Section 13 of the Copyright Act, III of 1914, be instituted only in the High Court or the District Court.
3. A suit against the Government or a Government officer in his official capacity must, in Bombay, under the Bombay Civil Courts Act, 1869, Section 32, be filed only in the High Court or the District Court.

4. Immovable property.—The phrase 'immovable property' has not been defined in the Code but 'moveable property' has been defined in Section 2 (18) as including growing crops. The definition of 'immovable property' in Section 3 (25) of the General Clauses Act, X of 1897 read with Section 2 (13) of the Code, will therefore govern the meaning of those words for the purposes of the Code.⁷ Under Section 3 (25) of the General Clauses Act, 'immovable property' includes :

1. land,
2. benefits to arise out of land, and
3. things attached to the earth, or permanently fastened to anything attached to the earth.

Land.—The word 'land' includes water covering the land and includes a *jalkar* or a right of fishery.³ *Jalkar* includes the right to drift stranded timber as well.³ The right to fish in territorial sea waters is, however, common to all and is not property of any kind.⁴

Benefits to arise out of land.—These include incorporeal hereditaments as issue out of, or are connected with immovable property so called and savouring of reality⁵ such as rights of common, rights of way and profits in *alieno solo* such as rents, pensions and annuities secured upon land.⁶ A right of ferry,⁷ a *hut*,⁸ an *ensemment*,⁹

it is not immovable property within the meaning of S. 9, Specific Relief Act, 1877. [*See* (91) 18 Cal 80 (82, 83).] (97) 1897 Pun Ra No. 48. (Do.) 3. (97) 24 Cal 504 (517) : 24 Ind App 38 (PC). 4. (77) 2 Bom 19 (48, 53). 5. (81) 5 Bom 322 (335). 6. (81) 5 Bom 322 (336). 7. (13) 18 Ind Cas 282 (283) : 35 All 156. 8. (09) 1 Ind Cas 520 (521) : 36 Cal 665. (96) 22 Cal 752 (755). But it is not immovable property within S. 9, Specific Relief Act, 1877 : *see* (03) 20 Cal 614 (617, 618). 9. (09) 4 Ind Cas 116 (117) (Cal). (Rivthib of Waj.) (75) 24 South W R 300 (300).

- (99) 23 Bom 22 (30). (Suit for varshasan allowance).
- (67) 4 Bom H C R 173 (175).
- (11) 10 Ind Cas 267 (267) (Mad).
- [*See also* (97) 19 All 450 (451).]
- (26) AIR 1931 Sind 50 (52) : 25 Sind L R 275. (Partition—Moveables alone within jurisdiction, immovables outside—No relief can be granted for immovables.)
1. *See* S. 3 of the General Clauses Act X of 1897.
2. (78) 3 Cal 276 (279).
- (98) 20 Cal 446 (448).
- (97) 24 Cal 449 (454). (A suit for arrears of rent of fishery.)
- (92) 19 Cal 544 (547, 554, 570, 571) (FB). (But

Note 4

1. *See* S. 3 of the General Clauses Act X of 1897.
2. (78) 3 Cal 276 (279).
- (98) 20 Cal 446 (448).
- (97) 24 Cal 449 (454). (A suit for arrears of rent of fishery.)
- (92) 19 Cal 544 (547, 554, 570, 571) (FB). (But

has been removed now by the provision of clause 13 of Section 2 of this Code that moveable property includes growing crops.²⁶ Titled butts are immovable property.²⁷ So are doors and windows which are fixed to, and are part of, a building.²⁸ For other illustrations, see the undermentioned cases.²⁹

5. Suits for recovery of immovable property—Clause (a).—This clause refers to suits to recover possession of immovable property where the title to that property is alleged by one side to be in him and by the other side to be in him. But as has been seen already in Note 2, the property must be one in British India.³⁰ Where the properties are within British India, but within the jurisdiction of different Courts, a suit for the recovery thereof may, under Section 17, be instituted in any Court within the local limits of whose jurisdiction any portion of such properties is situate.³¹

A suit for the recovery of property after setting aside a decree must be brought in the Court within whose local limits the property is situate though the decree may be that of another Court.³² But if the suit is merely to set aside the decree without anything more, it may be instituted in the Court which passed the decree though the properties affected by the decree are situate elsewhere.³³

6. Suits for partition of immovable property—Clause (b).—A suit for the partition of immovable property must be brought in the Court within whose jurisdiction the property is situate. As to where the properties are situated in different jurisdictions, see Section 17, *infra*. Where the property is situate outside British India, the Court cannot grant any relief in respect of such property.³⁴ It has, however, been held by the Lahore High Court that in a suit for accounts and for partition of joint family property some of which is situated in a foreign State, the Court could grant relief even in respect of the property situated in the foreign State.³⁵ The decision, if it is submitted, cannot be accepted as correct.

- (1900) 24 Bom. 81 (83). (Mango tree is not timber.)
 (198) 22 Bom 610 (611). (Under T. P. Act, trees pass with the land.)
 (195) 19 Bom 207 (208).
 (192) 16 Bom 353 (356).
 (1908) 7 Cal L Jour 152 (157, 166).
 (1975) 24 Suth W R 894 (394).
 (197) 20 Mad 58 (63, 66) (FB).
 (189) 12 Mad 208 (209): 1 Weir 758. (Tree Forest Act V of 1882, S. 6.)
 26. See Notes on S. 2, Cl. (13) ante.
 27. (168) 10 Suth W R 416 (417).
 (172) 17 Suth W R 309 (311) (FB).
 (194) 31 Cal 340 (342). (Under the Presidency Small Cause Courts Act.)
 (199) 4 Cal W N 470 (473). (Do.)
 (185) 11 Cal 164 (166). (Of a pucca building.)
 (190) 13 Mad 518 (520).
 (179) 4 Cal 946 (948). (Flour and oil mill, steam engine and boilers are fixtures and not goods and chattels under the Small Cause Courts Act when attached to the earth.)
 (31) AIR 1931 Rang 109 (111): 9 Rang 13. (Suit for damages for preventing plaintiff from removing buildings and materials.)

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 (197) 20 Mad 58 (63, 66) (FB).
 (189) 12 Mad 208 (209): 1 Weir 758. (Tree Forest Act V of 1882, S. 6.)
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 27. (168) 10 Suth W R 416 (417).
 (172) 17 Suth W R 309 (311) (FB).
 (194) 31 Cal 340 (342). (Under the Presidency Small Cause Courts Act.)
 (199) 4 Cal W N 470 (473). (Do.)
 (185) 11 Cal 164 (166). (Of a pucca building.)
 (190) 13 Mad 518 (520).
 (179) 4 Cal 946 (948). (Flour and oil mill, steam engine and boilers are fixtures and not goods and chattels under the Small Cause Courts Act when attached to the earth.)
 (31) AIR 1931 Rang 109 (111): 9 Rang 13. (Suit for damages for preventing plaintiff from removing buildings and materials.)
1. (19) AIR 1919 All 350 (350): 41 All 513.
 2. (18) AIR 1918 Nag 151 (152).
 (165) 2 Mad H O R 437 (438). (Property in Pudukkottah State.)
 (10) 7 Ind Gas 67 (67) (Mad). (Property in Cochin.)
 3. (08) 30 All 560 (566, 568).
 (06) 33 Cal 1065 (1075).
 (01) 5 Cal W N 559 (561).
 4. (06) 8 Bom L R 516 (516).
 (24) AIR 1924 Pat 831 (831).
 (01) 5 Cal W N 559 (561).
 Note 6
 1. (28) AIR 1928 Nag 295 (295, 296): 24 Nag L R 96.
 2. (23) AIR 1923 Lah 551 (553).
 [But see (27) AIR 1927 Sind 160 (161): 23 Sind L R 46.]

7. Suits for foreclosure, sale or redemption—Clause (c).—Suits for foreclosure¹ or for sale² or for redemption³ of a mortgage, being suits for reliefs respecting immovable property, must be brought within the local limits of whose jurisdiction the property is situate. If the land is therefore beyond the Court's local jurisdiction, the suit is incompetent.⁴ But a Court is not precluded in a suit for redemption from incidentally deciding questions relating to the mortgaged property held by the defendants outside the jurisdiction for the purpose of deciding plaintiff's right to recover the mortgaged property *within* the jurisdiction.⁵ A suit by a purchaser for contribution in respect of a payment made on account of an arrear of revenue against a person on whose part there is no personal obligation to pay but whose estate alone is liable, must be brought within the local limits of the jurisdiction of the Court where the property is situate.⁶ Where a party brings a suit on a hypothecation bond in a Court which has no jurisdiction over the hypothecated property, the decree passed can be looked upon only as a money decree.⁷

Where a suit, say for foreclosure or for redemption, is brought in the Court of a particular district within whose limits the properties are situate, but before final decree is passed the territorial jurisdiction of the Court is transferred to another Court, the original Court's jurisdiction is not lost and a final decree for foreclosure passed by the original Court is not bad; the reason is that once a Court gets validly seized of the case, the subsequent proceedings will not divest it of jurisdiction.⁸

8. Suit for the determination of any other right to, or interest in, immovable property—Clause (d).—A suit for the determination of any other right to, or interest in, immovable property must, under clause (d), be instituted in the Court within the local limits of whose jurisdiction the property is situate.¹ If the property be situate within jurisdiction, the Court has power to try a suit in respect thereof even though the parties may happen to be residents in a foreign State.^{1a} But it is unnecessary that the suit itself is for the purpose of determining such rights: it is not

Note 7

1. (83) 9 Cal 733 (735).
(65) Bourk O C 319.
(86) 1 Ind Jur (N S) 40.
2. (71) 15 Subh W R 277 (278).
(72) 18 Subh W R 269 (270).
(93) 17 Bom 570 (572).
(76) 1 Cal 168 (167) : 3 Ind App 1 (PC).
(72) 18 Subh W R 287 (287).
(68) 10 Subh W R 379 (379).
(68) 9 Subh W R 170 (173).
(64) 2 Mad H C R 307 (308).
3. (66) 1 Ind Jur (N S) 319.
(63) 1 Hyde 141.
(92) 19 Cal 361n (362n).
4. (66) 1 Ind Jur (N S) 319.
(75) AIR 1935 Nag 192(193):31 Nag L R 357.
(Mortgage of property in C. P. and Berar—
Suit in C. P. Court for sale of both property
—Court cannot pass decree for sale of Berar
property as it is foreign territory.)
[See (38) AIR 1938 Lah 226 (227). (Award
relating to mortgaged property situated at
Sialkot—Amritsar Court has no jurisdiction
to make order thing award under Arbitration Act.)]
5. (77) 1 All 431(433). (Account of all the mortgaged lands.)

Note 8

1. See cases in foot-note 5.
(04) 6 Bom L R 301(302). (Suit under O. 21, R. 103.)
(13) 21 Ind Cas 438 (440) (Cal).
(12) 17 Ind Cas 758 (758) (Mad). (Suit for declaration that the mortgage is not binding.)
(01) 2 Upp Bur Rul 216. (Suits under O. 21 R. 63)
[See also (69) 1 N W P H C R 288 (289). (Suit for a mahikana allowance.)]
1a. (15) AIR 1915 Mad 116 (116). (Suit for rent of lands in British territory belonging to a temple in French territory.)

[See also (80) 5 Cal 928 (930).]
6. (16) AIR 1916 Mad 980 (981) : 39 Mad 795.
7. (86) 8 All 117 (119).
(75) 23 Subh W R 123 (125).
[See also (04) 27 Mad 118 (119, 120).]
8. (25) AIR 1925 Mad 117(118). (Unless it is specially removed by a competent authority.)
(32) AIR 1932 Sind 67 (69). (Subsequent finding that no property is situate within the jurisdiction will not divest the jurisdiction of the Court.)
[See also (10) 8 Mad L J 299 (300).]
See also Note 4 to S. 21 where this aspect is fully discussed.

enough, for the clause to apply, to say that the relief granted in the suit would *indirectly* affect rights in immovable property.^{1b} Thus, a suit for a declaration that a will is a forgery,² or that a certain adoption is invalid,³ or a suit for an administration of an estate which does not involve a direct dealing with property outside jurisdiction,⁴ or a suit for dissolution of partnership,⁵ or to have certain lands registered as owner in the revenue records,⁶ or for money paid as compensation for land acquired under the Land Acquisition Act,⁷ or a suit on an agreement to lease,⁸ is not within this clause notwithstanding the fact that the relief claimed may indirectly affect rights to or interest in immovable property.

Suits in respect of the following rights have been held to be suits for the determination of an interest in immovable property:—

1. A right to a *toda giras hak*.⁹
2. A right to the possession and management of a *sarvanjam*.¹⁰
3. A right to open a water-course through land.¹¹
4. A right to hold land free of Government assessment.¹²
5. A mortgage right.¹³
6. *Varsahas* (annual allowance) charged on immovable property.¹⁴
7. A right to levy toll on all imports and exports from a State into British territory.¹⁵
8. A right to emoluments of a hereditary office arising out of a grant by the sovereign power,¹⁶ but not if the emolument is due by custom.¹⁷
9. A right to eject a person from land coupled with a right to recover rent.¹⁸
10. A right to *future* rent where such right is denied,¹⁹ but not a right to arrears of rent *accrued due*.²⁰
11. A right to maintenance or other amount to be charged on immovable property.²¹

- 1b. (28) AIR 1928 Mad 109 (110). (Suit for cancellation of a will.)
- (81) AIR 1981 Lah 678 (674). (Suit for accounts of factory for particular year—Not an interest in immovable property.)
2. (28) AIR 1923 Mad 109 (110).
3. (29) 30 Mad L W 691 (695, 696).
4. (21) AIR 1921 Low Bur 82 (86, 87) : 11 Low Bur Rui 188. (Administration suit dealing directly with property within jurisdiction—S. 16 (d) applies.)
- [See (26) AIR 1926 Lah 508 (504). (Overruling AIR 1926 Lah 456).]
5. (19) AIR 1919 All 350 (350) : 41 All 513. [See also (03) 30 Cal 369 (383).]
6. (95) 19 Bom 43 (45).
7. (88) 6 Mad 344 (347).
- [But see (08) 1908 Pun Re No. 122, (House in foreign State sold by British Indian Insolvency Court—Suit for share in sale proceeds on the ground of plaintiff being co-sharer in the house—*Held* suit fell under Cl. (d) of S. 16, C. P. Code.]]
8. (74) 22 Suth W R 287 (287).
- [But see (06) 33 Cal 1065 (1075). (Possession of land also claimed.)
9. (73) 1 Ind App 34 (53) (P C).
10. (91) 15 Bom 247 (255).
11. (65) 4 Suth W R 107 (107).
12. (74) 11 Bom H C R 1 (2). (A case under Limitation Act.)
- [But see (98) 20 All 35 (36, 37) (P B).]
18. (74) 8 Mad H C R 100 (102). (Mortgage of a house standing on site exclusive of site—Limitation Act.)
14. (99) 28 Bom 22 (26).
15. (09) 2 Ind Cas 489 (489) : 33 Bom 873. (1837) 2 Moo Ind App 23 (35, 36) (P C).
16. (1837) 2 Moo Ind App 23 (35, 36) (P C). (82) 6 Bom 512 (515) (P B). (Baita or Aya allowance—3 Bom 28, Not followed.)
17. (99) 22 Mad 351 (352).
18. (28) AIR 1928 Cal 619 (621). (Under S. 66, same Act. See also S. 144 of the Bengal Tenancy Act.
19. (99) 23 Bom 22 (30).
- (95) 5 Mad L Jour 95 (99).
20. (69) 6 Bom H C R A O 29 (30).
- (97) 19 All 450 (451).
- (28) AIR 1928 Cal 619 (621).
- (16) AIR 1916 Bom 272 (273) : 40 Bom 337.
- (71) 15 Suth W R 277 (278). (Suit to declare land liable for a debt.)
- (26) AIR 1926 Lah 660 (661). (Suit for money due on pro-note and for charge.)
- (95) AIR 1935 Mad 1043 (1043). (Suit by Hindu widow for maintenance coupled with prayer for charge on lands.)

12. Suit under Paragraph 20 of Schedule II, to file an award declaring the proprietary title to immovable property.²²

Where a dispute referred to arbitration out of Court involves the determination of a right to or interest in immovable property, the Court will have no jurisdiction to file the award if the property is situate outside the jurisdiction of such Court.²³

9. Suits for compensation for wrongs done to immovable property — Clause (e). — This clause applies to all wrongs of a civil nature affecting immovable property, such as trespass,¹ nuisance, etc.² Such suits must be instituted in the Court within the local limits of whose jurisdiction the property is situate.³

10. Suits for the recovery of moveable property actually under distraint or attachment — Clause (f). — It is a general maxim of law that moveables follow the person — *mobilia sequuntur personam*. They have no visible locality of their own and follow the law of the person.¹ Where, however, moveable property is attached, the locality becomes fixed and a suit to recover such property must be instituted in the Court within whose jurisdiction it is.² Thus, where moveable property situated in a foreign State and belonging to a person within the jurisdiction of a British Indian Court is under attachment of a Civil Court of such foreign State, the British Indian Court has no jurisdiction to deal with such moveable property.³

11. "Where the relief sought can be entirely obtained through his personal obedience" — Provision. — This proviso is based on the well known maxim *equity acts in personam* whereby the Court looks to the fulfilment of its decree to the person of the defendant.¹ The principle on which this maxim itself is based is that Courts can give relief in suits respecting immovable property situate abroad by enforcing their judgments by process *in personam*, i. e., by arrest of the person of the defendant or by attachment of his *personal property*.² But in order to do this it is essential that the defendant must either reside or carry on business or personally work for gain within the local limits of the jurisdiction of the Court. In *Living v. Orr Bwing*,³ Lord Selborne observed as follows :

"The Courts of Equity in England are, and always have been, Courts of conscience operating *in personam* and not *in rem*; and in the exercise of this *personal* jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so, as to land, in Scotland, in Ireland, in the Colonies, in foreign countries."

The jurisdiction of Courts in this country is governed and must be ascertained by the same principles except so far as they may be at variance with the legislative

- (99) 9 Ind Cas 930 (931) : 33 Mad 131.
- (81) AIR 1931 Sind 47 (48) : 25 Sind LR 204.
- (Suit on award creating a charge on immovable property.)
- [See also (64) 2 Mad HCR 307 (308). (Debt with a charge on immovable property.)]
- [But see (83) 9 Cal 535 (555).]
- (22) (38) AIR 1933 All 380 (382) : 55 All 542.
- (34) AIR 1938 Lah 226 (227).
- (34) AIR 1934 Lah 652 (653).
- (34) AIR 1934 Sind 183 (184).
- Note 9
1. (93) 20 Cal 689 (692).
2. (22) AIR 1922 Bom 188 (188) : 46 Bom 108.
- (95) 22 Cal 877 (885). (Suit for damages caused by trespass on plaintiff's land and for cutting

1. (1750) 1 Ves Sen 444 (454), Penn v. Baltimore.
- [See also (709) 1 Ind Cas 927 (928) : 36 Cal 233.]
2. (1750) 1 Ves Sen 444 (447). Penn v. Baltimore.
3. (1883) 9 App Cas 34 (40).
- [See also (1902) 2 Ch D 132 (140), Dunder V. Amster Danish Trustees.]

Note 11

3. (12) 14 Ind Cas 279 (282) (Mad).

moveables is by actual seizure.

2. See O. 21, R. 43 under which attachment of

Note 10

3. (99) 13 O P L R 48 (49).

crops. But a suit for damages to the crops only

is a suit for damages to moveable property.)

enactments.⁴ Such jurisdiction must, with regard to the High Court,⁵ be considered with reference to the Letters Patent and the general jurisdiction which it has inherited from the Supreme Court administering the Chancery Rules, and, with regard to the provincial Courts with reference to this proviso. It must be noted, however, that the only cases in which Courts of Equity in England exercise jurisdiction *in personam* are cases of *contracts* such as suits for the specific performance of contracts for sale of land⁶ or for foreclosure, sale or redemption of a mortgage;⁷ (b) cases of *fraud* as where lands abroad have been acquired by the fraud of a party residing within the jurisdiction,⁸ and (c) cases of *trust* as where a suit is filed against a person residing within jurisdiction, to enforce an express trust affecting land outside jurisdiction.⁹ But suits *directly involving title to property*, such as suits for the recovery,¹⁰ partition,¹¹ or damages for trespass¹² of immovable property situate abroad, will not be entertained.

The proviso applies only —

1. Where the relief is respecting *immovable property* situated *within* and not beyond British India.¹³ It has been held by the High Court of Madras that if the relief sought is in respect of *movable property* situate in a foreign State and can be obtained entirely through the personal obedience of the defendant, within the jurisdiction, a decree *in personam* can be passed.¹⁴ It has also been held by the High Court of Bombay and by the Judicial Commissioner's Court at Nagpur that even if the proviso may not be applicable to cases of land situate outside British India, the English law with regard to jurisdiction *in personam* will apply to Courts in India and that accordingly a suit to recover mesne profits of land situated outside British India can be instituted in British India if the relief can be obtained entirely through the personal obedience of the defendant.¹⁵
2. Where such property is held by or on behalf of the defendant.¹⁶
3. Where the relief can be obtained entirely through the *personal obedience* of the defendant.¹⁵

The expression 'personal obedience' must be interpreted with special reference to the fact that the defendants reside, or work within the jurisdiction of the Court whose order is to be obeyed; the obedience must be such as the defendants could render

4. (1900) 24 Bom 407 (411).
5. (1874) AIR 1934 Sind 123 (127) : 28 Sind L R 54. (Suit to set aside partition of property outside British India, on the ground of undue influence of defendant.)
6. For decisions under Cl. 12, Letters Patent, embodying this maxim, see notes under Cl. 12, Letters Patent.
7. (26) AIR 1926 Nag 313 (318). (Suit to enforce registration of an agreement to surrender an occupancy holding.)
8. (1874) L R 18 Eq 118 (125), Page v. Ede.
9. (Foreclosure.)
10. (See also) AIR 1932 Bom 642 (650) : 57 Bom 234. (High Court can enforce sale of property situate in Native State.)
11. (31) AIR 1981 Bom 161 (162) : 55 Bom 536. (29) AIR 1929 Lah 449 (453).]
12. (1796) 3 Ves 170 (182), Lord Cranston v. Johnston.
13. (1846) 8 Beav 547 (568), Nelson v. Bridport.
14. (1883) 23 Ch D 743 (748), Hathorne Graham v. Massey.
15. (99) 23 Bom 22 (30).
16. (1675) 2 Ch Ca 214, Cartwright v. Pettus.
17. (1892) 2 Q B 558 (373), Compagnia de Mocambique v. British South Africa Company.
18. (1893) 1893 App Cas 602 (629, 634), British South Africa Company v. Compagnia de Mocambique.
19. (09) 2 Ind Cas 489 (490) : 38 Bom 873.
20. (12) 14 Ind Cas 279 (282) (Mad). (Pro-note attached by foreign State at defendant's instance.)
21. (22) AIR 1922 Bom 188 (188) : 46 Bom 108.
22. (1900) 24 Bom 407 (414). (Suit to establish a right to a share of income.)
23. (09) 2 Ind Cas 489 (489) : 38 Bom 373.
24. (28) AIR 1928 Nag 56 (58) : 23 Nag L R 170.
25. See Note 12 below.
26. (12) 17 Ind Cas 758 (758) (Mad). (Relief not obtainable through personal obedience — through personal obedience—Proviso does not apply.)
27. (93) 20 Cal 689 (692). (Relief not obtainable through personal obedience—Proviso does not apply—Damages to land by removing grass.)
28. (96) 20 Bom 495 (500). (Defendant living in foreign State—Proviso cannot be applied.)

14. "Actually and voluntarily resides." — See Section 20, Note 3.

15. "Carries on business." — See Section 20, Note 8.

16. "Personally works for gain." — See Section 20, Note 11.

17. **Chartered High Courts.** — This Section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction. The High Courts of Allahabad, Patna, Lahore and Nagpur have no original civil jurisdiction. In the case of the other High Courts, the exercise of their ordinary original civil jurisdiction is governed by Clause 12 of the Letters Patent. See Clause 12 of the Letters Patent (Calcutta, Madras and Bombay).

18. **Explanation.** — See Notes 2, 5, 6, 9, 10 and 11 above.

17. [S. 19.] Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

[1877, Ss. 19, 22, 23, 24; 1859, Parts of Ss. 11 and 12.]

Synopsis

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| <p>1. Legislative changes.</p> <p>2. Scope and object of the Section.</p> <p>3. "Courts."</p> <p>4. Selection of forum.</p> <p>5. Different causes of action.</p> | <p>6. Separate suits.</p> <p>7. Effect of withdrawing part of claim.</p> <p>8. Execution against property outside jurisdiction. See also Notes to Ss. 38 & 39.</p> <p>9. Chartered High Courts.</p> |
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Other Topics

Bar of second suit. See note 6.
 Multitartiousness. See note 5.
 Power to make decree over property outside Courts' local jurisdiction. See Note 2.
 Sanction (under Code of 1859). See Note 2, pt. (7).

1. **Legislative changes.** — Section 19 of the old Code corresponding to this Section, applied only where the properties were situate *within the limits of a single district* but within the jurisdiction of different Courts. The words "within the limits of a single district" have now been omitted.

2. **Scope and object of the Section.** — This Section is practically another proviso to Section 16. That Section provides, as has been seen already, that all suits for relief respecting, or for compensation for wrong done to, immovable property, shall be instituted in the Court *within whose jurisdiction the property is situate*. This

Section enacts that where a suit is brought in respect of property situated in the jurisdiction of different Courts, a suit in respect thereof can be brought in any one of the Courts and such Court can deal with the whole of the property, though some portion of it is situated outside its jurisdiction. And the rule applies whether several properties are situated in different districts or the same property extends over several districts.

The Section is intended for the benefit of suitors and to prevent multiplicity of suits. It embraces evidently all the suits relating to immovable property to which Section 16 may apply. But it applies only where the properties are situated in British India and in jurisdictions to which the Code applies. Under the Code of 1859, leave had to be obtained from a superior Court to institute a suit in one Court in respect of properties situated in several districts. No such sanction is now necessary.

The provisions of this Code have been made applicable by Section 135 of the Oudh Rent Act to rent suits provided they are not inconsistent with the provisions of that Act. There being no inconsistency in this Section, its provisions apply to rent suits in Oudh filed under the Oudh Rent Act.

Note 2

1. (87) 14 Cal 661 (666, 670). (Suit on mortgage.)
- (31) AIR 1931 Pat 292 (296); 13 Pat 156. (Do.)
- (30) AIR 1930 P C 188 (189); 57 Ind App 191; 54 Bom 495 (PC). (Suit for foreclosure or sale of a mortgage.)
- (03) 30 All 560 (561, 562) (PB). (Suit for recovery of immovable property.)
- (13) 21 Ind Cas 438 (442) (Cal). (Suit for declaration of title to immovable property — Cox, J., dissenting.)
- (07) 5 Cal L Jour 580 (581, 582). (Suit to set aside sale of immovable property.)
- (06) 33 Cal 1065 (1075). (Suit for specific performance in respect of properties in two districts.)
- (77) 2 Cal 445 (463, 465). (Award might be filed in any Court in which a suit in respect of the subject-matter of the award might be instituted.)
- (26) AIR 1926 Lah 503 (504). (Property in two Provinces—Probate proceedings pending in one—Administration suit in the other province is maintainable.)
- (10) 5 Ind Cas 885 (888) (Lah). (Suit for recovery of possession of properties situate both in Delhi and Almorah.)
- (98) 1898 Pun Re No. 91.
- (28) AIR 1928 Mad 820 (820). (Suit to set aside alienations of properties in different districts.)
- (89) 12 Mad 380 (386). (Suit for partition.)
- (29) AIR 1929 Oudh 341 (347) : 4 Luck 578. (Suit for rent of lands in different jurisdiction — Oudh Rent Act.)
- (28) AIR 1928 Oudh 67 (78). (Part of property was wakf in different jurisdiction — Wakf property being appendage of the estate — Court trying suit for the estate can also try claim to wakf.)
2. (82) 8 Cal 703 (705).
3. (91) 16 All 359 (363).
4. (1884) Coryton 125, Khotter Mohun v. Chundar Money.
5. (14) AIR 1914 P C 140 (148) : 42 Cal 116; 41 Ind App 197 (PC). (Land situate in the unsettled districts of Southern Parganas.)
- (30) AIR 1930 P C 188 (189, 190) : 57 Ind App 194 : 54 Bom 495 (PC). (The British Indian Court has no jurisdiction to try suit so far as property outside British India is concerned.)
- (94) 1691 All W N 4 (5).
- (38) AIR 1938 Bom 121 (124) : 1 L R (1937) Bom 895. (The Courts in Bengal are foreign Courts. The words in S. 17 'within the jurisdiction of different Courts,' mean Courts to which the Code applies proprio vigore and as such, the mere fact that the Code has been applied under the Foreign Jurisdiction Act, would make no difference to the application of S. 17 of the Code.)
- (35) AIR 1935 Nag 193 (193) : 31 Nag L R 857. (19) AIR 1919 P C 150 (152) : 42 Mad 818; 46 Ind App 151 (PC). (Property situate in scheduled districts.)
- (95) 17 All 483 (485). (Property in district removed from the jurisdiction of the Courts of civil judicature.)
- (81) 3 All 568 (573).
- (77) 1 All 481 (482) : 2 All 241 (247).
- (Where leave was not got under the Code of 1859 a decree could not be given in respect of properties outside jurisdiction : see 7 Cal 739 (744); 14 Cal 885 (888) and 22 Bom 922 (927). But even in such a case a money decree can be passed : see (1880) 5 Cal 928 (930).)
- (69) 12 Suth W R 328 (328).
- (91) 1891 Pun Re No. 10. (Code of 1882 no sanction.)
8. (29) AIR 1929 Oudh 341 (347) : 4 Luck 578.

3. "Courts."—The word "Courts" in Section 17 must be held as meaning Courts to which the Code applies. Thus, where some of the lands comprised in a mortgage are situated in the jurisdiction of Court A and some in a scheduled district to which the Code does not apply, the Court A cannot, in a suit for sale on the mortgage, order the sale of the property in the scheduled district.

4. **Selection of forum.**—The Section gives an option to the plaintiff of bringing his suit in any Court within whose jurisdiction a portion of the subject-matter is situate. This is based on the general principle of law that where a suit can be instituted in more Courts than one, the plaintiff has a right to select his own forum.

A portion of the property, however, must *actually be existing* in the jurisdiction of the Court in which the suit is brought. Where a mortgage deed mentioned non-existent property within one jurisdiction and existing property in another, and a suit was brought on the mortgage in the Court situated in the former jurisdiction, it was held that the Court was not competent to grant a decree for sale.

Where a suit in respect of a house and certain land was filed in a Court within whose jurisdiction the house alone was situate and an appeal from the decree in the suit was filed in the Court to which appeals lie from the decrees of that Court, it was held that the plaintiff abandoned his claim in respect of the house in appeal and that the appeal related only to the land which did not lie within the jurisdiction of the Appellate Court, would not affect the jurisdiction of that Court to hear the appeal.

5. **Different causes of action.**—Where a plaintiff has two or more causes of action in the suit, he can take advantage of the provisions of this Section if the joinder of such causes of action is permitted by the provisions of O. 1 R. 3 and O. 2 R. 3, *infra*.¹ If he cannot do so and the joinder of such causes of action is bad for multifariousness, then the suit cannot be tried in either of the Courts within whose jurisdiction the properties are situate.

Note 3

1. (30) AIR 1930 P C 188 (190); 57 Ind App 194; 54 Bom 495 (PC), (e.g., British Indian Courts.)
- (19) AIR 1919 P C 150 (152); 42 Mad 813: 46 Ind App 151 (PC).
- (36) AIR 1936 P C 189 (191); 63 Ind App 311: 15 Pat 567 (PC). (The choice given by S. 17 can be utilised only if the O. P. Code applies to both the Courts.)
- (14) AIR 1914 P C 140 (148); 42 Cal 116: 41 Ind App 197 (PC).
- (95) 17 All 483 (484, 485).
- (38) AIR 1938 Bom 121 (124); 1 L R (1937) Bom 895. (Courts in Benares and foreign Courts.)
- (79) 4 Cal 222 (228).
- (29) AIR 1929 Lab 24 (26). (Award as to property outside British India cannot be filed in a Court in British India.)
- (19) AIR 1919 P C 150 (152); 42 Mad 813: 46 Ind App 151 (PC).
- (30) AIR 1930 P C 188 (190); 54 Bom 495: 57 Ind App 194 (PC). (Mortgaged property partly in British India and partly out of British India.)
- [But see (34) AIR 1934 Pat 292 (296): 13 Pat 486. (Land situate partly in Gaya

District and partly in Southal Parganas.)]

Note 4

1. (05) 32 Cal 146 (150).
- (96) 19 Mad 477 (478).
- (37) 20 Nag L Jour 238 (240). (Choice of the forum is left to the plaintiff or applicant unless it is restricted by any rule of law.)
- 1a. (38) AIR 1938 Bom 121 (122); 1 L R (1937) Bom 895. (Section cannot give a Court jurisdiction unless defendants are in possession of some property within jurisdiction.)
2. (14) AIR 1914 P C 67 (71); 41 Cal 972 (988): 41 Ind App 110 (PC).
- (38) AIR 1938 Oudh 65 (69).

Note 5

1. (33) AIR 1933 Mad 622 (624).
- (94) 16 All 359 (362).
- (81) 7 Cal 739 (745).
- (01) 4 Oudh Cas 397 (403). (Jurisdiction depends on the allegation in the plaint as to the cause of action and subject-matter of the suit.)
2. (10) 5 Ind Cas 835 (838) (Lab).
- (85) 1885 All W N 125 (126).
- (13) 21 Ind Cas 438 (440) (Cal).

Section enacts that where a suit is brought in respect of property situated in the jurisdiction of different Courts, a suit in respect thereof can be brought in any one of the Courts and such Court can deal with the whole of the property, though some portion of it is situated outside its jurisdiction. And the rule applies whether several properties are situated in different districts or the same property extends over several districts.

The Section is intended for the benefit of suitors and to prevent multiplicity of suits. It embraces evidently all the suits relating to immovable property to which Section 16 may apply. But it applies only where the properties are situated in British India and in jurisdictions to which the Code applies. Under the Code of 1859, leave had to be obtained from a superior Court to institute a suit in one Court in respect of properties situated in several districts. No such sanction is now necessary.

The provisions of this Code have been made applicable by Section 135 of the Oudh Rent Act to rent suits provided they are not inconsistent with the provisions of that Act. There being no inconsistency in this Section, its provisions apply to rent suits in Oudh filed under the Oudh Rent Act.

Note 2

1. (87) 11 Cal 661 (666, 670). (Suit on mortgage.) (34) AIR 1931 Pat 292 (296); 13 Pat 486. (Do.) (30) AIR 1930 P C 188 (189); 27 Ind App 194; 54 Bom 495 (PC). (Suit for foreclosure or sale of a mortgage.) (08) 30 All 560 (561, 562) (PB). (Suit for recovery of immovable property.) (13) 21 Ind Cas 438 (442) (Cal). (Suit for declaration of title to immovable property — Cox, J., dissenting.) (07) 5 Cal L Jour 550 (551, 552). (Suit to set aside sale of immovable property.) (06) 33 Cal 1065 (1075). (Suit for specific performance in respect of properties in two districts.) (77) 2 Cal 445 (463, 465). (Award might be filed in any Court in which a suit in respect of the subject-matter of the award might be instituted.) (26) AIR 1926 Lah 503 (504). (Property in two Provinces—Probate proceedings pending in one — Administration suit in the other province is maintainable.) (10) 5 Ind Cas 895 (898) (Lah). (Suit for recovery of possession of properties situate both in Delhi and Almorah.) (98) 1898 Pun Re No. 91. (28) AIR 1928 Mad 820 (820). (Suit to set aside alienations of properties in different districts.) (89) 12 Mad 380 (386). (Suit for partition.) (29) AIR 1929 Oudh 341 (347); 4 Luck 578. (Suit for rent of lands in different jurisdiction — Oudh Rent Act.) (28) AIR 1928 Oudh 67 (78). (Part of property was wakf in different jurisdiction — Wakf property being appendage of the estate — Court trying suit for the estate can also try claim to wakf.)
2. (82) 8 Cal 703 (705).

3. (94) 16 All 359 (363).
4. (1884) Coryton 125, Khotter Mohun v. Chund der Monoy. (61) S D N W P 658.
5. (14) AIR 1914 P C 140 (148); 42 Cal 116; 41 Ind App 197 (PC). (Land situate in the unscattered districts of Southern Parganas.) (30) AIR 1930 P C 188 (189, 190); 57 Ind App 194; 54 Bom 495 (PC). (The British Indian Court has no jurisdiction to try suit so far as property outside British India is concerned.) (94) 1894 All W N 4 (5).
- (98) AIR 1938 Bom 121 (124); I L R (1937) Bom 895. (The Courts in Barar are foreign Courts. The words in S. 17 'within the jurisdiction of different Courts,' mean Courts to which the Code applies proprio vigore and as such, the mere fact that the Code has been applied under the Foreign Jurisdiction Act, would make no difference to the application of S. 17 of the Code.) (35) AIR 1935 Nag 192 (193); 31 Nag L R 857. (19) AIR 1919 P C 150 (152); 42 Mad 818; 46 Ind App 151 (PC). (Property situate in scheduled districts.) (95) 17 All 488 (485). (Property in district removed from the jurisdiction of the Courts of civil judicature.)
7. (81) 3 All 568 (578).
- (77) 1 All 431 (432); 2 All 241 (247).
- (Where leave was not got under the Code of 1859 a decree could not be given in respect of properties outside jurisdiction; see 7 Cal 789 (744); 14 Cal 895 (838) and 22 Bom 922 (927). But even in such a case a money decree can be passed; see (1880) 5 Cal 928 (930).)
- (91) 1891 Pun Re No. 10. (Code of 1882 no sanction.)
8. (29) AIR 1929 Oudh 341 (347); 4 Luck 573.

6. Separate suits.—Where the plaintiff has a cause of action in respect of properties situated within the jurisdiction of different Courts, there are two courses open to him—

- (1) he may file a suit on the *whole* claim in *any* one of the Courts, or
- (2) he may file separate suits on the same cause of action in respect of each of the properties situated within the jurisdiction of the said Courts,¹ and none of such suits will operate as a bar to the others.² In other words, it leaves untouched the jurisdiction of each Court to entertain a suit in respect of the portion of the property situate within its jurisdiction.³

7. Effect of withdrawing part of claim.—The subsequent withdrawal of a part of the claim does not affect the jurisdiction of the Court to dispose of the other part of the claim. Thus, where a suit is brought in Bareilly in respect of the properties situate, one in Bareilly District and the other in the district of Bara Banki and the claim in respect of the lands in Bareilly is withdrawn or compromised or abandoned by the plaintiff, the Bareilly Court does not thereby lose its jurisdiction to proceed to adjudicate on the claim respecting the property in Bara Banki unless the withdrawal or compromise or abandonment is fraudulent or is a mere device to evade the provisions of the Code as to local jurisdiction.¹ Similarly, the fact that at the time of the decision the plaintiff is found not to have title to a portion of the property within jurisdiction, as alleged, does not take away the jurisdiction unless the inclusion of such portion is not *bona fide*.² The principle is that when once jurisdiction is vested in Courts, it cannot be divested by any act of the parties.³

8. Execution against property outside jurisdiction.—The provisions of Sections 38 and 39 indicate that the general principle of law is that no Court can execute a decree in which the subject-matter of the suit or of the application for execution, is property situated *entirely* outside the local limits of its jurisdiction.¹⁻² Suits under this Section in respect of properties within the jurisdiction of more Courts than one are an exception to this rule. Where a Court has acquired, under this Section, jurisdiction over property situated partly within its limits and partly outside it, it will continue in execution proceedings also.³ For instance, a Court that has jurisdiction to pass a decree for sale of property comprised in a mortgage can sell the *whole* of the property in execution of the decree even though a portion of the property be situated outside the local limits of its jurisdiction.⁴ The reason is that the proceedings in execution of a decree are only a continuation of the proceedings in

Note 6

1. (17) AIR 1917 Mad 350 (351). (Suit for partition.)

Note 7

1. (67) 3 Mad H C R 376 (377).
 2. (84) 1884 Pun Re No. 162.
 3. (67) 3 Mad H C R 376 (377).
- [See also (95) 28 Mad 216 (223, 224).]
(70) 5 Mad H C R 419 (421, 422).]

1. (08) 30 All 560 (566, 567) (FB). (Compromise.)
- (89) 12 Mad 380 (386). (Withdrawal.)
- [See also (94) 16 All 359 (363). (Do.)]
- 1a. (30) AIR 1930 Nag 189 (191): 26 Nag L R 103.
2. (03) 30 All 560 (566) (FB).
- (30) AIR 1930 Nag 189 (191): 26 Nag L R 103.

Note 8

- 1-2. (11) 14 Cal L Jour 228 (231) : 38 Cal 104.
- (90) 17 Cal 699 (703) (FB).
- (91) 18 Cal 526 (533).
- (75) 23 Subh W R 233 (234).
3. (92) 19 Cal 13 (15).
- (93) AIR 1933 Lah 687 (687) : 14 Lah 457.
- (95) 22 Cal 871 (875).
- (94) 21 Cal 639 (641).
- (87) 14 Cal 661 (668, 670).
- (86) 12 Cal 307 (312).
- (83) 12 Cal L Rep 404 (406).
- (82) 8 Cal 703 (705).
- (73) 11 Beng L R 56 (64, 66).
- (25) AIR 1925 Pat 139 (139, 140).

4. See the cases in foot-note (3).
[See also (75) 23 Subh W R 154 (155).]

property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

Synopsis

1. Scope and principle.
2. Allegation of uncertainty.
3. Effect of not recording statement as to uncertainty.
4. Objection to jurisdiction.
5. Immovable property. See Notes to Section 16, *supra*.

Other Topics

Absence of notification creates reasonable uncertainty. See Note 2, Pt. (v).
 Execution proceedings, applicability to — See Note 1, Pt. (1).
 Whether adjudication by Revenue authorities of boundaries binding. See Note 2, Pt. (1).

1. Scope and principle. — The object of the Section, as mentioned by Mr. Scoble, in his speech in the Supreme Legislative Council on the 10th March 1888, is "to avoid a difficulty as to jurisdiction which frequently arises where the boundaries of estates are destroyed by invalid action." The principle of this Section applies also to execution proceedings though it does not, in terms, bind persons like execution creditors.¹

The words "and unless there has been a consequent failure of justice" have been newly added, in order to prevent the taking of technical objections as to jurisdiction.

2. Allegation of uncertainty. — When an allegation as to the uncertainty of the property in dispute lying within the Court's jurisdiction is made, the Court must be satisfied that there is such uncertainty; and if so satisfied, it may record a statement and proceed with the case. It must try the question itself and cannot take the decision of a Revenue Court in respect of boundaries as settling the matter.² But a former decision of the Privy Council adjudging certain lands to be in a particular jurisdiction is binding upon the Courts and removes the uncertainty in the matter.³ When there has been no notification fixing the boundaries of a particular district, that fact might create a reasonable uncertainty as to whether a certain property is within that district or not.⁴

3. Effect of not recording statement as to uncertainty. — The non-recording of the statement as to uncertainty will not vitiate the decree where the

Section 18 — Note 1

1. (120) AIR 1920 Mad 505 (508); 43 Mad 135 (140).

Note 2

1. (101) 1901 Pun Re No. 1, p. 8.

(64) 1864 Suth W R 191 (192).

(69) 12 Suth W R 150 (150).

(69) 11 Suth W R 389 (391).

(67) 7 Suth W R 200 (201) (F B).

(66) 5 Suth W R 211 (211).
 (64) 1864 Suth W R 369 (369). (Award of the survey authorities is an award within the purview of S. 14 of Act VII of 1859 and while it so remains a suit in respect of it should not be instituted in the Court of another district.)
 2. (172) 18 Suth W R 182 (183) (P O).
 3. (97) 24 Cal 449 (454). (Suit for rent of fishery.)

Judge has, in fact, brought his mind to bear upon the question.¹ Even otherwise it will not vitiate the decree unless —

(1) it appears that no reasonable uncertainty existed at the time of the suit, and (2) there has been a failure of justice in consequence thereof.²

4. Objection to jurisdiction. — An objection to jurisdiction must be taken in the Court of first instance¹ and unless so taken, the decree of the trial Court cannot be set aside on the ground of uncertainty of its territorial jurisdiction.²

5. Immovable property. — See Notes to Section 16, *supra*.

19. [S. 18.] Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Suits for compensation for wrongs to person or moveables.

Illustrations

- (a) A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.
- (b) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

[1877, S. 18.]

Synopsis

- 1. Scope of the Section.
 - 2. Wrong to person or personal property.
 - 3. Suit must be one for compensation.
 - 4. Torts committed outside British India.
 - 5. "Resides."
 - 6. "Carries on business." See Section 20.
 - 7. "Personally works for gain." See Section 20.
- Suits against Government. See Note 5. Wrong. See Note 2.

Other Topics

1. Scope of the Section. — Having dealt with suits relating to *immovable property* in Sections 16, 17 and 18 *supra*, this Section proceeds to deal with another class of cases, namely suits for *compensation* for wrong done to the *person or personal property*. It declares that suits may be brought either where the wrong is committed, or where the defendant resides or carries on business or personally works for gain.¹ It applies to the High Courts and Chief Courts also.

Note 3

- 1. (01) 1901 Pun Re No. 1, p. 3.
- 2. (22) AIR 1922 Cal 345 (346) : 49 Cal 37.
- Note 4**
- 1. (08) 7 Cal L Jour 152 (167).

- 2. (98) 1 Oudh Cas 51 (53).
- (28) AIR 1928 Pat 324 (325) : 7 Pat 216.
- Section 19 — Note 1**
- 1. (15) AIR 1915 Mad 1206 (1207, 1208) : 39 Mad 433 (439). (Suit for damages for defamation committed outside British India.)

In order that the Section may apply —

(1) there must be a wrong done to the person or personal property, and

(2) the suit must be one for compensation therefor.

2. Wrong to person or personal property. — A wrong, in this Section, means the infringement of a legal right¹ and is consequently an *actionable* wrong.² Legal civil rights relate to the body, mind, or estate of a person and any invasion of such rights will constitute an actionable wrong.³ Where there is no legal injury, no action will lie.⁴

The Section, however, does not apply to all kinds of actionable wrongs but only to actionable wrongs to the *person* or to *moveable property*. Where wrongful criminal proceedings are instituted against a person and he is arrested thereunder, the arrest is a wrong done to his *person* and the Court of the place where he is arrested will have jurisdiction to try a suit in respect of such wrong.⁵ Where plaintiffs' cargo-boats are wrongfully seized by the defendant, the seizure is a wrong done to *moveable property*, and a suit in respect thereof can be brought at the place where the seizure was made.⁶ Where property is lost in one district and is found in another, a suit for its recovery may be instituted in the district in which it is found.⁷ In suits relating to moveable property the Court within whose jurisdiction the moveable property is kept has jurisdiction to try the case.⁸

3. Suit must be one for compensation. — Suits for injunctions, *e.g.* against disturbances of rights of patent and trade mark, are excluded from the scope of the Section.¹ Where the defendant has, by means of a tort, become possessed of a sum of money at the expense of the plaintiff, the plaintiff may elect to sue either for damages for tort or for the recovery of money wrongfully obtained by the defendant; the latter is based on an implied contract of agency, the defendant being fictitiously assumed to have rightfully received the money as the plaintiff's agent and to have failed to pay it over to his principal, the plaintiff. In the former case, the suit would be one falling within this Section and in the latter, within Section 20 *infra*.²

4. Torts committed outside British India. — The Section applies only to wrongs *in* British India. Cases of wrongs committed *outside* British India by

(26) AIR 1926 P C 88 (89) (P C). (Wrong committed in Persia—Suit could be brought at Quetta where defendant carried on business. Report of the Select Committee appended to Act No. III of 1877.)

(34) AIR 1934 AH 226 (230). (Suit for recovery of money.)

Note 2

1. (1860) 18 Moo P C 209 (241) : 15 H R 78 (90),

Rogers v. Rajendro Dutt.

2. (01) 25 Bom 230 (236). (Giving of false evidence is not an actionable wrong.)

3. (1898) 1898 App Cas 1 (73, 96), Allen v. Flood.

(01) 25 Bom 230 (236).

(1794) 1 Peak N P C 270, Tattleton v. McGawley.

(Intentional driving away of customers.)

(1881) 6 Q B D 333 (338), Bowen v. Hall.

(Inducing persons to break contracts.)

(1620) Cro Jac 567, Garrett v. Taylor. (Threatening servants.)

1. For a suit for infringement of copyright, see (1895) 19 Bom 557 (564).
 2. (36) AIR 1936 Sind 229 (231) : 30 Sind L R 182.
- Note 3**
8. (34) AIR 1934 AH 226 (230).
 7. (68) 9 Suth W R 586 (586).
 6. (05) 3 Low Bur Rul 164 (165).
 - where the offence is committed.
 - (95) 19 Bom 557 (564). (Offender must be sued.
 5. (70) 6 Beng L R 141 (144).
 - (1859) 7 Q B (N S) 175 (187), Barber v. Lister.
 - (1898) 1898 App Cas 1 (96), Allen v. Flood.
 - ship v. McGregor.
 - (1892) 1892 App Cas 25 (38), Moghal Steam-
 4. (1890) 26 L R Ir 268, Kearney v. Lloyd.
 - (Slander.)
 - (1895) 4 B & C 247 (255), Bromage v. Prosser.
 - contracts.)
 - (Inducing persons to commit breach of
 - (1863) 2 H & B 216 (227), Lamley v. Gye.
 - stage.)
 - Brandon. (Preconcerted hissing at actor on
 - (1910) 2 Camp 358 (369, 370), Clifford v.

defendants residing within the jurisdiction of the Court fall under Section 20 of the Code and not under this Section.¹

5. "Resides."—The word "resides" does not apply to legal entities such as the Government or a company, but to natural persons. Where therefore a tort is committed for which the Secretary of State is liable, the suit can be brought only where the tort was committed and not elsewhere on the ground that he "resides" there.¹ For fuller notes, see Section 20.

6. "Carries on business."—See Section 20.

7. "Personally works for gain."—See Section 20.

20. [S. 17.] Subject to the limitations aforesaid,² every suit shall be instituted in a Court within the local limits of whose jurisdiction —

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides,³ or carries on business,⁸ or personally works for gain;¹¹ or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court¹² is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution;¹³ or

(c) the cause of action,¹⁴ wholly or in part, arises.¹⁵

Explanation I.—Where a person has a permanent dwelling at one place and also a temporary residence⁴ at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence. *Explanation II.*—A corporation⁵ shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Note 4

1. (15) AIR 1915 Mad 1206 (1208) : 39 Mad 433.

Note 5

1. (27) AIR 1927 Mad 689 (690) : 50 Mad 449. (The case of a company is covered by the words "carries on business.")

Illustrations

(a) A is a tradesman in Calcutta. B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta and C at Delhi. A, B and C being together at Benares, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

[1877, S. 17; Letters Patent: Bombay, Calcutta and Madras, Cl. 12.]

Synopsis

1. Legislative changes.
2. Scope and principle of the Section.
3. "Actually and voluntarily resides."
4. Temporary and occasional residence—Explanation I.
5. Several places of residence.
6. Home non-existent or abandoned.
7. Compulsory residence.
8. "Carries on business."
9. Business through agent.
10. Secretary of State.
11. "Personally works for gain."
12. Leave of Court—Clause (b).
13. Acquiescence in institution.
14. Cause of action, meaning of.
15. "Wholly or in part arises."
16. Suits on contracts—General.
17. Place of making the contract.
18. Place of breach or non-performance in general.

Other Topics

- Ancestral home at one place and actual residence in another. See Note 3, Pt. (5).
- Bond—Cause of action for suit on. See Note 19, Pt. (3).
- Carrier—Suit relating to. See Notes 15, Pt. (1); Note 16; Note 18, Pt. (7).
- Cause of action in cases where goods are ordered to be sent by V. P. P. See Note 18 F-N (6).
- Cause of action in suits for compel registration of document. See Note 18, Pt. (16).
- Cause of action in suits for breach of contract of betrothal. See Note 18, F-N (1).
- Cause of action in suits for dowry. See Note 27, Pt. (2).
- Cause of action in suits for infringement of trade marks and copyright. See Note 24, F-N (2).
- Cause of action in suits on hath chitta. See Note 19, Pt. (8).
- Cause of action in suits for bailment. See Note 18, F-N (2), and Pt. (15).

19. Place where money is payable.
20. Suit for accounts against agent.
21. Suit for accounts in partnership cases.
22. Suits between banker and customer.
23. Suits on negotiable instruments.
- 23a. Suits on assigned debts.
24. Suit on torts.
25. Suit for custody of minor.
26. Suits for restitution of conjugal rights.
27. Suits for divorce.
28. Administration suits.
29. Suit to set aside decree on the ground of fraud.
30. Suit to set aside documents on the ground of fraud.
31. Suits against corporations—Explanation II.
32. Suits against foreigners.
33. Revision.
34. Chartered High Courts.

- Cause of action in suits for services rendered. See Note 18, Pt. (14).
- Debtor must seek the creditor. See Note 19, "Dwells" as meant in Clause 12 of the Letters Patent. See Note 3.
- Legacy. See Note 3, F-N (1).
- Letters of administration. See Note 28, Pt. (2).
- Plaintiff's right to select his forum. See Note 2, Pt. (8).
- Suit on contracts for sale of goods—Cause of action. See Note 18, Pt. (6).
- Suit to recover excess fare paid when goods are sent through railway. See Note 17, Pt. (15).
- Suit to recover money on a life insurance policy; where to be filed. See Note 19, Pt. (6).
- Voluntary residence. See Note 7.
- Zamindari business is not carrying on business within the meaning of this Section. See Note 8, Pt. (15).

1. Legislative changes.

- (1) The words "every suit" have been substituted for the words "all other suits" in the corresponding Section 17 of the Code of 1882.¹
 - (2) Explanation III to the old Section has been omitted and the words "wholly or in part" in clause (c) have been newly added.²
- Under the scheme of the Code actions are either those which relate to immovable property, or those which relate to the person or moveable property, or mixed actions partly relating to immovable property and partly personal. The first and the third classes of suits have been dealt with under Sections 16 to 18, *supra*. Sections 19 and 20 deal with the second class.

A Court gets jurisdiction under this Section if —

- (1) the defendant resides or carries on business or personally works for gain within the local limits of its jurisdiction, or
 - (2) the cause of action arises wholly or in part within such local limits.³
- If several causes of action are joined against a defendant, it is necessary that the Court should have jurisdiction over *all* causes of action.⁴ The *onus* is upon the plaintiff to establish one or other of the two facts mentioned above.⁵

After the question of *local* jurisdiction is decided, the question of *pecuniary* jurisdiction may arise before any plea affecting the suit is entertained.⁶

The rules stated in the various portions of the Section are *alternative*,⁷ and give a choice of forum to the plaintiff. This is based on the general principle of law that where a suit can be instituted in more Courts than one, the plaintiff has a right to *select his own forum*.⁸ And very strong reasons must be shown for depriving a plaintiff of such right.⁹ But a plaintiff cannot take advantage of his own default to choose his own *forum*.¹⁰ He cannot, after he has made his choice and

Section 20 — Note 1

1. ('03) 30 Cal 453 (456). (The words "all other suits" were held to mean all suits other than those mentioned in S. 16 of the old Code.)
 2. ('11) 11 Ind Cas 712 (713) : 34 All 49. (The change has not altered the meaning of "cause of action" in re: contracts.)
 1. ('96) 19 Mad 477 (478). (Plaintiff may choose the forum in which to bring the suit.)
 2. ('03) 30 Cal 453 (457).
 - (31) AIR 1936 Sind 229 (231) : 30 Sind L.R. 182.
 - (96) 19 Mad 477 (478).
 - (14) AIR 1914 Bom 211 (218, 214) : 20 Ind Cas 492 (494, 495) : 38 Bom 125.
 - (11) 9 Ind Cas 824 (824) (All). (Defendant neither residing nor cause of action arising within jurisdiction—Court has no power to entertain suit.)
 - (20) AIR 1920 Low Bur 22 (23). (Suit for restitution of conjugal rights.)
 4. ('84) 7 Mad 171 (173).
 - (95) 20 Bom 496 (500).
10. ('21) AIR 1921 Lab 213 (213, 214). (Payment to be made at D but made at L owing to plaintiff's default—L Court has no jurisdiction to try the suit.)

- (22) AIR 1922 Oudh 124 (126). (Accounts of several shops of plaintiff treated as one with consent of defendant — Cause of action for accounts is single and not separate.)
5. ('90) 14 Bom 541 (552).
- (80) 6 Cal L. Rep 417 (420).
- (30) AIR 1930 Bom 150 (151) : 54 Bom 192.
6. ('08) 30 Cal 453 (457).
- (10) 7 Ind Cas 718 (718) : 1910 Pun Re No. 83, p. 243.
7. ('13) 21 Ind Cas 789 (801) (Mad).
- (96) 19 Mad 477 (478).
- (05) 32 Cal 146 (150).
- (36) AIR 1936 All 514 (515).
- (23) AIR 1923 Mad 109 (111).
- (35) AIR 1935 Rang 310 (314).
- [See also ('29) AIR 1929 Sind 170 (171) : 28 Sind L.R. 365.]
9. ('14) AIR 1914 Low Bur 37 (39) : 7 Low Bur Rul 129.

selected the forum, be allowed to change the forum by withdrawing the suit to be filed elsewhere.^{10a} Nor will a Court get jurisdiction, where, in order to bring a suit within the jurisdiction, the plaintiff makes a false averment.¹¹ Where a Court once obtains jurisdiction over a suit, it is not deprived of it either by the fact that the place where the cause of action arises ceases to be situated within its jurisdiction,¹² or by the defendant changing his residence to a place beyond the local limits of its jurisdiction.¹³

3. "Actually and voluntarily resides."—A Court has jurisdiction to entertain a suit, if the defendant resides¹ or all the defendants reside² within its jurisdiction even if the cause of action arises outside it.³ But the residence must be an *actual* and not a constructive residence.⁴ Where a person actually resides outside the Court's jurisdiction but has his ancestral home within it, the latter fact would not give the Court jurisdiction.⁵

The word "reside" is not used in the same sense in all the Indian Acts or in other parts of the Code.⁶ It is in fact elastic and has been differently construed in different cases.⁷ In every case residence is a question of fact and it must depend upon

- 10a. (135) AIR 1935 Rang 310 (314).
11. (23) AIR 1923 All 137 (138) : 45 All 193.
12. (28) AIR 1928 Mad 746 (747).
- (138) AIR 1938 Nag 318 (320) : 29 Nag L R 842. (Appeal transferred to Additional Judge holding Court in a local area. Local area and the Court transferred to another district before judgment—Court has jurisdiction to deliver judgment.)
13. (69) 1869 Pura Ho No. 88.
- Note 3**
1. (93) 1898 Pura Ho No. 1 (P B).
- (71) 16 Subh W R 805 (805). (Suit for legacy—Place of heir's residence is proper forum.)
- (69) 11 Subh W R 64 (65).
- (13) 21 Ind Cas 789 (801) (Mad).
- (28) AIR 1928 Nag 295 (296) : 24 Nag L R 95. (Defendant living out of British India—No decree can be passed with regard to movables with him.)
2. (77) 1 Mad 340 (342, 343).
- [See also (106) 30 Bom 364 (390).
- (74) 13 Beng L R 91 (100). ("Defendant" in OI. 12 of the Letters Patent means "all the defendants".)]
3. (15) AIR 1915 Mad 1206 (1208) : 39 Mad 433.
- (68) 9 Subh W R 215 (216). (Defendant not residing within jurisdiction—Court has no jurisdiction.)
- (19) AIR 1919 All 350 (350) : 41 All 513. (Parties to partnership suit residing within jurisdiction of Court—Property outside British India—Suit maintainable)
- (21) AIR 1921 Bom 460 (460, 461) : 45 Bom 1228. (Partnership carried on in foreign territory—Partners residing within jurisdiction.)
- (69) 6 Bom H O R A O 29 (30). (Do).
- (23) AIR 1923 Cal 619 (621). (Suit for rent.)
- (26) AIR 1926 Mad 1207 (1208). (Loan borrowed at B—Debtor permanently residing at P and temporarily at B. P Court can try suit to recover the loan.)
- (28) AIR 1928 Nag 56 (58) : 23 Nag L R 170. (Suit for mesne profits of property outside British India.)
4. (67) 7 Subh W R 417 (417, 418).
- [See also (71) 3 N W F H O R 121 (123).]
- (1900) 2 Bom L R 605 (606).
- (1900) 2 Bom L R 605 (606).
- (33) AIR 1933 Lah 851 (851).
- (21) AIR 1921 All 193 (193).
- (17) AIR 1917 Lah 30 (31).
6. See S. 136, O. 3, R. 2 and O. 25, R. 1.
- (85) 8 Mad 205 (206).
- (94) 21 Cal 634 (638). (S. 5 of the Insolvency Act—Residence need not be permanent.)
- (96) 1896 All W N 170 (170). (S. 33 of the Registration Act, 1877—"Reside" has same meaning as that in S. 17 of the old Code—it does not include domicile.)
- (81) 6 Bom 100 (101, 102).
- (81) 8 Cal L R 14 (16). (S. 5 of the Insolvency Act—Residence for the purpose of prosecuting insolvency petition is not "residence" under the Act.)
- (74) 14 Beng L R 60 (74) : 1 Ind App 337 (P C). ("Reside" used in a will was construed to include occasional use of the house and keeping an establishment there.)
- (73) 11 Beng L R 254 (255). (S. 5 of the Insolvency Act—"Reside" includes occupation for trade whether or not accompanied by sleeping or dwelling.)
- (68) 1 Beng L R O G 84 (86). (S. 5 of the Insolvency Act—Residence for the purpose of filing petition is not "residence" under the Act.)
- (06) 16 Mad L Jour 238 (262) : 29 Mad 289. (Insolvency Act—Temporary residence is sufficient to give jurisdiction.)

the particular circumstances.⁸ It has also to be determined according to the intention of the Legislature as ascertained from the context and the particular provision in which the word occurs.⁹

Under the Code of 1859, the word used in this Section corresponding to this Section was 'dwell'. Clause 12 of the Letters Patent also provides that suits, other than those for land, may be brought in Chartered High Courts if the defendant *dwells*, or carries on business, or personally works for gain, within the local limits of the ordinary original jurisdiction thereof. Strictly speaking, the word 'dwell' seems to have a more extended signification than the word 'reside'¹⁰ and seems to imply a more permanent stay than that denoted by the word 'reside'.¹¹ Neither of the words, however, necessarily implies a permanent state of things.¹² A traveller putting up at an hotel, may be said, in one sense to reside there, but a man can be said to 'dwell' in the sense in which the term is used as giving jurisdiction, only in the place where he *ordinarily and permanently* resides;¹³ that is to say, in the place where his family or servants generally reside.¹⁴ The word 'residence' has also been held to denote the place where a person eats, drinks and sleeps, or where his family or servants eat, drink and sleep.¹⁵

The word 'dwell', as used in the Letters Patent, and the word 'reside' as used in Sections 16, 19 and 20, are however often treated as being synonymous¹⁶ and have been held to denote the fixed and permanent home of a man's wife and family, to which he has always an intention of returning.¹⁷ The decisions interpreting the former word may therefore be usefully looked to in construing the meaning of the latter word.

4. Temporary and occasional residence—Explanation I.—In order to give jurisdiction on the ground of residence, something more than a *temporary* stay is required.¹ It must be of a more or less permanent character, and of such a nature that the Court in which the defendant is sued is his natural form.² An *occasional* residence is therefore not sufficient.³⁻⁴ Where a person has a permanent residence at one place, he cannot be said to dwell, also at a place where he *casually* or *temporarily* resides, without the intention of remaining there.⁵ Where a *girl* residing permanently at N came to B at the invitation of devotees, and, while there, exchanged visits with his followers and stayed in a house which had been purchased by him for occasional

8. ('24) AIR 1924 All 669 (670).
9. ('79) 3 Bom 227 (229).
10. ('86) 8 Mad 205 (206).
11. ('71) 8 N W P H C R 121 (122).
12. ('79) 8 Bom 227 (229).
13. ('64) 2 Hyde 117 (119).
14. ('71) 3 N W P H C R 121 (122).
15. ('25) AIR 1925 All 140 (140).
16. ('67) 7 South W R 349 (350).
17. ('71) 3 Bom 227 (229).
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1. ('90) 14 Bom 541 (550).
2. ('90) 14 Bom 541 (552).
- 3-4. Marsh 64.
5. ('71) 3 N W P H C R 121 (122).
6. ('71) 3 N W P H C R 121 (122).
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85. ('71) 3 N W P H C R 121 (122).
86. ('71) 3 N W P H C R 121 (122).
87. ('71) 3 N W P H C R 121 (122).
88. ('71) 3 N W P H C R 121 (122).
89. ('71) 3 N W P H C R 121 (122).
90. ('71) 3 N W P H C R 121 (122).
91. ('71) 3 N W P H C R 121 (122).
92. ('71) 3 N W P H C R 121 (122).
93. ('71) 3 N W P H C R 121 (122).
94. ('71) 3 N W P H C R 121 (122).
95. ('71) 3 N W P H C R 121 (122).
96. ('71) 3 N W P H C R 121 (122).
97. ('71) 3 N W P H C R 121 (122).
98. ('71) 3 N W P H C R 121 (122).
99. ('71) 3 N W P H C R 121 (122).
100. ('71) 3 N W P H C R 121 (122).

one place—Cultivation in another.

(65) 2 Mad H O R 304 (305). (Dwelling at residence as a traveller.)

(20) AIR 1920 Low Bur 22 (23). (Casual residence.)

No. 112. (Ancestral home not a place of residence.)

(17) AIR 1917 Lab 30 (31): 1916 Pun Re (64) 2 Hyde 117 (119).

(94) 18 Bom 290 (292).

(1900) 2 Bom L R 605 (606).

change while on leave.

(63) 1 Bom H O R 113 (114). (A stay for a place is to have permanent abode there.)

selected the forum, be allowed to change the forum by withdrawing the suit to be filed elsewhere.¹⁰ Now will a Court get jurisdiction, where, in order to bring a suit within the jurisdiction, the plaintiff makes a false averment.¹¹

Where a Court once obtains jurisdiction over a suit, it is not deprived of it either by the fact that the place where the cause of action arises ceases to be situated within its jurisdiction,¹² or by the defendant changing his residence to a place beyond the local limits of its jurisdiction.¹³

3. "Actually and voluntarily resides."—A Court has jurisdiction to entertain a suit, if the defendant resides¹ or all the defendants reside² within its jurisdiction even if the cause of action arises outside it.³ But the residence must be an *actual* and not a constructive residence.⁴ Where a person actually resides outside the Court's jurisdiction but has his ancestral home within it, the latter fact would not give the Court jurisdiction.⁵

The word "reside" is not used in the same sense in all the Indian Acts or in other parts of the Code.⁶ It is in fact elastic and has been differently construed in different cases.⁷ In every case residence is a question of fact and it must depend upon

- 10a. (136) AIR 1935 Rang 310 (314).
 11. (123) AIR 1923 All 137 (138) : 45 All 193.
 See also Notes to S. 9.
 12. (28) AIR 1928 Mad 746 (747).
 (83) AIR 1933 Nag 818 (820) : 29 Nag L R 342. (Appeal transferred to Additional Judge holding Court in a local area. Local area and the Court transferred to another district before judgment—Court has jurisdiction to deliver judgment.)
 13. (69) 1869 Pun Re No. 88.
Note 3
 1. (93) 1893 Pun Re No. 1 (F B).
 (71) 16 South W R 305 (305). (Suit for legacy—Place of heir's residence is proper forum.)
 (69) 11 South W R 64 (65).
 (18) 21 Ind Cas 789 (801) (Mad).
 (28) AIR 1928 Nag 295 (296) : 24 Nag L R 96. (Defendant living out of British India—No decree can be passed with regard to movables with him.)
 2. (77) 1 Mad 340 (342, 343).
 [See also (76) 30 Bom 364 (390).
 (74) 13 Beng L R 91 (100). ("Defendant" in Cl. 12 of the Letters Patent means "all the defendants".)]
 3. (15) AIR 1915 Mad 1206 (1208) : 39 Mad 433. (Port committed outside British India.)
 (68) 9 South W R 215 (216). (Defendant not residing within jurisdiction—Court has no jurisdiction.)
 (19) AIR 1919 All 350 (350) : 41 All 513. (Parties to partnership suit residing within jurisdiction of Court—Property outside in Gwalior State—Defendant resident of British India—Suit maintainable.)
 (21) AIR 1921 Bom 460 (460, 461) : 45 Bom 1228. (Partnership carried on in foreign territory—Partners residing within jurisdiction.)
 (69) 6 Bom H C R A O 29 (30). (Do).
 (73) AIR 1923 Cal 619 (621). (Suit for rent.)
 (26) AIR 1926 Mad 1207 (1208). (Loan borrowed at B—Debtor permanently residing at F and temporarily at B. F Court can try suit to recover the loan.)
 (28) AIR 1928 Nag 56 (58) : 23 Nag L R 170. (Suit for mesne profits of property outside British India.)
 4. (67) 7 South W R 417 (417, 418). [See also (71) 3 N W P H C R 121 (123).]
 (1900) 2 Bom L R 605 (606).
 (1900) 2 Bom L R 605 (606).
 (1900) 2 Bom L R 605 (606).
 (33) AIR 1933 Lab 851 (851).
 (21) AIR 1921 All 193 (193).
 (17) AIR 1917 Lab 30 (31).
 6. See S. 136, O. 3, R. 2 and O. 25, R. 1.
 7. (85) 8 Mad 205 (206).
 (94) 21 Cal 634 (638). (S. 5 of the Insolvency Act—Residence need not be permanent.)
 (96) 1896 All W N 170 (170). (S. 38 of the Registration Act, 1877—"Reside" has same meaning as that in S. 17 of the old Code—it does not include domicile.)
 (81) 6 Bom 100 (101, 102).
 (81) 8 Cal L R 14 (16). (S. 5 of the Insolvency Act—Residence for the purpose of prosecuting insolvency petition is not "residence" under the Act.)
 (74) 14 Beng L R 60 (74) : 1 Ind App 387 (P O). ("Reside" used in a will was construed to include occasional uses of the house and keeping an establishment there.)
 (73) 11 Beng L R 254 (255). (S. 5 of the Insolvency Act—"Reside" includes occupation for trade whether or not accompanied by sleeping or dwelling.)
 (68) 1 Beng L R O 84 (86). (S. 5 of the Insolvency Act—Residence for the purpose of filing petition is not "residence" under the Act.)
 (96) 16 Mad L Jour 238 (262) : 29 Mad 239. (Insolvency Act—Temporary residence is sufficient to give jurisdiction.)

residence, he was held not to dwell in B.⁶ Similarly where an officer attached to a regiment at Vellore went on medical leave to Madras where he resided in a rented house and finally returned to Vellore, the latter was held to be the place where he dwelt.⁷ But where a person permanently residing in Mysore left his house in charge of a servant and went with his wife and family to Madras with the intention of remaining there for several months, it was held that he must be deemed to dwell at the latter place.⁸

In the case of persons in service, at any place, whether of the Government or of a private person,¹⁰ they will be deemed to dwell at the place of service, and not at the place where they should have a family house in which their parents live and which they occasionally visit. But a person in Government service who is liable to be sent to various places and may possibly be left at one place for several years cannot be said to have residence at the place where he is stationed for a temporary purpose only.¹¹

There is one exception to the rule that a person having a permanent residence at one place cannot be said to dwell also at another place where he *temporarily* resides, and that is provided for by Explanation I to the Section. Under the Explanation a person will be deemed to reside at the place of temporary stay also in respect of a cause of action arising at the place where he has such temporary residence.¹²

5. Several places of residence.—A man may have more than one place of residence at the same time¹ living sometimes at one and sometimes at another, and, during his temporary absence, each house though empty, if there be an *animus revertendi*, will still be his dwelling place.² In such a case he may be sued in the place where he is actually staying for the time being. Thus a person spending his time alternately in the mufassil and in Calcutta and who resided in Calcutta for some days previous to the filing of the plaint was held to reside in Calcutta for the purposes of jurisdiction.³

6. Home non-existent or abandoned.—Every person is deemed in law to have a dwelling or place of residence, and where he has none, he will be deemed to dwell at the place at which he may be *actually* staying at the time.¹

Illustrations

(A) A, who was the Political Agent at Kolhapur and was living in the Government House there, left it *en route* to England on a year's furlough after having sold off his furniture and stayed in Bombay for 3 days before sailing for England, held that A dwelt in Bombay so as to give jurisdiction to the Bombay High Court.²

(B) A, an officer attached to a regiment at S having availed himself of a furlough of 2 years and having retained no permanent place of residence at S or elsewhere, attended race meetings at

(1860) 29 L J Q B 70 (72), Kerr v. Haynes.
(1862) 21 L J Q P 27 (30), Macdougall v. Paterson.

[But see (12) 14 Ind Cas 573 (573) (Mad.)]

6. (90) 14 Bom 541 (552, 553).
(94) 18 Bom 290 (293).
(70) 5 Mad H C R 471 (472).
(11) 11 Ind Cas 447 (449) : 34 Mad 257 : 38

9. (92) 1892 All W N 115 (116).
Ind App 129 (P C).
(73) 10 Bom H C R 409 (410).
(67) 7 Subh W R 417 (418).

10. (73) 10 Bom H C R 409 (410).
[Contra (76) 1 All 51 (53).]
(11) 11 Ind Cas 851 (852) (Low Bur).

12. (78) 1878 Pun Re No. 75, page 878.
(93) AIR 1933 Lab 120 (121). (Suit can be

1. (01) 25 Bom 176 (178).
(65) Corryton 152 : Bourke O C 127, Morris v. Baumgarten.
[See (94) 21 Cal 634 (638).]
2. (01) 25 Bom 176 (178).

Note 6

(36) 164 Ind Cas 907 (913) (Cal).

3. (64) Corryton 24.

2. (75) 1 All 51 (52).

1 El & El 340 (345), Bailey v. Bryant.

(67) 7 Subh W R 349 (350).

1. (81) 3 All 91 (102) : 7 Ind App 196 (P C).

Note 5

brought at both places.)
(30) AIR 1930 Cal 347 (347) : 57 Cal 65.

of the Madras High Court, in 1 Madras High Court Reports 286 which has not been followed by that High Court in a later case.²³

It is not necessary that there should be a *head office* or a *regular place* of business in order to "carry on business." Thus, a person residing at A who goes twice or thrice a week to a friend's house at C and does business there will be held to carry on business there.²⁴

9. Business through agent.—As has been seen already, a business may be carried on through an agent¹ and it is not necessary that the principal should have ever gone to the place of business at all. But it is essential that the agent must be an agent in the *strict* sense of the term² and must attend exclusively to the business of the principal. A person conducting business at a place through *commission* agents or brokers³ or general agents⁴ cannot be held to carry on business there. A manager of a joint Hindu family is not an agent in the strict sense and the members of the family cannot be said to carry on business through him at any place.⁵

10. Secretary of State.—The words "carry on business" are inapplicable to the Secretary of State for India in Council.¹ Nor do the words "actually and voluntarily resides" apply to the Secretary of State. They refer only to *natural persons* and not to *legal entities*.²

11. "Personally works for gain."—It is sufficient to give a Court jurisdiction if the defendant personally works for gain within the local limits of its jurisdiction. To constitute work there must be some physical or mental effort.¹ A *guru* accepting presents and offerings from his *chelas* and invoking blessings upon

23. ('82) 4 Mad 209 (212).

24. ('64) 2 Hyde 79 (88).

24. ('71) 16 Suth W R O C 16 (27).

Note 9

1. See Note 8, Foot note 21.

See also the following cases :

('37) AIR 1937 All 208 (217) : 1 L R (1937) All

284.

('03) 26 Mad 544 (553) : 30 Ind App 220 (PC).

('98) 17 Bom 662 (665).

('80) 5 Cal 605 (610). (A trader, residing out

of the jurisdiction of High Court but carrying on business at Calcutta by agent, can be

adjudicated insolvent in Calcutta.)

(1900) 23 Mad 458 (472). (Person acting as

agent should be an agent in the strict and

correct sense of the term.)

2.

(1900) 23 Mad 458 (472).

('36) AIR 1936 Sind 175 (178) : 29 Sind L R

410. (Where jurisdiction is sought to be en-

forced against a person who carried on busi-

ness through an agent, such agent must be

an agent strictly so called and not a com-

mission agent or a broker or a general agent.)

('36) AIR 1936 Sind 121 (123) : 29 Sind L R

292. (Expression "carrying on business" does

not apply to an agent who is a mere post

office for bringing about contracts.)

[See also ('03) 26 Mad 544 (553) : 30 Ind

App 220 (PC). (Manager of joint Hindu

family property is not an agent of the

members of the family.)]

1. ('90) 14 Bom 541 (553, 554).

Note 11

2. ('30) AIR 1930 Lah 818 (819).

Cal 256.)]

Kindoch v. Secy. of State. (Cited in 14

[See also (1880) L R 15 Ch D 1 (9, 10),

('30) AIR 1930 Lah 818 (819).

('62) 1 Hyde 37 (41).

('87) 14 Cal 262n.

('13) 40 Cal 308 (317) : (Following 14 Cal 256.)

('87) 14 Cal 256 (272).

449. (Dissenting from 1 Mad H C R 286.)

1. ('27) AIR 1927 Mad 689 (690, 692) : 50 Mad

Note 10

(Where cases not referred to.)

[But see ('22) 67 Ind Cas 69 (70) (Lah).

5. ('03) 26 Mad 544 (553) : 30 Ind App 220 (PC).

('36) AIR 1936 Sind 121 (123) : 29 Sind L R

292.

410.

('36) AIR 1936 Sind 175 (178) : 29 Sind L R

410. (23) AIR 1923 Lah 427 (427).

who acted as broker also.)

4. ('66) 3 Mad H C R 146 (148). (General agent

292.

('36) AIR 1936 Sind 121 (123) : 29 Sind L R

410.

('36) AIR 1936 Sind 175 (178) : 29 Sind L R

410. ('37) AIR 1937 Sind 17 (18).

69. 11 Suth W R 530 (531).

3. ('71) 8 Bom H C R O C 102 (113).

them in return cannot be said to be personally working for gain.² An Advocate, who though residing outside the station where the High Court is located, appears in the High Court whenever he is engaged, works for gain within the local limits of the jurisdiction of the High Court.³ Similarly a person residing at A and coming constantly to Calcutta for making contracts, works for gain within Calcutta.⁴ As already observed, the carrying on of business may be either in person or through agents; but the *work for gain* must be *in person*. On this ground a person carrying on business through an agent cannot be said to *personally* work for gain where the agent carries on the business.⁵

The Government of India cannot be said to "work for gain" anywhere as the income obtained by it is held for the benefit of the Indian Exchequer.⁶

12. Leave of Court — Clause (b). — Where no part of the cause of action arises within the jurisdiction and some of the defendants reside outside it, leave to sue them all should be obtained, unless they *acquiesce* in the institution of the suit.¹ No leave is necessary where the cause of action arises within the Court's jurisdiction though some of the defendants reside outside it.^{1a} The clause is not to be read as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India. It makes no difference whether the defendants, in respect of whom leave is asked, are residents of British India though outside the local limits of the Court's jurisdiction or are residents outside British India.^{1b}

Under Clause 12 of the Letters Patent, it is necessary that the leave should be obtained *before* the institution of the suit.² Under clause (b) of this Section, however, the leave may be granted even *after* the institution of the suit.³ The leave may be given even after the decision of the preliminary issue as to jurisdiction, but before the plaint is ordered to be returned for presentation to the proper Court.^{3a} But it is necessary that the grant of leave should be distinctly sought and obtained⁴ and cannot be inferred from the plaintiff being allowed to continue the suit.⁵ In exercising its power to grant or refuse leave to sue, the question of convenience of parties should be taken into consideration.⁶ No notice is necessary to the defendants residing outside jurisdiction, of an application for grant of leave to sue under this Section.⁷ But the leave cannot be given arbitrarily, and when the defendants who reside outside jurisdiction do not appear, the Court is bound to consider their position

2. ('94) 18 Bom 290 (294).

('90) 14 Bom 541 (553, 554).

3. ('73) 6 N W P H C R 43 (45).

4. ('62) 2 Hyde 79 (83).

5. ('69) 11 Suth W R 530 (531).

6. ('87) 14 Cal 256 (274).

('62) 1 Hyde 37 (41, 42).

Note 12

1. ('22) AIR 1922 Bom 152 (153) : 46 Bom 229.

[See ('17) AIR 1917 Mad 404 (405).]

1a. ('29) AIR 1929 Sind 170 (171, 172) : 23 Sind

I R 365.

1b. ('38) AIR 1938 Mad 731 (733) : 1 I R (1938)

Mad 1080.

2. ('07) 34 Cal 619 (626).

1 Ind Jour (N S) 218.

('97) 21 Bom 126 (133).

('96) 20 Bom 767 (774, 775).

('91) 15 Bom 93 (97).

('87) 11 Bom 649 (652).

- ('74) 13 Beng L R 91 (98).
 For other cases, see the following :
 ('79) 4 Cal L Rep 366 (370).
 ('08) 35 Cal 394 (398, 399). (Objection that leave has not been properly obtained may be waived.)
 3. ('06) 30 Bom 570 (574).
 3a. ('33) AIR 1933 Sind 179 (180) : 27 Sind L R 230. (Discretion of trial Court as to grant of leave not to be lightly interfered with in appeal—But where Court refuses to exercise discretion Appellate Court may interfere.)
 4. ('91) 15 Bom 93 (98).
 ('80) 4 Bom 482 (488).
 5. ('03) 1903 Pun Re No. 27.
 6. ('07) 30 Mad 438 (440) (Application under Cl. 12, Letters Patent).
 ('04) 26 All 603 (605).
 ('21) AIR 1921 Low Bur 19 (19, 20) : 11 Low Bur Rul 26.

before granting leave. This obligation is in no way lessened when they do appear and object, especially when the objecting defendant is the real person against whom the plaintiff wants to proceed.^{7a} Where leave is granted under this clause without issuing notice to the opposite party, the Court can in the exercise of its inherent powers hear any objection against the grant of such leave and pass such orders as are necessary in the interests of justice.⁸

13. Acquiescence in institution.— Under Section 20 of the Code of 1882, which provided that any defendant not applying for stay of proceedings before the issues are settled, "shall be deemed to have acquiesced in the institution of the suit," it was held that if a non-resident defendant did not apply for a stay of proceedings, he should be taken to have "acquiesced" in the institution¹ though he objected to the jurisdiction in his *written statement*.² But the said Section has not now been re-enacted in the present Code as sufficient provision for transfer of suits has been made in Sections 22 to 24 of the Code. A defendant who *objects* to the jurisdiction will not be deemed to have acquiesced in the institution simply because he did not apply for transfer of the case.³ A defendant who *appears* and does not object to the jurisdiction, may, it is conceived, be held to have acquiesced in the institution.

Where a suit is brought against defendants some of whom reside within, and some without the jurisdiction of the Court, and neither the leave of the Court has been obtained nor acquiescence shown on the part of the defendants not residing within jurisdiction, the suit cannot proceed against those only of the defendants within jurisdiction.⁴

14. Cause of action.— As has been seen already in Note 2 above, a Court will have jurisdiction over a matter if the *cause of action* arises within the local limits of its jurisdiction.¹ And such jurisdiction is not affected by the death of the person originally liable.²

The words "cause of action" are sometimes used in a restricted sense and sometimes in a wider sense.³ In the restricted sense it means the circumstances forming the infringement of the right or the immediate occasion for the action.⁴ In its wider sense it means the necessary conditions for the maintenance of the suit, including not only the infringement of the right, but the infraction coupled with the right itself.⁵ It has been compendiously defined to mean every fact which it would be necessary

7a. (38) AIR 1938 Nag 262 (268).

8. (38) AIR 1938 Lah 266 (266, 267).

[But see (38) AIR 1938 Pesh 15 (17).]

Note 13

1. (98) 8 Mad L Jour 38 (39).

(88) 6 Mad 344 (349).

(06) 30 Bom 81 (83).

(85) 9 Bom 266 (268).

[But see (03) 1908 Pun Re No. 27.]

2. (98) 8 Mad L Jour 38 (39).

(06) 30 Bom 81 (82, 83).

3. (15) AIR 1915 Cal 62 (63).

4. (22) AIR 1922 Bom 152 (153) : 46 Bom 229.

Note 14

1. See the following cases :

(85) 9 Bom 454 (455).

(1900) 24 Bom 407 (413).

(90) 12 All 212 (216, 217).

(95) 22 Cal 833 (840).

(1900) 1900 Pun Re No. 93. (Suit against military officer—Court where cause of action

arises has jurisdiction.)

2. (62) 2 Hyde 18 (21).

[See also (72) 9 Bom H C R 429 (432).

3. (95) 22 Cal 833 (840).

(82) 4 All 428 (425).

(Case of action commenced in the Court where the plaintiff's rights were interfered with.)

4. (82) 9 Cal 105 (110).

[See also (83) 5 All 277 (279, 280).]

(68) 3 Mad H C R 384 (406).

(88) 5 All 163 (173) : 1882 All W N 202 (F.B).

(14) AIR 1914 Cal 854 (857). (Suit for injunction may be filed in the Court where the plaintiff's rights were interfered with.)

(13) 20 Ind Cas 347 (348) (Cal).

(02) 6 Cal W N 585 (588).

[See also (89) 12 Mad 184 (136).]

[See also (74) 14 Beng L R 367 (369).]

(68) 3 Mad H C R 384 (406).

(83) 5 All 163 (173) (F.B).

(87) 14 Cal 256 (270).

for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of *evidence* which is necessary to prove each fact, but every *fact* which is necessary to be proved.⁶ In other words, it means the whole bundle of material facts which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit.⁷ In delivering the judgment of the Board, in *Chand Kuar v. Partab Singh*, I. L. R. 16 Calcutta 98, Lord Watson observed as follows: "Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour."⁸ Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case⁹ and with reference to the *substance* rather than the form of the action.¹⁰ The cause of action must, however, be *antecedent* to the institution of the suit and cannot be furnished by the pleadings themselves.¹¹ Where two or more causes of action against

6. (1888) L. R. 22 Q. B. D. 128 (131), *Read v. Brown*, (Followed in 16 All 165.)

(1878) L. R. 8 Q. B. 107 (116), *Cooke v. Gill*.

(37) AIR 1987 All 208 (210); I.L.R. (1987) All 234.

(32) AIR 1982 All 548 (545); 54 All 525.

(17) AIR 1917 All 17 (18); 39 All 506.

(96) 18 All 432 (434).

(96) 18 All 181 (187).

(05) 29 Bom 868 (872).

(31) AIR 1981 Cal 659 (662); 58 Cal 539.

(04) 31 Cal 274 (282).

(17) AIR 1917 Mad 221 (222).

(05) 1 Nag L. R. 4 (5, 6).

(22) AIR 1922 Oudh 109 (111).

(05) 8 Oudh Cas 889 (898).

(11) 11 Ind Cas 851 (852) (Rang).

(26) AIR 1926 Sind 31 (32); 20 Sind L. R. 209.

(21) AIR 1921 Sind 200 (201); 17 Sind L. R. 41.

(38) AIR 1938 Bom 179 (180); 57 Bom 306.

(32) AIR 1932 Bom 42 (46).

(34) AIR 1984 All 226 (229).

(08) 25 All 48 (52).

(94) 16 All 165 (170) (F. B.).

(06) 30 Bom 167 (170).

(05) 29 Bom 868 (872); 7 Bom L. R. 20.

(04) 6 Bom L. R. 1038 (1040).

(97) 21 Bom 126 (133, 134).

(81) 5 Bom 42 (45). (Suit by liquidator of Bank against defendant for failure to respond to call on shares—Service of balance order is not necessary and is not a part of the cause of action.)

(37) AIR 1937 Cal 643 (645).

(35) AIR 1935 Cal 160 (167); 61 Cal 1023.

(31) AIR 1931 Cal 659 (662); 58 Cal 539.

(19) AIR 1919 Cal 1014 (1015).

(95) 22 Cal 451 (453).

(05) 1905 Pun Re No. 1. (Suit to set aside several alienations by widow—Each alienation gives rise to a separate cause of action.)

(23) AIR 1923 Mad 109 (110).

(21) AIR 1921 Mad 664 (665).

(19) AIR 1919 Mad 883 (884).

(24) AIR 1924 Nag 308 (309).

(14) AIR 1914 Oudh 314 (315).

(06) 3 Low Bur Rui 56 (60).

(36) AIR 1936 Sind 229 (231); 30 Sind L. R. 182.

(33) AIR 1933 Sind 179 (180, 181); 27 Sind L. R. 280.

(26) AIR 1926 Sind 31 (32); 20 Sind L. R. 209.

(25) AIR 1925 Sind 132 (134); 19 Sind L. R. 207.

(14) AIR 1914 Sind 146 (147); 8 Sind L. R. 107.

(1889) 22 Q. B. D. 107 (116), *Cooke v. Gill*.

(1878) L. R. 8 Q. B. 107 (116), *Cooke v. Gill*.

(See also) (87) 11 Bom 649 (652). (In case of an action on contract it consists of the making of the contract and of its breach in the place where it ought to be performed.)

8. See also the following cases:

(02) 25 Mad 736 (739).

(10) 8 Ind Cas 9 (11) (All). (The infringement of some right entitling the owner to seek the assistance of the Court.)

(32) AIR 1932 Bom 42 (43).

(05) 7 Bom L. R. 925 (927). (Cause of action does not mean cause of action according to the facts stated by the defendant.)

(19) AIR 1919 Cal 194 (194, 195).

(07) 1907 Pun Re No. 57. (Cause of action does not depend on the relief claimed.)

(17) AIR 1917 Mad 221 (222).

(10) 6 Ind Cas 238 (236); 34 Mad 97.

(17) AIR 1917 Nag 1 (4).

(05) 1 Nag L. R. 4 (6).

(29) AIR 1929 Pat 685 (687); 9 Pat 447.

9. See (22) AIR 1922 Nag 127 (128).

(92) 19 Cal 372 (379).

(73) 20 South W. R. 377 (380); Ind App Sup Vol. 12 (P. C.).

(75) 2 Ind App 283 (285); 1 Cal 144 (P. C.).

(See also) (24) AIR 1924 Rang 145 (147); 1 Rang 694. (Meaning of the expression 'alienation' from the previous legislation in India and not from definitions of the expression in English decisions.)

(19) AIR 1919 Pat 507 (510); 4 Pat L. Jour 387.

(93) 15 All 399 (403).

a defendant are sought to be joined in one suit, the Court to which the plaint is presented must have jurisdiction over both the causes of action.¹²

15. "Wholly or in part arises."—This clause makes it clear that in all cases covered by this Section a suit may be instituted where a part of the cause of action arises. Where a right and an infringement thereof are both necessary to be proved before relief can be granted, the cause of action arises partly where the right was created and partly where it was infringed. Thus, where freight was collected from the plaintiff at Calicut, but the goods were short delivered, the cause of action for refund of the freight and for price of goods short delivered arises in part at Calicut.¹ Similarly the refusal to refer to arbitration on the part of one of the parties is a fundamental part of the cause of action in an application under Schedule II, Paragraph 17 to have the agreement filed in Court.¹⁴

If the creation of the right and the infringement thereof both happen at a particular place, the whole cause of action will be said to arise there. But if they take place in different places, parts of the cause of action arise in the different places.² Where the infringement itself is in respect of several items, parts of the cause of action arise in the several places of infringement in respect of those items.^{2a}

The corresponding Section of the Code of 1882 was amended by the addition of an Explanation, being Explanation III, which provided that in suits arising out of contract, the cause of action arose within the meaning of the Section at any of the following places, namely—

- (a) The place where the contract was made.
- (b) The place where the contract was to be performed or performance thereof completed.
- (c) The place where, in performance of the contract, any money to which the suit relates was expressly or impliedly payable.

This Explanation had been added to the old Section to make it clear that suits arising out of contract could be instituted in the Court within the local limits of whose jurisdiction the cause of action arose either wholly or in part. But this gave rise to doubts whether other classes of suits could be instituted in a Court within the local limits of whose jurisdiction part only of the cause of action arose. It was, however, held in the undermentioned case,³ following older decisions,⁴ that the introduction of the said Explanation did not effect any change in the law and that a

12. (84) 7 Mad 171 (178).
- (89) AIR 1939 All 168 (164) : 1 L R (1939) All 167. (Suit for two reliefs based on two independent causes of action—Court having jurisdiction in respect of one only—Mere fact that the plaintiff has sued in one plaint for two reliefs would not give jurisdiction to Court in respect of other cause of action.)
1. (19) AIR 1919 Mad 883 (884).
- (15) AIR 1915 All 53 (54) : 26 Ind Cas 620 (621). (Goods booked at Calicut—Suit for recovery of excess freight payable in Calicut.)
- (82) 4 All 423 (425). (The term, as used in this Section, does not necessarily mean the whole of the cause of action.)
- 1a. (38) AIR 1933 Lah 18 (21, 22).
2. (18) AIR 1918 Lah 52 (52) : 1918 Pun Re No. 26.

- (18) AIR 1918 Lah 320 (320) : 1918 Pun Re No. 98, page 325.
- (78) 3 Cal 264 (269). (Jewels obtained by fraud at C and pledged at K—Cause of action for recovery arises at C.)
- (74) 18 Beng L R 91 (99).
- (68) 4 Mad H C R 218 (222). (Contract entered into at S for carrying on partnership at B—Goods to be sent to Madras—Price payable at Madras—Cause of action arises partly in Madras.)
- 2a. (23) AIR 1923 Mad 109 (111). (Reversionary right to properties situate in different local jurisdictions.)
3. (03) 25 All 48 (52, 53).
4. (88) 5 All 277 (279).
- (75) 14 Beng L R 367 (369).
- (89) 13 Bom 404 (415).
- (75) 1 Bom 23 (43).

Court would have jurisdiction if the *material part* of the cause of action arose within its jurisdiction. The effect of the present addition of clause (c) of the Section in substitution of the old Explanation III, is to leave no room for doubt that *all* classes of suits can be instituted where the cause of action arises wholly, or in part. The old Explanation III has now been omitted, but the cases decided thereunder are still good law in cases arising out of contract.⁵

It must, however, be noted that a party to a contract cannot rely, at his *option*, on any of the alternatives mentioned in the old Explanation III in order to sue in any particular *form*. It depends in each case upon the allegations in the plaint in support of the relief claimed. Thus, where under a contract goods had to be delivered at A and the price was payable at B, the cause of action for the non-delivery of the goods will arise at A alone,⁶ and that for the non-payment of the price will arise at B alone.⁷

16. Suits on contracts—General.—The meaning of the expression "cause of action" when applied to suits based on contracts should be ascertained by a consideration of the meaning of the expression in the past in the course of the development of legislation in India and the case law based thereon.¹ In a suit based on a contract the cause of action will consist of the *making* of the contract and of its *breach* at the place where it is to be performed.² An action therefore for breach of a contract can, at the option of the plaintiff, be brought either at the place where the contract was made or the place where the breach was committed.³ Originally the place of making the contract alone was regarded as the proper *form* of action and it was only afterwards that the place of performance and the place of breach came also to be regarded as *forms* of action.⁴ See also Note 15, *ante*.

- (193) 9 Cal 105 (111).
[See also ('74) 13 Beng L R 461 (467, 471, 472).]
5. ('88) AIR 1938 Bom 179 (180): 57 Bom 306.
(111) 11 Ind Cas 712 (713): 34 All 49.
As to whether under Clause 12 of the *Letters Patent*, the High Court has jurisdiction in cases where the cause of action arises in part within its jurisdiction, see the following cases:—
(178) 1 Mad 375 (377). (Whole cause of action must arise within limits. But, if part arises then leave must be obtained.)
(196) 20 Bom 15 (44, 45). (Partly arising—Leave must be obtained.)
(187) 11 Bom 257 (267). (Do.)
(175) 1 Bom 23 (35). (Part arising within jurisdiction—Leave obtained.)
(87) 14 Cal 256 (270). (Means the whole cause of action—Contract as well as the breach must have taken place within the jurisdiction of the Court if leave is not taken.)
(66) 1 Ind Jur (NS) 218. (If part arises, then leave must be obtained.)
6. ('20) AIR 1920 All 142 (143): 42 All 480.
7. ('20) AIR 1920 Mad 146 (148).
Note 16
1. ('24) AIR 1924 Rang 2 (8): 1 Rang 231. (Not by reference to any English decision or the construction of any English Statute.)
2. ('87) 14 Cal 256 (270).

- (122) AIR 1922 Lah 164 (165).
(197) 21 Bom 126 (134).
(91) 15 Bom 93 (102). (Letters Patent.)
(87) 11 Bom 649 (652).
(75) 12 Bom H O R 113 (125, 126). (Letters Patent.)
(67) 1867 Pun Re No. 29.
(104) 27 Mad 494 (495).
(124) AIR 1924 Rang 2 (7): 1 Rang 231. (Contract of insurance—Loss to property insured is not a cause of action.)
(18) AIR 1918 Low Bur 101 (102): 9 Low Bur Rul 75.
(39) AIR 1939 Pat 294 (294, 295). (Place of suing is either where contract is made or where it is agreed to be performed—In the absence of plea to the contrary by defendant it may be taken that money was to be repaid where the transaction was made.)
(1864) 2 Hurl & C 954 (957, 958). *Sichel v. Borch*.
[But see ('82) 8 Cal 483 (490, 491, 495) (Letters Patent).]
(128) AIR 1928 Nag 305 (306). (Suit on fire insurance—Part of cause of action arises where fire occurs.)
3. ('78) 1 Mad 375 (377).
(33) AIR 1933 Sind 9 (12): 26 Sind L R 167.
(33) AIR 1933 Bom 179 (180): 57 Bom 306.
(174) 22 Sudh W R 79 (81).
(73) 20 Sudh W R 6 (7).
(19) AIR 1919 Lah 272 (272).
4. ('74) 13 Beng L R 461 (472).

acceptance will be the place where the contract is made.⁷ The whole correspondence, if the contract was made by correspondence, must be looked into in order to find out where the proposal was accepted.⁸ Where the contract is entered into by postal communication, the contract will be deemed to be made where the letter of acceptance is posted, and not where it is received.⁹ The communication of the acceptance of the proposer only affects the *time* of the coming into force of the contract and not the *place* of making the contract.¹⁰ If the acceptance of a proposal consists of the performance of a condition of the proposal, the contract will be deemed to be made where the condition is performed.¹¹ If an agreement is to be executed by the plaintiff, part of the cause of action arises where the agreement is executed.¹²

Where the contract purports on the face of it to have been made at any particular place, as for instance a promissory note dated at X, it will be presumed to have been made there, though it might actually have been made elsewhere.¹³ Where in a suit upon the breach of a contract to deliver goods, it did not appear where the contract, if any, was made, the mere fact that an advance on account of the contract was made at a particular place would not give the Court of that place jurisdiction in the suit.¹⁴

The principles enunciated above apply both to express as well as *implied* contracts and to obligations resembling those under contracts. Thus, where excess of freight is paid to a Railway Company at a particular place, there is an implied contract on the part of the Company to return the excess and a cause of action for a suit for return of the excess will arise, in part, where the obligation to return came into existence, namely where the excess was paid.¹⁵ Similarly where plaintiff sent a larger quantity of goods to defendant than that ordered for, and the latter returned the same and the plaintiff filed a suit for damages, it was held that the cause of action arose wherever the defendant returned the goods.¹⁶ Similarly where goods were lost in one district and found in another, the finder is under an obligation to return them at the place where he found them and the Court of that place will have jurisdiction to entertain a suit for the recovery thereof.¹⁷

18. Place of breach or non-performance in general.—As has been mentioned already, the place of breach will also furnish the *forum* for a suit on contract, even though the place of making it be not within the forum.¹ The place of breach is

7. (05) 32 Cal 884 (889, 890).
(28) AIR 1923 Lah 427 (427).
(19) AIR 1919 Lah 26 (27) : 1 Lah 208.
(Orders for goods by wire from L.—Acceptance by wire at K.)
(37) AIR 1937 Mad 571 (573) : 1 L R (1937) Mad 990.
(14) AIR 1914 Mad 311 (311). (Seller consigning goods to Railway—Suit for price lies where consignment was made.)
(29) AIR 1929 Sind 227 (228).
[See (17) AIR 1917 All 121 (122).]
(19) AIR 1919 Mad 1043 (1043).
[See also (31) AIR 1931 Cal 659 (662) : 58 Cal 539.]
8. (20) AIR 1920 Mad 177 (179). (Offer transmitted from N and accepted at M—Payment against bill of lading at M—No part of cause of action arises at N.)
9. (09) 1 Ind Gas 77 (77) (All).

- (21) AIR 1921 Nag 42 (43) : 17 Nag L R 1.
(34) AIR 1934 Mad 581 (582).
10. (96) 1896 Pun Re No. 76.
11. (05) 32 Cal 884 (888).
12. (06) 30 Bom 364 (377).
13. (05) 28 Mad 19 (22).
14. (67) 2 Agra 188 (188).
15. (15) AIR 1915 All 53 (53).
(19) AIR 1919 Mad 883 (884).
16. (19) AIR 1919 Mad 1043 (1043).
17. (68) 9 Suth W R 586 (586).
Note 18
1. (18) AIR 1918 Upp Bur 17 (18) : 3 Upp Bur Rul 38.
(17) AIR 1917 Lah 12 (12) : 1916 Pun Re No. 93. (Contract of betrothal—Breach.)
(82) 4 All 423 (425).
(67) 2 Agra 248 (248). (Goods sent to Calcutta to be sold there—Sold elsewhere—Cause of action for breach arises at Calcutta.)

Where the contract itself does not stipulate the place of performance, it is the duty of the promisor under Section 49 of the Contract Act to apply to the promisee to appoint a reasonable place for the performance of the promise.⁸ Where this has not been done, the place of performance should be determined with reference to the intention of the parties as gathered from their acts, the terms of the contract and the surrounding circumstances.⁹ Where no actual intention can be inferred, recourse may be had to presumptions.¹⁰⁻¹¹ But where goods are contracted to be delivered, for instance, in Bengal, the mere fact that the goods were *despatched* from a place in the United Provinces will not give rise to a cause of action at that place, for a suit for damages for non-delivery.¹²

In many cases the place of performance will be determined by the *course of business* to which the contract relates¹³ or by the *nature of the act* to be done under the contract. Thus, in a contract of service the salary is payable at the place of work.¹⁴ In a contract of bailment, the remuneration of the bailee is payable where the goods bailed are stored.¹⁵ Where the performance consists of work done on immovable property, the place where it is situated will obviously be the *forum*. Similarly, where an agreement relates to the execution of a document which requires registration at a particular place, that place will be the place where a suit will lie for compelling the registration.¹⁶

19. Place where money is payable.—The payment of money under a con-

19. Place where money is payable.—The payment of money under a contract is a part of the performance of the contract and will furnish a cause of action.¹ As per the principles set forth in Note 18 above, the place where money is expressly or impliedly payable will be a *form of action*.² Thus the place where the money

8. (05) 7 Bom L R 993 (994).
(13) 19 Ind Cas 438 (438) : 6 Sind L R 181.
(Where no such place is fixed, creditor can institute a suit for recovery of money at the place where he resides.)
(38) AIR 1938 Mad 977 (979).
(87) 11 Bom 649 (653).
(17) AIR 1917 Al 365 (365); 39 All 368. (Ev-
dence whether place of delivery was essential
part of contract should be taken.)
(60) 8 Moo Ind App 291 (307) (PC).
(82) 4 All 423 (426).
(35) AIR 1935 Bom 283 (285); 59 Bom 365.
(68) 5 Bom H C R A C 33 (35).
(12) 13 Ind Cas 943 (944) (Cal).
(08) 7 Cal W N 912 (913, 914).
(83) 9 Cal 105 (106).
(74) 22 Sub W R 79 (82).
(72) 17 Sub W R 345 (345). (Bond executed
at A making amount payable to plaintiff in
person—Plaintiff residing at time of bond at
A, though an inhabitant of P—Held inten-
tion of parties was to make the amount pay-
able at A.)
(20) AIR 1920 Lah 412 (413); 60 Ind Cas 481
(481). (Place of business of defendant held to
be the place of performance on the facts of the
case.)
(13) 18 Ind Cas 496 (496) (Lah). (Indent form
providing that all disputes to be settled in a
particular place—Civil Court of that place
will have jurisdiction.)
(38) AIR 1938 Mad 977 (979).
(82) 4 Mad 372 (374).
9. (05) 7 Bom L R 993 (994).
(13) 19 Ind Cas 438 (438) : 6 Sind L R 181.
(Where no such place is fixed, creditor can
institute a suit for recovery of money at the
place where he resides.)
(38) AIR 1938 Mad 977 (979).
(87) 11 Bom 649 (653).
(17) AIR 1917 Al 365 (365); 39 All 368. (Evi-
dence whether place of delivery was essential
part of contract should be taken.)
(60) 8 Moo Ind App 291 (307) (PC).
(82) 4 All 423 (426).
(35) AIR 1935 Bom 283 (285); 59 Bom 365.
(68) 5 Bom H C R A C 33 (35).
(12) 13 Ind Cas 943 (944) (Cal).
(08) 7 Cal W N 912 (913, 914).
(83) 9 Cal 105 (106).
(74) 22 Sub W R 79 (82).
(72) 17 Sub W R 345 (345). (Bond executed
at A making amount payable to plaintiff in
person—Plaintiff residing at time of bond at
A, though an inhabitant of P—Held inten-
tion of parties was to make the amount pay-
able at A.)
(20) AIR 1920 Lah 412 (413); 60 Ind Cas 481
(481). (Place of business of defendant held to
be the place of performance on the facts of the
case.)
(13) 18 Ind Cas 496 (496) (Lah). (Indent form
providing that all disputes to be settled in a
particular place—Civil Court of that place
will have jurisdiction.)
(38) AIR 1938 Mad 977 (979).
(82) 4 Mad 372 (374).
- 10-11. (12) 15 Ind Cas 885 (886) (Cal). (Parties
resident of place where money advanced—Ab-
sence of agreement to repay at another place
—Presumption that money to be repaid
where transaction took place.)
(72) 9 Bom H C R 270 (272). (Indorser of
hundis contracts to pay the amount of the
hundis to the holder in the place where the
hundis has been indorsed.)
(22) AIR 1922 All 448 (448).
(82) 4 All 423 (426). (Place of performance
held to be plaintiff's place of business.)
(07) 30 Mad 438 (440). (Service at H — Suit
for salary at Madras will not lie.)
(1900) 2 Bom L R 514 (515). (Service at S—
Suit for salary lies at S.)
(34) AIR 1934 All 549 (550). (Doctor treating
a patient under agreement made at K where
the treatment was made. Cause of action
arose at K.)
(17) AIR 1917 All 121 (122).
(73) 7 Mad H C R 176 (176).
Note 19
(09) 4 Ind Cas 977 (978) (Lah).
(78) 3 Cal L Rep 459 (460).
(75) 23 Sub W R 63 (63). (Refusal of pay-
ment gives cause of action for suit for pay-
ment.)
(33) AIR 1933 Lah 599 (599, 600).
(68) 1 Beng L R (O C) 76 (78). (Impliedly
payable.)
(08) 1908 Pun Re No. 36.

is payable under a promissory note or a bond will be a proper *forum* though the document itself was executed and the executant resides outside the *forum*.³ Similarly, in the case of goods sold and delivered, a suit for the price thereof will lie where the same is to be paid,⁴ even though both the sale and the delivery should have been made in another place.⁵ An action to recover money due on a life insurance policy can be instituted in the place where the death of assured takes place, as the death furnishes the cause of action for the payment.⁶ Similarly, in a contract of insurance against burglary, the burglary is a part of the cause of action entitling the plaintiff to sue, and a claim for the insurance amount can be made at the place where the burglary was committed.^{6a}

From what has been stated in Note 18 above, it follows that where the place of payment is not indicated in the contract, it is to be ascertained with reference to the intention of the parties and the circumstances of the case.⁷ Thus, where a *hathitha* was executed and the parties were also resident at a particular place, the money is presumably repayable there.⁸

The rule that debtor must find the creditor.—Under the Common Law in England, the general rule, in the absence of a contract to the contrary, is that a debtor is bound to find the creditor for making the payment, i. e. the place of

hundi is negotiated—Madras Court has jurisdiction.)
[See (63) 1 Mad H C R 436 (439). (Neither note executed nor money payable within jurisdiction—High Court cannot entertain suit.)]
(33) AIR 1933 Lah 940 (941). (Promissory note payable in district *M* assigned in district *N*—Court at *N* has jurisdiction to try suit.)]
4. (08) 7 Cal W N 912 (914).
(29) AIR 1929 Oudh 91 (92) : 4 Luck 347.
(35) AIR 1935 Mad 668 (664).
(20) AIR 1920 Mad 146 (148).
5. (82) 4 All 428 (426). (Payment by draft—place of payment)
(18) AIR 1918 Mad 685 (686).
(32) AIR 1932 Bom 392 (393).
(19) AIR 1919 Cal 1014 (1015).
(18) AIR 1918 Lah 320 (320) : 1918 Pun Re No. 98.
(34) AIR 1934 Sind 76 (76) : 28 Sind L R 192.
(37) AIR 1937 All 208 (211, 212) : 1 L R (1937) All 234.
7. (19) AIR 1919 Nag 135 (136). (Where intention cannot be so ascertained, recourse may be had to presumptions).
(30) AIR 1930 Lah 818 (820). (Best evidence of intention of the parties is what they actually did.)
(30) AIR 1930 Rang 216 (218). (Suit for recovery of balance of advances by a commission agent.)
8. (12) 15 Ind Cas 885 (885) (Cal). (Contract concluded and completed at *A*—Subsequent promise without consideration to pay at *B*—Court at *B* has no jurisdiction.)
[See also (18) AIR 1918 Low Bur 101 (102) : 9 Low Bur Rul 75.]

(38) AIR 1938 All 147 (148, 149). (Lease of property outside jurisdiction. There is an implied promise to pay at place of lessor's residence.)
(66) 1 Agr 115 (116).
(87) 11 Bom 257 (267, 268).
(26) AIR 1926 Cal 100 (101). (Thing purchased at *C*—Part of purchase money paid at *D*—Court at *D* has jurisdiction to try suit for return of purchase money on ground of breach of warranty.)
(34) AIR 1934 Lah 803 (803).
(22) AIR 1922 Lah 36 (37).
(24) AIR 1924 Mad 789 (790).
(82) 4 Mad 372 (374). (Impliedly payable.)
(30) AIR 1930 Nag 90 (91). (Expressly payable.)
(25) AIR 1925 Nag 408 (408). (Contract to supply goods—Breach—Suit for damages at place where price was payable is maintainable.)
(24) AIR 1924 Nag 808 (309).
(16) AIR 1916 Low Bur 67 (68). (Money payable in England—King's Bench Court has jurisdiction.)
(10) 6 Ind Cas 111 (112) (Sind). (Contract made in *F* and defendant residing in *F*—No evidence that money is payable at *K*—Court at *K* has no jurisdiction.)
(68) 3 Agr 242 (244) (FB).
(96) 19 Mad 477 (478).
(35) AIR 1935 Bom 283 (283) : 59 Bom 365.
(80) 5 Cal 82 (86). (Suit for recovery of money lent.)
(15) AIR 1915 Lah 481 (482) : 1916 Pun Re No. 2.
(24) AIR 1924 Mad 464 (465) : 47 Mad 408. (Hundi drawn by Calcutta firm on Madras firm agreed to be payable in Madras—Payment cannot be considered to be made when

payment is the place where the creditor resides.⁹ The same rule has been held to apply in India also.¹⁰ In *Raman Chettiar v. Gopalachari*, I. L. R. 31 Madras 223, which was a case under the old Code, the Madras High Court held that the said Common Law rule did not control the express provisions in Explanation III to the Section, and that the place of payment, in order to give jurisdiction, must be where the money is payable expressly or impliedly under the contract itself and not under any general rule of law. In view of the omission of the Explanation in the present Section and in view of the decisions of the Privy Council and of other High Courts to the contrary,¹¹ the view expressed by the Madras High Court cannot be treated as correct law. But in order that the Common Law rule should apply, whether in England or in India, it is necessary that the creditor should be within the realm.¹² A debtor in a Native State, for instance, is not bound to seek and pay his creditor who is a resident of British India. As to the applicability of the Common Law rule to cases of negotiable instruments, see Note 23, *infra*.

20. Suit for accounts against agent.—In accordance with the general principles mentioned in Note 18 and Note 19 above, a suit for accounts against an agent can be filed where the contract of agency was made or where the accounts are to be rendered and payment made by the agent.¹ Where the contract does not specifically provide for the place where the accounts are to be rendered, it is to be ascertained by reference to the intention of the parties as gathered from the

— Rule that debtor must find the creditor

- (36) AIR 1936 Rang 251 (252).
[See also ('74) 14 Beng L R 367 (369).]
11. See cases in foot note (10).
12. ('25) AIR 1925 P C 290 (292) : 53 Cal 88 : 53 Ind App 58 (PC).

Note 20

1. ('25) AIR 1925 Lah 387 (389) : 6 Lah 158.
(20) AIR 1920 Low Bur 48 (48). (Cause of action arises where refusal to account takes place.)
(32) AIR 1932 Bom 42 (44, 45).
(30) AIR 1930 Bom 150 (151) : 54 Bom 192.
(Each separate payment or collection is not the cause of action.)
(15) AIR 1915 Mad 1001 (1002) (FB). (Accounts to be rendered in Madras—Madras High Court has jurisdiction.)
(38) AIR 1938 Nag 186 (187). (Commission agent can be sued at the place from where the order was made if the contract was made at the place.)
(36) AIR 1936 Rang 251 (252).
(26) AIR 1926 Sind 238 (241). (Cause of action arises where refusal to account takes place.)
[See also ('17) AIR 1917 All 152 (153). (Where neither the contract is made nor the accounts to be rendered at a particular place, the Court of that place has no jurisdiction.)
(32) 34 Bom L R 1410 (1415).
(26) AIR 1926 Lah 287 (288). (Suit by commission agent against principal is maintainable in a Court within whose jurisdiction commission business is carried on.)

9. ('08) 11 Oudh Cas 191 (193).
(05) 7 Bom L R 993 (994).
(09) 1909 Pun Re No. 75.
(18) 20 Ind Cas 688 (683) (Low Bur).
(09) 3 Ind Cas 892 (893) : 3 Sind L R 81.
10. ('87) 11 Bom 649 (656).
(38) AIR 1938 Sind 62 (64).
(27) AIR 1927 P C 156 (158) : 54 Ind App 265 : 5 Rang 451 (PC). (Distinguishing 7 Bom L R 993 and approving 11 Bom 649 and 30 Bom 167.)
(26) AIR 1926 All 477 (478) : 48 All 310.
(17) AIR 1917 All 128 (129). (Banker and depositor.)
(33) AIR 1933 Bom 179 (181, 182) : 57 Bom 306. (Deposit for due performance of contract—On cancellation of contract it becomes a debt due and this rule will apply.)
(06) 30 Bom 167 (171, 172).
(07) 9 Bom L R 903 (911, 912).
(36) AIR 1936 Cal 97 (99) : 63 Cal 726. (Suit by Mahomedan wife for prompt dower—Court within whose jurisdiction she resides has jurisdiction to entertain suit.)
(74) 13 Beng L R 461 (467).
(31) 131 Ind Gas 303 (304) (Lah).
(35) AIR 1935 Mad 983 (987).
(37) AIR 1937 Nag 39 (40) : 1 L R (1937) Nag 97. (Agreement to pay maintenance—Absence of receipt as to place of payment—Suit lies at promisee's place of residence.)
(30) AIR 1930 Nag 207 (208) : 26 Nag L R 300.
(25) AIR 1925 Oudh 209 (210).
(37) AIR 1937 Rang 433 (434). (Suit not based on promissory note but on loan in regard to which it is incidentally mentioned that a pro-note was executed as collateral security

obviously that the money should be paid to the depositor wherever he happened to be when he demanded repayment. In fact the ordinary rule that a debtor must seek his creditor applies to such cases.¹

23. Suits on negotiable instruments. — A suit may be filed where a promissory note is *made* or bill of exchange is *drawn*.¹ It may also be filed where the instrument is *payable*,² though it is executed in a different district.³ A promissory note, which on its face purports to have been made at a particular place, will be presumed to have been made there.⁴ Where a promissory note payable on demand was executed by the defendant and handed over by him to the plaintiff at *B*, but the note described the plaintiff as a resident of *M*, it was held that the Court at *M* had no jurisdiction to entertain a suit on the note, but only the Court at *B*.^{4a}

Where a negotiable instrument is drawn at one place and *accepted* at another, part of the cause of action will arise at the *place of acceptance*.⁵ The liability of the acceptor does not attach, however, by merely writing his name upon the bill. It attaches only when the instrument so signed is delivered, or the fact of acceptance is communicated to the person entitled to the bill.⁶

The *indorsement* of a negotiable instrument or the *assignment* of a promissory note will also give rise to a cause of action at the place of indorsement or assignment⁷ though the *mere negotiation* of an instrument does not constitute a *payment* of the instrument.⁸

The *dishonour* of a negotiable instrument will also furnish a cause of action and a suit may be brought at the place where it was dishonoured.⁹ Even a *notice of dishonour* will be a part of the cause of action and the Court of the place wherefrom it is given will have jurisdiction.¹⁰

Note 22

1. ('17) AIR 1917 All 128 (129).

Note 23

1. ('16) AIR 1916 Oudh 105 (106).
('08) 31 Mad 223 (227). (Payee's place of residence not to be presumed to be the place of payment.)
(1900) 1900 Pun Re No 57.
[See also ('91) 15 Bom 93 (100, 101). (A case under Letters Patent.)]
2. ('20) AIR 1920 Pat 157 (159); 5 Pat L Jour 536.
('68) 1 Beng L R (O O) 35 (37). (Instrument made and delivered at *C* and also made payable there.)
('16) AIR 1916 Bom 227 (228) : 40 Bom 473. (Hundi drawn and payable outside Bombay — Bombay High Court has no jurisdiction.)
('29) AIR 1929 Cal. 306 (307). (New place of payment of assignee—Suit does not lie there.)
('66) 1 Ind Jur (N S) 233.
('94) 1894 Pun Re No. 21.
[See also ('72) 3 N W P H C R 343 (344). (Hundi drawn at *S* and payable at *F* — Suit cannot be filed at the abode of the endorsee.)
('67) 2 Agra 123 (123). (Hundi drawn at Banda and payable at Benares cannot be sued on at Agra where the bill was sold.)]
3. ('83) 9 Cal 105 (109).
('01) 24 Mad 259 (261).
('74) 13 Beng L R 461 (472, 473). (Place of

payment not mentioned—Gathered from the intention of the parties.)

- ('15) AIR 1915 Lah 481 (482) : 1916 Pun Re No. 2 (A different place of payment may be indicated by circumstances.)
- ('94) 1894 Pun Re No. 21. (Drawn at Jamna and payable at Sialkot.)
- ('83) 1883 Pun Re No. 71. (Hundi drawn at Multan and payable at Amritsar.)
- ('20) AIR 1920 Pat 157 (159); 5 Pat L Jour 536.
4. ('05) 28 Mad 19 (22).
('62) 1 Mad H C R 202 (203).
[See also ('63) 1 Mad H C R 436 (440).]
- 4a. ('37) AIR 1937 Nag 241 (242); I L R (1938) Nag 301.
5. ('20) AIR 1920 Cal 718 (720) : 47 Cal 583.
('79) 5 Cal L Rep 268 (276, 277).
('03) 1903 Pun Re No. 10.
6. (1865) 34 L J Ex 186 (187), Chapman v. Cottrel.
(1822) 5 B & Ald 474 (478, 479), Cox v. Troy.
7. ('28) AIR 1928 Sind 86 (87); 22 Sind L R 305.
('33) AIR 1933 Lah 940 (941).
('72) 9 Bom H C R 270 (272).
('95) 22 Cal 451 (453).
('17) AIR 1917 Mad 221 (222).
('11) 11 Ind Cas 851 (853) (Low Bur).
8. ('24) AIR 1924 Mad 464 (465) : 47 Mad 403.
9. ('76) 1 Bom 23 (35).
('75) 12 Bom H C R 113 (127).
('83) 1883 Pun Re No. 132.
10. ('86) 11 Bom 257 (267).

There is a difference of opinion on the question whether the Common Law rule that the debtor must find the creditor is applicable to the case of negotiable instruments. According to the undermentioned case¹¹ of the Nagpur High Court, it does not apply, the reason being that Section 81 of the Negotiable Instruments Act, 1881, requires the holder of the instrument to *call upon* the person liable to pay. In another case, also of the same Court,¹² the rule was held not to apply but the view was based on the provision in Section 70 of the Negotiable Instruments Act, 1881, that the holder must present it for payment at the place of business or residence of the maker, drawee or acceptor thereof, as the case may be. On the other hand, it has been held by the High Court of Lahore that in the case of a *promissory note* no presentment is necessary when the suit is against the *maker* of the note and that, consequently, in such a case, the Common Law rule will apply.¹³

23a. Suits on assigned debts. — A *bona fide* voluntary assignment of a debt affords a valid cause of action to the assignee to sue his assignor and the original debtor in the Court within whose jurisdiction the assignment is made.¹ See also Note 23, Pt. 7, above.

24. Suit on torts. — Section 19, *supra*, as has already been seen, provides that a suit for compensation for wrong done to the person or to moveable property may be instituted either where the defendant resides or carries on business or personally works for gain or where the wrong was done. Where there are several tort-feasors and some of them only reside within jurisdiction, a suit will be maintainable against them at the place where they reside.¹

The *commission* of a tortious act will be a part of the cause of action and the Court within the local limits of whose jurisdiction it is committed, is competent to try the suit.²

The *damage* resulting from the tort will also, it is submitted, furnish a cause of action.³ This is in accord with sound principle. In a suit in respect of a tort the plaintiff has to prove both a *tortious act* and a *consequent injury or damage*. The damage or injury is therefore a material fact which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit. Thus, where the defendant

11. ('38) AIR 1938 Nag 262 (264).

12. ('35) AIR 1935 Nag 144 (144).

13. ('39) AIR 1939 Lah 18 (19).

Note 23a

1. ('33) AIR 1933 Sind 179 (182); 27 Sind LR 230.

Note 24

1. ('28) AIR 1928 Cal 887 (889). (Suit for damages for conversion of land.)
2. ('05) 3 Low Bur Rul 164 (165).
('05) 29 Bom 368 (372). (Malicious prosecution — Place where extradition proceedings are taken will give jurisdiction.)
('15) AIR 1915 All 262 (262); 37 All 446. (Infringement of trade-mark by means of advertisement — Cause of action arises where the advertisement is published or distributed.)
('10) 7 Ind Cas 101 (102); 33 All 24. (Infringement of copyright — Cause of action arises where the infringement takes place.)
('70) 2 N W PHCR 13 (16). (Misrepresentation — Suit for damages can be filed where misrepresentation takes place.)

('88) 13 Bom 178 (161). (Like place of publication will give jurisdiction.)

('71) 6 Beng LR 141 (142, 143). (Malicious prosecution — Cause of action arises where plaintiff is arrested.)

('74) 1874 Pun Re No 33. (Publication gives jurisdiction.)

('10) 5 Ind Cas 318 (319). (Wrongful ex-communication — Cause of action arises where order of ex-communication is handed over to the community.)

('80) AIR 1980 Bom 388 (389). (Railway collision — Cause of action arises where it took place.)

[See ('32) AIR 1932 Bom 42 (44). (Negligence — Cause of action arises where the accident takes place.)]

('22) 22 Bom 179 (180). (The term 'cause of action' includes as well as a contract.)

s. 20, 1909 Cal LR 91 (99). (Effect of assignment of tortious act — Cause of action arises where the tortious act took place in Bombay and the suit is filed at Bombay and the defendant is a resident of Bombay.)

(The term 'cause of action' includes as well as a contract.)

s. 20, 1909 Cal LR 91 (99). (Effect of assignment of tortious act — Cause of action arises where the tortious act took place in Bombay and the suit is filed at Bombay and the defendant is a resident of Bombay.)

(The term 'cause of action' includes as well as a contract.)

s. 20, 1909 Cal LR 91 (99). (Effect of assignment of tortious act — Cause of action arises where the tortious act took place in Bombay and the suit is filed at Bombay and the defendant is a resident of Bombay.)

instituted criminal proceedings at *D* against the plaintiff, who was residing at *C* and the plaintiff suffered damages at *C*, the cause of action for a suit for damages for malicious prosecution arises in part at *C*.⁴

25. Suit for custody of minor. — Where the defendant removes a minor from the custody of his guardian from *A* to *L*, the Courts at both the places have jurisdiction to entertain a suit for the custody of the minor.¹

26. Suits for restitution of conjugal rights. — The cause of action, in a suit for restitution of conjugal rights, is the breach of the marital obligations on the part of either party.¹ In a suit by a husband against his wife for restitution of conjugal rights, the wife's absenting herself from her husband's residence without his consent will furnish a cause of action, and the suit can therefore be brought in the Court within whose jurisdiction the husband resides.² Of course the suit can also be brought at the place where the wife resides at the time of the suit.³ The reason is that a suit can be brought either where the cause of action arises or where the defendant actually and voluntarily resides. But where the defendant does not reside within the jurisdiction of the Court and the parties never lived together within such jurisdiction, it cannot be said that the cause of action arises within that jurisdiction.⁴

A suit by the plaintiff against his wife's father for an injunction restraining him from preventing his daughter returning to the plaintiff is not a suit for the restitution of conjugal rights and cannot be filed at the place of the husband's residence, when the father lives beyond the jurisdiction of the Court.⁵

27. Suits for divorce. — The acts constituting the cause of action in suits for divorce are detailed in Sections 10 and 19 of the Divorce Act (IV of 1869) and the Court within whose jurisdiction any of the said acts are committed will have jurisdiction to entertain the suit. The fact that the marriage took place elsewhere will not affect the venue.¹ A suit for the recovery of a dower debt on the divorce of the wife may be brought where the divorce takes place.²

28. Administration suits. — In a suit to administer an estate, the grant of probate and the undertaking to administer will furnish parts of the cause of action.¹ It may be noted that a Court can grant letters of administration only if the deceased, at the time of his death, had any property or had a fixed place of abode, within its jurisdiction.²

29. Suit to set aside decrees on the ground of fraud. — A suit to set aside a decree on the ground of fraud can be brought where the defendant actually and voluntarily resides or where the cause of action, wholly or in part arises.¹ The cause

4. ('33) AIR 1933 Cal 706 (708) : 60 Cal 198.

Note 25

1. ('90) 12 All 213 (217).

Note 26

1. (1884) L R 9 P D 52 (55), *Weldon v. Weldon*.

2. ('94) 18 Bom 316 (318).

('19) AIR 1919 All 96 (96).

('36) AIR 1936 Mad 288 (289) : 59 Mad 392.

(The fact that the wife has not previously lived with her husband within the jurisdiction, nor the fact that the marriage was not consummated will make no difference.)

3. ('14) AIR 1914 Bom 211 (214) : 20 Ind Cas 492 (495) : 38 Bom 125.

4. ('34) AIR 1934 Mad 407 (408).

5. ('36) AIR 1936 Mad 288 (290) : 59 Mad 392.

Note 27

1. ('96) 20 Bom 362 (365) (FB).

2. ('05) 32 Cal 146 (150).

Note 28

1. ('06) 29 Mad 239 (277).

('26) AIR 1926 Lah 456 (456, 457). (The fact that part of the property to be administered is within another district will not give the other Court jurisdiction.)

2. See Section 270 of the Indian Succession Act (39 of 1925).

('96) 20 Bom 607 (609).

('93) 17 Bom 689 (690).

Note 29

1. ('17) AIR 1917 Pat 598 (599). (Defendant's residence.)

of action in such cases is the commission of the fraud and the obtaining of the fraudulent decree.² The mere *discovery* of the fraud is not a part of the cause of action.³

Where a part of the fraud is committed within the jurisdiction of a Court, that Court will have jurisdiction to entertain the suit.⁴ Thus, where *A* obtains a fraudulent decree against *B* at *X* and *executes or applies for execution* of the decree at *Y*, part of the cause of action arises at *Y*.⁵ But a mere transfer for execution to another Court without anything more being done will not enable the latter Court to entertain the suit to set aside the decree,⁶ though a suit for an *injunction* restraining the defendant from executing the decree is maintainable in that Court.⁷

30. Suit to set aside documents on the ground of fraud. — A suit to set aside a document on the ground that it was obtained by fraud will lie where the fraud was committed. Thus the cause of action for a suit to set aside a will on the ground that it is a forgery arises at the place where the alleged will is published.¹ It will also arise where the fraudulent document *takes effect* against the plaintiff's interest. Thus in a suit to set aside, on the ground of fraud, a release deed executed in Calcutta, in respect of the plaintiff's interest in certain property in Bombay, it was held that since the release took effect and operated on the property in Bombay, part of the cause of action arose there.² This view has been followed by the High Court of Madras in the undermentioned case.³

31. Suits against corporations — Explanation II. — The residence and domicile of a trading company is its principal place of business, *i. e.*, the place where the *administrative* business of the company is conducted, which may not be the place where its manufacturing or other business operations are carried on.¹ A foreign company which gets itself registered in British India and carries on business there must be deemed to have its principal office in British India.²

(10) 5 Ind Cas 648 (649) (Cal).

2. (14) AIR 1914 All 98 (94) : 36 All 564. (No residence nor fraud within jurisdiction—Suit not entertainable.)

3. (28) AIR 1928 Mad 272 (272).

4. (08) 30 Cal 369 (381, 382).

(20) AIR 1920 Lah 290 (291). (Serving officer wrongly reporting that plaintiff was evading summons.)

5. (02) 25 All 48 (53).

(15) AIR 1915 Mad 915 (916).

(17) AIR 1917 All 176 (177) : 39 All 607. (Place where plaintiff was arrested in execution of fraudulent decree.)

(15) AIR 1915 All 163 (164, 165) : 37 All 189.

(38) AIR 1938 Cal 274 (277, 278) : 60 Cal 98.

(23) AIR 1923 Cal 425 (425, 426). (Applied for execution.)

(01) 5 Cal W N 559 (561). (Sale at *Y* in execution of decree—*Y* Court has jurisdiction.)

(27) AIR 1927 Lah 778 (779).

(26) AIR 1926 Lah 277 (278) : 7 Lah 61. (Threat of attachment and sale—Suit lies where property is situate.)

(24) AIR 1924 Lah 398 (399). (Application for rateable distribution based upon fraudulent decree.)

(28) AIR 1928 Oudh 88 (88) : 3 Luck 142.

(24) AIR 1924 Pat 831 (832). (If application

to execute the decree had been put in, that would constitute a cause of action.)

(17) AIR 1917 Pat 598 (599). (Property sold in execution—Suit to recover lies where property is situate.)

6. (07) 29 All 418 (422).

(29) AIR 1929 Lah 449 (458).

7. (24) AIR 1924 Nag 413 (415).

[See also (18) AIR 1918 Mad 711 (712) : 41 Mad 213. (Declaratory suit—Inferior Court has jurisdiction to set aside decree of superior Court obtained by fraud, provided it is otherwise competent to try the suit.)]

Note 30

1. (83) 1883 All W N 128 (128) : 5 All 589.

2. (74) 13 Beng L R 91 (98, 99).

3. (23) AIR 1923 Mad 109 (111). (Cause of action arises where forged will takes effect.)

Note 31

1. (04) 27 Mad 315 (321). (*Ching Adams v. G. and W. Ry. Co.*, 6 H & N 420; *Shank v. G. N. Ry. Co.*, 7 Fent (N S) 621; *Minors v. G. N. Ry. Co.*, 1 C P N S 825; *London & N. W. Ry. v. Inland Waterways*, 1 C P N S 482; *Kerrison v. Ry. Co.*, 1886 1 Q B 729; *Taylor v. Great Eastern Ry. Co.*, 1887 1 Q B 729.)

(28) AIR 1928 Sind 111 (118).

2. (57) AIR 1957 All 228 (231, 232, 233, 234).

Where, however, a cause of action arises at any place where the company has a subordinate office, that place will, according to Explanation II, be deemed to be the place where the company carries on business, irrespective of the location of its head office.³

The Government of India is not a corporation within the meaning of the Explanation and the Secretary of State for India in Council cannot be deemed to be carrying on business anywhere in British India.⁴

32. Suits against foreigners. — The general rule of private international law with regard to jurisdiction over foreigners is *extra territorium jus dicenti non paretur legis extra territorium non obligant*—an authority who legislates or administers justice beyond his own realm may be safely disobeyed beyond his jurisdiction.¹ And the presumption is that the Legislature does not intend to exceed its jurisdiction. But it is only where the words of the enactment leave room for doubt whether a Court has such jurisdiction, that the rule of international law would be considered.²

Another general rule to be remembered is that all legislation is territorial and is consequently applicable only to such foreigners as come into the country or have made themselves subject to the jurisdiction of the Courts of that country.³

The Code does not exempt foreigners from the jurisdiction of British Indian Courts⁴ and the grounds on which a Court may exercise jurisdiction over a foreigner are, as the Section says, residence, carrying on business, personal work for gain or the arising of the cause of action within jurisdiction.⁵

As regards *residence*, it has been held that even a *temporary* residence is sufficient to give jurisdiction.⁶

As regards the carrying on of business by a foreigner within jurisdiction, it was held by the Bombay High Court in the undermentioned case⁷ that the foreigner must *personally* carry on the business within jurisdiction. That case, has, however, been disapproved by the same High Court in a later case⁸ and also by the Madras High Court.⁹ These cases have held that a foreigner carrying on business *through an agent* within jurisdiction will become amenable to the jurisdiction of the Court.¹⁰

Where the cause of action against a non-resident foreigner arises within jurisdiction, that, in itself, is a sufficient ground of jurisdiction.¹¹ The same principle is found in Clause 12 of the Letters Patent which extends to absent foreigners also.

3. ('18) AIR 1918 Pat 126 (126); 4 Pat L Jour 141.

4. ('87) 14 Cal 256 (271).

('30) AIR 1930 Lah 818 (819).

Note 32

1. ('06) 29 Mad 239 (245).

('27) AIR 1927 Sind 160 (161) : 23 Sind L R 46. (Court cannot pass decree against a person, subject of foreign Government, which cannot be enforced against him.)

2. ('06) 29 Mad 239 (246).

3. ('95) 22 Cal 222 (238) : 21 Ind App 171 : 1894 Pun Re No. 112 (PC).

[See (1900) 23 Mad 458 (473). (Quære).]

4. ('27) AIR 1927 All 413 (414) : 49 All 669. (Foreigners are not excepted from jurisdiction of British Indian Courts.)

('34) AIR 1934 All 740 (743) : 56 All 828.

5. ('78) 2 Bom 19 (24, 53). (Residence within jurisdiction.)

('93) 16 Mad 405 (406). (Neither cause of action nor residence within jurisdiction — British Courts cannot entertain suit.)

6. ('06) 29 Mad 239 (270).

('84) 10 Cal 878 (883).

7. ('88) 12 Bom 507 (521).

8. ('93) 17 Bom 662 (667).

9. ('24) AIR 1924 Mad 158 (159).

10. See also ('03) 26 Mad 544 (552) : 30 Ind App 220 (PC).

11. ('03) 26 Mad 544 (552); 30 Ind App 220 (PC).

('34) AIR 1934 All 740 (746, 754) : 56 All 828.

('01) 25 Bom 528 (536).

('96) 20 Bom 133 (142, 143).

('93) 17 Bom 662 (668).

('38) AIR 1938 Mad 731 (733) : I L R (1938) Mad 1080.

('35) AIR 1935 Mad 545 (546).

('19) AIR 1919 Mad 883 (884).

A Court exercising jurisdiction over foreigners should do so with caution¹² and should protect his interests as if he were a British subject.¹³

33. Revision.—No hard and fast rule as to revision can be laid down in cases of decisions as to jurisdiction under this Section and each case must, therefore, be decided on its own merits; ordinarily interference in revision is inadvisable in such cases and should only be exercised in exceptional cases to remedy an injustice; where the defendant is, by law, entitled to have the case tried at Patna, it will be a grave injustice to him to insist on its trial at Jagraon in the Punjab, and in such a case the High Court will interfere in revision.¹

34. Chartered High Courts.—This Section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction.¹ These are governed by the Letters Patent granted to them.

In order to give the High Court jurisdiction under the Letters Patent, either the whole cause of action must have arisen within the local limits of its jurisdiction or the leave of the High Court must have been obtained.²

21. No objection³ as to the place of suing⁴ shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.⁵

[But compare 1882, S. 16 A (2).]

[Ss. 16-20; S. 99, C. P. C. and S. 11, Suits Valuation Act.]

Synopsis

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| <ol style="list-style-type: none"> 1. Scope and object of the Section. 2. Jurisdiction, meaning of. See Section 9, Notes 3, 4 and 5. 3. Objection to jurisdiction—General. 4. Objection to place of suing. 5. "Unless there has been a consequent failure of justice." 6. Execution proceedings. | <ol style="list-style-type: none"> 7. Insolvency proceedings. 8. Collateral proceedings. 9. Foreign Courts. 10. Court trying a remanded case, jurisdiction of. 11. Procedure where suit is filed in wrong Court. See also O. 7 R. 10. |
|--|--|

- (15) AIR 1915 Mad 116 (116). (Suit for rent of lands within jurisdiction—Defendant residing outside—Court has jurisdiction.)
 ('06) 29 Mad 69 (71).
 ('69) 4 Mad H C R 218 (222).
 ('03) 2 Low Bur Rul 47 (52). (Case law reviewed.)
 12. ('07) 30 Mad 438 (440).
 13. ('26) AIR 1926 Mad 584 (586) : 50 Mad 27.

Note 33

1. ('23) AIR 1923 Lah 565 (566).
- ('22) AIR 1922 Lah 100 (101). (Seller sending quotations on enquiry—Order sent by buyer—Court wrongly holding that suit maintainable at buyer's place—High Court can interfere in revision.)

Note 34

1. See S. 120, *infra*.
 ('23) AIR 1923 Mad 272 (274).
2. ('87) 14 Cal 256 (269, 270).
 ('72) 10 Beng L R 122 (124). (Pro-note made without, but payable within, the jurisdiction—Leave not obtained—*Held*, suit not maintainable.)
 ('05) 29 Bom 249 (253, 254). (Cause of action in Cl. 12 of the Letters Patent, means the whole cause of action.)
 ('91) 15 Bom 93 (99, 100, 101). (Do.)
 ('82) 8 Cal 483 (493) (FB). (Do.)
 ('74) 13 Beng L R 91 (98, 99). (Do.)

Other Topics

Absence of jurisdiction. See S. 9.

Analogous law—S. 11, Suits Valuation Act. See Note 1, Pt. (2a).

"At or before settlement of issues," meaning of. See Note 4.

Waiver of jurisdiction. See S. 9.

Whether executing Court can consider validity of decree. See S. 38.

Whether decree could be challenged in a separate suit for want of jurisdiction. See Note 6, Pt. (5)

1. Scope and object of the Section.—It has been seen in Notes 3 to 5 of Section 9 that when a Court has no jurisdiction over a litigation, its judgments and orders, however precisely certain and technically correct, are merely nullities and can be declared to be void by every Court in which they may be presented.¹ It has also been seen that in such cases no amount of consent or waiver on the part of the parties can create jurisdiction where there is none.² There are, however, two legislative exceptions to this rule, the first with reference to the *pecuniary jurisdiction* and the second with reference to the *territorial jurisdiction* of Courts.^{2a}

Section 21—Note 1

1. See Note 3 to S. 9.

('23) AIR 1923 Cal 619 (621).

('11) 12 Ind Cas 464 (476) : 38 Cal 639.

('81) AIR 1931 Bom 402 (402) : 55 Bom 803.

('26) AIR 1926 Bom 1 (12) : 50 Bom 1 (FB).

('10) 7 Ind Cas 718 (718) : 1910 Pun Re No. 83.

(When it is contended that the Court has no jurisdiction, the Court must first decide the question of jurisdiction and then proceed further.)

('24) AIR 1924 Mad 144 (145). (Thus an Agency Court has no right to sell the right to collect Kattubadi in villages situated beyond the limits of its territorial jurisdiction.)

('17) AIR 1917 Mad 318 (319) : 39 Mad 1031.

('18) AIR 1918 Pat 71 (72) : 4 Pat L Jour 202.

(Bengal, N W P and Assam Civil Courts Act (1887), S. 21, Cl. (a).)

('81) AIR 1931 Oudh 398 (400).

[See ('91) 13 All 300 (305) : 18 Ind App 55 (PC)]

[See also ('21) AIR 1921 Upp Bur 15 (16) : 4 Upp Bur Rul 75. (Whenever an objection to the jurisdiction of a Court is taken the Court is bound to entertain it and give effect to it.)]

2. ('26) AIR 1926 Mad 421 (422) : 49 Mad 746.

('18) AIR 1918 Cal 946 (946).

('25) AIR 1925 P O 155 (156) (PC).

('14) AIR 1914 P O 140 (148) : 42 Cal 116 : 41 Ind App 197 (PC). (Where the prohibition is by a statute.)

('81) AIR 1931 All 454 (456) : 53 All 560.

('26) AIR 1926 All 650 (652, 653).

('09) 2 Ind Cas 677 (680) (All).

('87) 9 All 191 (203) : 13 Ind App 134 (PC).

('32) AIR 1932 Bom 42 (46).

('27) AIR 1927 Bom 663 (664). (Where a suit was tried as a small cause, which ought not to have been so tried.)

('11) 10 Ind Cas 746 (747) (Bom). (As regards valuation agreed upon between pleaders.)

('10) 4 Ind Cas 830 (831) : 34 Bom 171.

('09) 3 Ind Cas 816 (817) : 33 Bom 664.

('87) 11 Bom 153 (159).

('72) 9 Bom H C R 242 (246).

('32) AIR 1932 Cal 629 (631) : 59 Cal 1092.

('32) AIR 1932 Cal 67 (70) : 58 Cal 1251.

('31) AIR 1931 Cal 651 (653) : 58 Cal 768.

('25) AIR 1925 Cal 812 (814) : 52 Cal 559.

(Where a Court has no jurisdiction to refer a dispute to arbitration, the consent of the parties cannot validate the reference.)

('20) AIR 1920 Cal 131 (134) : 47 Cal 770. (When a Court has no jurisdiction over the subject-matter of suit in which an order is made, such order as made is wholly void and does not operate as *res judicata*.)

('18) AIR 1918 Cal 925 (927) : 45 Cal 519.

('12) 16 Ind Cas 940 (942) (Cal).

('12) 12 Ind Cas 464 (476) : 38 Cal 639.

('09) 3 Ind Cas 466 (467) (Cal). (Absence of objection does not confer jurisdiction).

('79) 5 Cal 489 (493).

('71) 16 Suth W R (Gr) 69 (70). (Ignorance and consequent silence.)

('33) AIR 1933 Lah 746 (747).

('30) AIR 1930 Lah 240 (241).

('23) AIR 1923 Lah 425 (426). (Agreement.)

('21) AIR 1921 Lah 72 (72).

('15) AIR 1915 Lah 185 (185).

('33) AIR 1933 Mad 471 (474).

('33) AIR 1933 Mad 346 (347).

('24) AIR 1924 Mad 406 (409).

('23) AIR 1923 Mad 497 (498). (Where directions were issued to a guardian in respect of trust property of which the minor was trustee.)

('15) AIR 1915 Mad 1075 (1076). (Even if defendant is equitably estopped from raising the objection.)

('88) 11 Mad 26 (36) : 14 Ind App 160 (PC).

('19) AIR 1919 Nag 91 (92).

('32) AIR 1932 Oudh 313 (314) : 6 Luck 697.

('31) AIR 1931 Oudh 398 (400).

('29) AIR 1929 Oudh 383 (384).

('16) AIR 1916 Oudh 229 (230) : 18 Oudh Cas 364.

('15) AIR 1915 Oudh 114 (116) : 27 Ind Cas 543 (544) : 18 Oudh Cas 80. (Acquiescence.)

('20) AIR 1920 Pat 291 (324) : 5 Pat L Jour 164.

('18) AIR 1918 Pat 392 (395).

('15) AIR 1915 Low Bur 121 (122).

('25) AIR 1925 Sind 324 (328) : 18 Sind LR 286.

2a. ('38) AIR 1938 Mad 257 (259, 261).

('38) AIR 1938 Pesh 77 (78).

(1) Under Section 11 of the Suits Valuation Act, 1887, an objection that by reason of *over-valuation* or *under-valuation* of a suit or appeal, a Court has exercised jurisdiction which it has not, cannot be entertained by an Appellate Court unless such objection was taken in the Court of the first instance at or before the hearing at which issues were first framed or in the lower Appellate Court in the memorandum of appeal *and* such over-valuation or under-valuation has prejudicially affected the disposal of the suit on the merits.^{2aa}

(2) Under this Section which is framed on the analogy of Section 11 of the Suits Valuation Act, 1887,³ an objection as to the *place of suing* cannot be entertained by an Appellate Court except under the circumstances mentioned in the Section.^{3a}

The object of the Legislature in enacting this Section is that when the Court of first instance after giving an affirmative finding on jurisdiction takes proceedings on the merits of the case, the latter should not be rendered abortive and all the time and labour spent thereon should not be wasted simply by reason of the fact that the higher Court comes to a contrary finding on the point of territorial jurisdiction.⁴ The Section applies to *all* objections as to the place of suing, that is, to territorial jurisdiction based on the alleged infringement of the provisions of Sections 16 to 20 *supra*⁵ and its effect is to cure, for all purposes, objections to territorial jurisdiction except under the conditions specified in the Section.⁶ The failure to notice the provisions of this Section is analogous to an irregularity in procedure or a mistake or error apparent on the face of the record.^{6a}

2aa. ('24) AIR 1924 All 388 (389) : 46 All 250.

('30) AIR 1930 All 869 (873).

('33) AIR 1933 All 249 (252) : 55 All 345.

('37) AIR 1937 Cal 430 (431). (Objection cannot be raised in execution proceedings.)

('38) AIR 1938 Nag 149 (150) : I L R (1939) Nag 300. (The objection is to be taken at the earliest possible opportunity — But where issues are to be framed it may be allowed at or before settlement of issues—Court's discretion.)

('37) AIR 1937 Oudh 379 (380) : 13 Luck 340.

See also the following cases:—

('18) AIR 1918 P C 188 (191, 192) : 43 Bom 507 : 46 Ind App 24 (PO).

('27) AIR 1927 All 359 (360).

('21) 3 U P L R 201 (201).

('14) AIR 1914 All 128 (128) : 36 All 58.

('91) 18 All 580 (580, 581).

('62) 1 Bom H C R A C 62 (63). (Cannot be raised in second appeal.)

('04) 31 Cal 849 (856).

('03) 31 Cal 344 (348).

('97) 24 Cal 661 (667).

('95) 1 Cal W N 136 (137).

('74) 22 Suth W R 301 (302).

('74) 22 Suth W R 124 (126).

('74) 22 Suth W R 120 (121).

('74) 22 Suth W R 101 (101).

('30) AIR 1930 Mad 541 (542).

('25) AIR 1925 Oudh 561 (563) : 28 Oudh Cas 203.

('20) AIR 1920 Pat 92 (94).

3. ('23) AIR 1923 Cal 619 (622).

('14) AIR 1914 Lah 385 (388) : 1914 Pun Re No. 87.

3a. ('25) AIR 1925 Mad 117 (122, 123). (Principle of S. 21, C. P. Code, is that the plea of want of territorial jurisdiction may be waived.)

('23) AIR 1923 Cal 619 (622).

4. ('14) AIR 1914 Lah 385 (387, 388) : 1914 Pun Re No. 87. (This Section was considered retrospective and was applied to a suit filed before its coming into force.)

5. ('17) AIR 1917 Mad 198 (200, 201).

('34) AIR 1934 Sind 123 (129) : 28 Sind L R 54. (Suit relating to immovable property outside British India—Objection as to want of jurisdiction can be taken on appeal notwithstanding this Section.)

('24) AIR 1924 Mad 697 (701).

('20) AIR 1920 Mad 1019 (1023, 1024) : 43 Mad 675 (FB).

('18) AIR 1918 Mad 297 (299). (Quære only.)

('31) AIR 1931 Oudh 411 (411). (Question whether suit triable on small cause or original side is not governed by Section.)

6. ('20) AIR 1920 Mad 1019 (1024) : 43 Mad 675.

('35) AIR 1935 Oudh 358 (360) : 11 Luck 187.

[See ('35) AIR 1935 Cal 153 (153). (Trial Court dismissing suit as against person on ground of want of jurisdiction as against such person — On appeal by other defendant, Appellate Court passing decree as against person against whom it was dismissed—In application for review of appellate judgment contention raised that this Section cured the defect of want of jurisdiction as against former defendant—Held not cured as objection was in fact raised in trial Court.)]

6a. ('29) AIR 1929 Nag 73 (74) : 25 Nag L R 104.

This Section does not apply to Chartered High Courts in the exercise of their original jurisdiction, as they are governed by Clause 12 of the Letters Patent.⁷

The principle underlying the Section is of general application and has been applied to appeals^{7a} and also to cases which do not fall strictly within its terms.⁸ See Notes 6 to 8, *infra*. When a suit is instituted in a British Indian Court, that Court must determine whether it has jurisdiction to hear the suit or not, by the aid of the provisions of this Code.⁹

The Section only applies to want of *territorial* jurisdiction. It does not apply to the *inherent* incompetency of a Court to deal with a cause¹⁰ or to the want of *pecuniary* jurisdiction.¹¹

See also the undermentioned case.¹²

2. Jurisdiction, meaning of. — See Section 9, Notes 3, 4 and 5.

3. Objection to jurisdiction — General. — It has been seen in Note 5 to Section 9 that a party may waive irregularities in the *exercise* of jurisdiction which it has, or an *enquiry* into the existence of facts necessary to give jurisdiction, but that otherwise no amount of consent or waiver can give jurisdiction where there is none. An objection to the inherent jurisdiction of a Court to try a cause cannot therefore be waived and can be raised at any stage of the proceedings.¹ Thus, it can be allowed

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| <p>7. ('29) AIR 1929 Cal 358 (364) : 56 Cal 940.
('36) 164 Ind Cas 907 (910) (Cal). (Where High Court has no jurisdiction under Cl. 12, the omission to raise the objection at the earliest opportunity will not preclude defendant from raising it at the appellate stage.)
('35) AIR 1935 Rang 517 (520).
[See also ('32) AIR 1932 Bom 291 (300) : 56 Bom 324.]]</p> <p>7a. ('33) AIR 1933 Nag 318 (321, 322) : 29 Nag L R 342. (Objection to jurisdiction of Appellate Court not raised in first Appellate Court cannot be raised in second appeal.)</p> <p>8. ('26) AIR 1926 Mad 421 (422, 426) : 49 Mad 746.
('30) AIR 1930 All 873 (874) : 52 All 947. (Section held applicable to an application under O. 9, R. 18.)</p> <p>9. ('34) AIR 1934 All 226 (230).</p> <p>10. ('37) AIR 1937 All 515 (525) : I L R (1937) All 670. (Objection that Court had no jurisdiction to entertain an application for restitution it not being the Court which passed the decree in the suit.)
('36) AIR 1936 Nag 1 (3) : 31 Nag L R Sup 57 (FB). (Jurisdiction over subject-matter.)
('35) AIR 1935 Nag 250 (256) : 31 Nag L R Sup 43 (FB).</p> <p>11. ('37) AIR 1937 All 515 (525) : I L R (1937) All 670.
('37) AIR 1937 Mad 112 (113).
[See also ('35) AIR 1935 Mad 723 (724). (Want of pecuniary jurisdiction cannot be waived)]</p> <p>12. ('37) AIR 1937 All 567 (569) : I L R (1937) All 761.</p> | <p>('32) AIR 1932 Bom 42 (45).
('89) 13 Bom 650 (652).
('88) 12 Bom 155 (157).
('83) 7 Bom H C R A C 79 (81).
('88) 16 Cal 13 (16). (Absence of jurisdiction found by the Court itself.)
('82) 8 Cal 678 (685). (A new trial of a small cause suit may be granted on the ground of want of jurisdiction in the Court though not originally raised.)
('65) 4 Suth W R (Mis) 21 (21). (Plea of limitation.)
('65) 2 Suth W R Act X 76 (76).
('62) 1862 Suth W R Sup No. 15 (16).
('33) AIR 1933 Lah 890 (890).
('29) 119 Ind Cas 721 (722) (Lah).
('14) AIR 1914 Lah 85 (85, 86) : 1914 Pun Re No. 64.
('18) AIR 1918 Mad 757 (758). (No jurisdiction can be conferred by practice however long continued it may be.)
('90) 13 Mad 25 (27). (If the objection is apparent on the face of the plaint.)
('36) AIR 1936 Nag 1 (3) : 31 Nag L R Sup 57 (FB). (Even in execution.)
('35) AIR 1935 Nag 212 (214) : 31 Nag L R 408.
('31) AIR 1931 Oudh 411 (411). (Objection that suit is cognisable only by a small cause Court.)
('35) AIR 1935 Pesh 151 (152).
('35) AIR 1935 Rang 174 (176). (Court can raise the point at the time of delivering judgment even though not raised by the parties.)
('21) AIR 1921 Upp Bur 15 (16) : 4 Upp Bur Rul 75.
('15) AIR 1915 Low Bur 107 (108) : 8 Low Bur Rul 211. (Where a suit was brought for the custody of a child and not under the Guardians and Wards Act.)</p> |
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- Note 3**
1. ('85) 7 All 230 (243).
('32) AIR 1932 Bom 291 (294) : 56 Bom 324.
('26) AIR 1926 All 650 (652).

to be taken for the first time in appeal,² in second appeal,³ in Letters Patent appeal,^{3a} in revision,⁴ in an appeal after remand,⁵ and even in the course of argument before the Privy Council.⁶ If the objection is not raised till at a late stage and the jurisdiction is doubtful, the proper course is to proceed with and determine the suit.⁷ Where an objection as to jurisdiction is raised very late, the party may in the discretion of the Court be made liable for costs.⁸ If a question is raised as to the jurisdiction of the Court, the Court should decide it first and then proceed to decide other points, if it holds that it has jurisdiction.^{8a}

A defendant who objects to the jurisdiction of a Court cannot be said to have acquiesced in the trial of the suit simply because he did not apply for a transfer.⁹

Although a defect of jurisdiction cannot be waived, the High Court may, in the exercise of its discretion, refuse to interfere in revision where substantial justice has been done.¹⁰

The proper way to plead to the jurisdiction of the Court is to take the plea in the written statement as a substantive part of the defence.¹¹

- [See ('36) AIR 1936 Cal 133 (135). (Suit by partnership firm not registered under S. 58, Partnership Act — Plea that suit is not maintainable can be raised even after filing written statement.)]
[See also ('31) AIR 1931 All 689 (693) : 53 All 747.]
[But see ('71) 8 Bom H C R A C 245 (247). (Held, the High Court was not bound to entertain the objection unless it was patent on the face of the record.) ('69) 12 Suth W R 140 (140).]
2. ('24) AIR 1924 P C 95 (101) : 51 Cal 361 : 20 Nag L R 38 : 51 Ind App 72 (PC). (If there is a defect of jurisdiction.) ('39) AIR 1933 All 392 (393). ('19) AIR 1919 P C 150 (152) : 42 Mad 813 : 46 Ind App 151 (PC). ('84) AIR 1934 All 139 (140). ('31) AIR 1931 All 490 (494) : 54 All 25 (FB). ('31) AIR 1931 All 406 (407). ('32) AIR 1932 Bom 42 (45). ('87) 11 Bom 153 (170, 171, 172). ('29) AIR 1929 Cal 358 (364) : 56 Cal 940. ('09) 36 Cal 193 (206, 207). ('07) 7 Cal L Jour 152 (167). (Question of limitation.) ('90) 13 Mad 25 (27). ('34) AIR 1934 Sind 123 (129) : 28 Sind L R 54. (Suit relating to immovable property outside British India. Objection as to want of jurisdiction can be taken notwithstanding this Section.)
 3. ('19) AIR 1919 Low Bur 45 (45). ('29) AIR 1929 All 442 (443). ('32) AIR 1932 All 701 (702) : 54 All 998. ('31) AIR 1931 All 406 (407). ('30) AIR 1930 All 519 (519). ('09) 2 Ind Cas 677 (680) (All). ('23) AIR 1923 Bom 321 (349) : 47 Bom 843. ('89) 13 Bom 489 (491). ('89) 13 Bom 424 (427). ('87) 12 Bom 155 (157). ('80) 4 Bom 638 (640).
 - 3a. ('64) 2 Bom H C R A C 192 (193). ('99) 26 Cal 598 (600). ('71) 16 Suth W R 69 (70). ('70) 14 Suth W R 228 (230). ('70) 14 Suth W R 12 (14). ('62) 1862 Suth W R 15 (16) (FB). ('23) AIR 1923 Lah 551 (553). ('90) 13 Mad 273 (274). ('35) AIR 1935 Oudh 825 (826) : 11 Luck 106. ('36) AIR 1936 Pat 177 (178).
 4. ('85) 7 All 230 (243). (At any stage.) ('30) AIR 1930 All 873 (874, 875) : 52 All 947. ('09) 3 Ind Cas 816 (817) : 33 Bom 664.
 5. ('99) 23 Bom 22 (26, 29, 30). ('70) 14 Suth W R 288 (288). ('82) 8 Cal 678 (685).
 6. ('14) AIR 1914 P C 140 (143) : 42 Cal 116 : 41 Ind App 197 (PC). ('91) 13 All 300 (304) : 18 Ind App 55 (PC). ('84) 2 Bom H C R 40 (45).
 7. ('52) 1 Hyde 284 (286).
 8. ('67) 7 Suth W R 490 (490). ('71) 15 Suth W R 48 (49). ('36) AIR 1936 Pat 177 (178). (Costs not allowed). [See ('35) AIR 1935 Pat 160 (164). (Objector not allowed costs.)] [See also ('29) AIR 1929 Lah 246 (246). (Objector deprived of costs.)]
 - 8a. ('33) AIR 1933 Oudh 191 (192) : 8 Luck 676. ('33) AIR 1933 Pat 104 (107) : 12 Pat 117.
 9. ('15) AIR 1915 Cal 62 (63).
 10. ('04) 28 Bom 458 (460). ('18) AIR 1918 All 355 (356) : 40 All 666.
 11. ('32) AIR 1932 Cal 146 (147) : 59 Cal 150.

If a Court is competent to try a suit and the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute the jurisdiction of the Court upon the ground that there were irregularities in the initial procedure which if objected to at the time, would have led to the dismissal of the suit. The irregularity in assuming jurisdiction is waived if no objection is taken in time.¹²

4. Objection as to place of suing. — As has been observed in Note 1, above, this Section is an exception, so far as *territorial* jurisdiction is concerned, to the general rule that an objection to the jurisdiction of a Court can be entertained at any stage. Under this Section no objection as to the place of suing will be entertained by any appellate or revisional Court unless the following two conditions exist —

- (1) the objection is taken at the earliest possible opportunity, and in cases where issues are settled, at or before such settlement,¹ and
- (2) there has been a consequent failure of justice.

In cases in which issues are settled, if the territorial jurisdiction of a Court is transferred to another Court after the settlement of issues, but the former Court nevertheless proceeds to act in the suit, is it necessary to raise an objection to the jurisdiction at the earliest possible opportunity and does Section 21 apply? It was assumed in the undermentioned cases² that Section 21 would apply and that if no objection was raised at the earliest possible opportunity after the transfer, the objection would be deemed to have been waived. It is submitted that Section 21 does not apply to such a case. As will be seen in Note 2 to Section 150 *infra*, where a Court has jurisdiction to entertain a suit or proceeding *at the time of its institution*, such jurisdiction is not lost by the subsequent transfer of the area or territory with reference to which the suit or proceeding was instituted. If this be so, no question of any objection as to the place of suing can arise and consequently no question of the applicability of Section 21.

5. "Unless there has been a consequent failure of justice." — Even if an objection has been raised at the proper time, it is still necessary, before an appellate or revisional Court could entertain such objection, to show that the trial in the wrong Court has led to a failure of justice.¹ The question whether trial in the wrong Court

12. ('36) AIR 1926 Nag 1 (3) : 31 Nag L R Sup 57 (FB).

('35) AIR 1935 Pat 439 (444).

('12) 18 Ind Cas 542 (544) (Cal).

Note 4

1. ('19) AIR 1919 Mad 1033 (1033).
- ('19) AIR 1919 Cal 1077 (1078).
- ('31) AIR 1931 All 454 (455) : 53 All 560.
- ('14) AIR 1914 Lah 385 (385) : 1914 Pun Re No. 87. (Objection as to non-residence within jurisdiction.)
- ('21) AIR 1921 Mad 455 (455).
- ('20) AIR 1920 Mad 1019 (1023) : 43 Mad 675 (F B).
- ('19) AIR 1919 Mad 242 (244). (Cannot maintain subsequent suit that the decree is a nullity.)
- ('31) AIR 1931 Oudh 136 (137).
- ('28) AIR 1928 Pat 324 (325, 326) : 7 Pat 216.
- ('17) AIR 1917 Pat 593 (593).
2. ('24) AIR 1924 Mad 697 (699).
- ('25) AIR 1925 Mad 117 (123).

[See also ('20) AIR 1920 Mad 1019 (1023) : 43 Mad 675. (The question was raised but not decided.)]

Note 5

1. ('19) AIR 1919 All 52 (52) : 42 All 74.
- ('23) AIR 1923 Pat 553 (557).
- ('34) AIR 1934 All 549 (550).
- ('34) AIR 1934 All 226 (229).
- ('31) AIR 1931 All 553 (557).
- ('23) AIR 1923 All 226 (226).
- ('22) AIR 1922 Cal 345 (345) : 49 Cal 37.
- ('19) AIR 1919 Cal 1014 (1015).
- ('13) 20 Ind Cas 370 (371) (Cal).
- ('35) 40 Pun L R 234 (234).
- ('34) AIR 1934 Lah 233 (233, 234).
- ('32) AIR 1932 Lah 135 (135, 136).
- ('31) AIR 1931 Lah 142 (145).
- ('29) AIR 1929 Lah 509 (511) : 11 Lah 15.
- ('22) AIR 1922 Lah 164 (165).
- ('19) AIR 1919 Lah 217 (217).
- ('17) AIR 1917 Lah 12 (12, 13) : 1916 Pun Re No. 93.

subsequently objected to on the ground of want of territorial jurisdiction.^{3a} But the Calcutta High Court has taken a contrary view,^{3b} based on the ground that Section 21, being an exception to the general rule that the inherent want of jurisdiction of the Court cannot be waived by consent of the parties, should not be so interpreted as to have a wider application than what is justified by its terms. In a recent case of the Madras High Court,⁴ one of the learned Judges, Mr. Justice Ramesam, was of opinion that Section 21 cannot be applied to execution proceedings. The observation was, however, *obiter*, and was dissented from by the other learned Judge. The actual decision in that case was that where a Court had *no power* to sell certain properties *though within its territorial jurisdiction*, the objection to jurisdiction cannot be deemed to have been waived by its not having been raised at the earliest possible opportunity.

It was held in the undermentioned case⁵ that where a Court sells properties without objection by the judgment-debtor, after the territorial jurisdiction has been withdrawn from it, the estoppel against the judgment-debtor cannot be extended to apply to a subsequent purchaser of the same property at a sale held in execution of a decree against the same judgment-debtor in another suit.

The High Court of Madras has also held⁶ that the failure of a party to object to the territorial jurisdiction of a Court *to pass a final decree* does not amount to a waiver of objection to the Court's jurisdiction to *sell* the property in execution of that decree.

7. Insolvency proceedings. — Under the proviso to Section 11 of the Provincial Insolvency Act of 1920, no objection as to the place of presentment of an insolvency petition shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard, at the earliest opportunity, and unless there has been a consequent failure of justice.

8. Collateral proceedings. — As has been seen already in Note 6 above, the effect of Section 21 is that an objection to the territorial jurisdiction of a Court not taken in the manner provided by that Section must be considered cured for *all* purposes. It has accordingly been held by the High Courts of Lahore,¹ Madras² and Patna³ that an objection as to the territorial jurisdiction of a Court, not raised at the proper time under Section 21, cannot be raised in any collateral proceeding or in a separate suit. The High Courts of Bombay,⁴

3a. ('20) AIR 1920 Mad 505 (506, 507, 508) : 43 Mad 135.

('13) 18 Ind Cas 498 (499) (Mad). (Sale.)

('34) AIR 1934 Mad 573 (575). (Sale.)

('26) AIR 1926 Mad 421 (422, 426, 427) : 49 Mad 746 (Sale.)

('24) AIR 1924 Mad 457 (458). (Delivery of property.)

[See also ('32) AIR 1932 Mad 440 (442) : 55 Mad 856. (No objection taken as to transferee Court's jurisdiction to execute the decree even on the grounds of appeal. Point cannot be argued in appeal.)

3b. ('23) AIR 1923 Cal 619 (622). (Sale.)

[But see ('12) 13 Ind Cas 542 (544) (Cal).]

4. ('28) AIR 1928 Mad 746 (759).

5. ('20) AIR 1920 Mad 505 (506, 507, 508) : 43 Mad 135.

6. ('27) AIR 1927 Mad 627 (630) : 50 Mad 882.

Note 8

1. ('29) AIR 1929 Lah 449 (452).

2. ('25) AIR 1925 Mad 117 (119, 123).

('19) AIR 1919 Mad 242 (244).

('29) AIR 1929 Mad 323 (324). (Objection as to pecuniary jurisdiction.)

[See also ('38) AIR 1938 Mad 257 (261, 262) (Do.)]

3. ('28) AIR 1928 Pat 324 (326) : 7 Pat 216.

[See also ('33) AIR 1933 Pat 104 (106) : 12 Pat 117.

('33) AIR 1933 Pat 457 (459).]

4. ('26) AIR 1926 Bom 481 (483).

[See also ('33) AIR 1933 Bom 398 (401, 402) : 57 Bom 456.

('87) 11 Bom 160 (Note) (170, 171).]

Allahabad⁵ and Calcutta⁶ and the Judicial Commissioner's Court of Nagpur⁷ have, on the other hand, held that this Section does not preclude the objection being raised in a separate suit. But the Bombay High Court has arrived at the same conclusion as the former set of High Courts, by applying the principle of constructive *res judicata* to such cases and holding that an objection to the territorial jurisdiction of the Court in a previous suit, which might and ought to have been raised therein, must be deemed to have been heard and decided in favour of the existence of jurisdiction and is barred from being raised again in a subsequent suit.⁸ The High Court of Allahabad⁹ and the Judicial Commissioner's Court of Nagpur¹⁰ have held that the principle of constructive *res judicata* will not apply, the reason given being that the decree in the former suit was one passed without jurisdiction. The High Court of Calcutta in coming to the conclusion that the question of territorial jurisdiction can be re-agitated in a separate suit, has not referred to the question of *res judicata*.¹¹

9. Foreign Courts.—This Section has no application unless the place of suing is one to which the Code applies.¹ It has, therefore, no application to a case in which there has been *usurpation* by the lower Court of the jurisdiction of a foreign Court.² Thus, a suit instituted in a British Indian Court against a non-resident foreigner on a cause of action which arose wholly outside British territory is not covered by Section 21.³ But where the defendant has *submitted* to the jurisdiction of the Courts, he cannot subsequently challenge its decision for want of jurisdiction.⁴

10. Court trying a remanded case, jurisdiction of.—The jurisdiction of the Court trying a remanded case depends entirely on the *order of remand*. Where, therefore, a case is remanded to Court *A* for trial, Court *B* can have no jurisdiction to deal with it or pass any orders in it. Neither Section 21 in terms nor the principle underlying it is applicable to the case.¹

Where a case is remanded to Court *A* for trial *on the merits*, it has been held that it has no power to entertain a question as to jurisdiction raised before it for the first time.²

11. Procedure where suit is filed in a wrong Court.—See also O. 7 R. 10.

Where a Court finds that it has no jurisdiction to entertain the suit, the proper procedure is to return the plaint under O. 7 R. 10 for presentation to the proper Court.¹

5. ('81) AIR 1981 All 454 (458) : 53 All 560.

6. ('87) AIR 1987 Cal 738 (739).

('84) 10 Cal 697 (707). (When no objection as to jurisdiction is taken, it may be taken as conclusively decided that Court had jurisdiction.)

('81) 8 Cal L Rep 261 (264). (Irregularity—Objection to, cannot be allowed at a late stage.)

('79) 5 Cal 64 (69, 70, 71).

('70) 13 Suth W R 292 (293, 294).

('68) 10 Suth W R 6 (6). (Appeal heard without objection to jurisdiction.)

('69) 2 Beng L R App 42 (43).

[See also ('22) AIR 1922 Pat 322 (334).]

7. ('35) AIR 1935 Nag 250 (256) : 31 Nag L R Sup 43 (F B).

8. ('26) AIR 1926 Bom 481 (483).

9. ('31) AIR 1931 All 454 (458) : 53 All 560.

10. ('35) AIR 1935 Nag 250 (256) : 31 Nag L R Sup 43 (F B).

11. ('37) AIR 1937 Cal 738 (739).

Note 9

1. ('19) AIR 1919 P O 150 (152) : 42 Mad 818 : 46 Ind App 151 (P O).

('28) AIR 1928 Lah 297 (298) : 9 Lah 445.

2. ('19) AIR 1919 Mad 1043 (1043).

('28) AIR 1928 Lah 297 (299) : 9 Lah 445.

3. ('25) AIR 1925 Mad 788 (789).

('28) AIR 1928 Lah 297 (298) : 9 Lah 445.

4. ('34) AIR 1934 All 740 (757) : 56 All 828. (Defendant taking plea of want of jurisdiction but also defending suit on merits is estopped from contending that the Court had no jurisdiction.)

Note 10

1. ('23) AIR 1923 Mad 351 (351, 352).

2. ('68) 5 Bom H C R A C 137 (138).

Note 11

1. ('19) AIR 1919 Lah 26 (27) : 1 Lah 203.

('75) 23 Suth W R 263 (263).

The objection as to jurisdiction need not have been raised at any particular stage to enable the Court to so transfer. The question of delay mentioned in Section 21 is only applicable where the objection as to jurisdiction is raised before an appellate or revisional authority.² The trial Court, however, is incompetent to order the return of the plaint after the passing of the decree.³

22. [S. 22.] Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

Power to transfer suits which may be instituted in more than one Court.

Synopsis

1. Scope and applicability of the Section.
2. "Apply to have the case transferred."
3. Notice to the other parties necessary before making application.
4. Grounds for transfer. See Section 24.
5. Objections must be heard before making order.
6. Application, when to be made.
7. Transfer to Court subordinate to a different High Court. See Section 23.
8. Stay of suit.
9. Appeal.

Other Topics

How application made. See Note 2.

"May be instituted." See Note 1.

"Shall determine in which of several Courts having jurisdiction the suit shall proceed." See Note 1.

Transfer where plaintiff has a choice of Courts. See Note 1.

When discretion exercised. See Note 1.

Whether question as to want of jurisdiction of trying Court can be raised in application for transfer under this Section. See Note 1, Pt. (5).

('26) AIR 1926 All 708 (709). (Appellate Court can under Ss. 196 and 197, Agra Tenancy Act, if possessed of all materials, itself dispose of the suit on merits.)

('66) 1 Agra 280 (280).

('66) 1 Agra 222 (222). (The Court should not however reject the plaint without recording its reasons.)

('99) 23 Bom 756 (759).

('89) 23 Bom 679 (681).

('85) 9 Bom 266 (268). (Appellate Court may also return.)

('85) 9 Bom 259 (265) (Do.)

('84) 8 Bom 313 (318).

('75) 1 Bom 538 (543). (Appellate Court may also return.)

('68) 5 Bom H C R A C 212 (213).

('87) 10 Mad 211 (212).

('26) AIR 1926 Nag 313 (313).

[See ('88) 11 Mad 482 (485). (However, the Appellate Court is not bound to return.)]

2. ('11) 10 Ind Cas 980 (980) : 4 Sind L R 264.

3. ('15) AIR 1915 Nag 116 (117) : 11 Nag L R 13.

[See also ('84) 8 Bom 380 (389). (Refusal by High Court to return, after decision in second appeal.)]

1. Scope and applicability of the Section. — It is a general principle of law that a plaintiff, as *arbiter litis*, has a right to choose his own *forum*.¹ This Section curtails that right to a certain extent by providing that the suit can be transferred under certain circumstances from the *forum* chosen by the plaintiff to another. Very strong reasons, therefore, must be shown to deprive the plaintiff of this right to choose his *forum*;² and Courts, as a rule, ought not to lightly interfere with it.³ The mere fact that it would be more convenient to the applicant to have the action tried elsewhere is no sufficient reason to force the plaintiff out of the Court in which he is legally entitled to sue. But the totality of circumstances should indicate the preponderance of the balance of convenience in favour of the suit being proceeded with in a Court different from that in which it has been instituted.⁴

This Section assumes that the party applying for transfer does not question the *jurisdiction* of the Court. Consequently this Section has no application where the party applying for transfer pleads that the Court has no jurisdiction.⁵ Where, however, the plea as to want of jurisdiction has been heard and decided in plaintiff's favour and the defendant thereupon applies for transfer on the basis of *the evidence of jurisdiction*, the Section will apply.⁶

This Section has reference only to cases which, *at the option of the plaintiff*, can be brought in more Courts than one.⁷ It is less general than the provisions of Section 24.

This Section and Section 23 do not apply to a case in which the question is whether a suit should be tried by a Court subordinate to a High Court or by a High Court. In such a case the High Court may, under its inherent powers, exercise powers similar to those contemplated by these Sections.⁸

Where some of the defendants to a suit are resident within the jurisdiction of one Court and others within the jurisdiction of another Court and the suit is instituted in the former Court by leave of Court granted under Section 20 (b) *ante*, the proper remedy, where such leave has been granted without notice to the opposite party, is to

Section 22 — Note 1

1. ('24) AIR 1924 Lah 249 (250).
('24) AIR 1924 Lah 304 (305).
('79) 4 Cal L Rep 282 (284). (Where in both suits practically the same issues are triable, the plaintiff who first institutes his suit is entitled to proceed in the Court in which he has chosen to bring the suit and to have the other suit stayed.)
('28) AIR 1928 Lah 183 (184, 185).
('28) AIR 1928 Lah 159 (159, 160).
('24) AIR 1924 Lah 306 (308, 309, 310).
2. ('24) AIR 1924 Lah 306 (310).
('28) AIR 1928 Lah 159 (159, 160).
('20) AIR 1920 Lah 381 (382) : 1919 Pun Re No 167.
('94) 1894 Pun Re No 8.
('14) AIR 1914 Low Bur 37 (39) : 7 Low Bur Rul 129 (133, 134).
3. ('24) AIR 1924 Lah 249 (250).
('28) AIR 1928 Lah 183 (184, 185).
('09) 10 Cal L Jour 208 (212).
4. ('24) AIR 1924 Lah 249 (250).
('24) AIR 1924 Lah 304 (305).
('35) AIR 1935 All 979 (980).
5. ('28) AIR 1928 Lah 183 (184, 185).
('24) AIR 1924 Lah 306 (310).
('36) AIR 1936 Pesh 5 (6, 7).
('01) 1901 All W N 136 (137).
('23) AIR 1923 Lah 288 (289).
('35) AIR 1935 All 979 (980). (Application for transfer maintainable when jurisdiction of Court is not challenged.)
('14) AIR 1914 All 351 (352).
('08) 1908 All W N 46 (47). (Section does not empower a Court to entertain a suit which otherwise it would have no jurisdiction.)
('09) 4 Ind Gas 922 (922) (Lah).
('18) AIR 1918 Oudh 441 (442) : 21 Oudh Cas 217.
('20) AIR 1920 Pat 138 (140).
('19) AIR 1919 Pat 345 (348).
6. ('27) AIR 1927 Lah 183 (184, 185).
7. ('14) AIR 1914 All 351 (352) : 12 All L Jour 896 (896).
('23) AIR 1923 Lah 288 (289).
('34) AIR 1934 All 569 (571).
[See ('29) AIR 1929 Lah 175 (176). (Under the Section both Courts must have jurisdiction over the suit.)]
8. ('34) AIR 1934 All 14 (16) : 56 All 201.

The objection as to jurisdiction need not have been raised at any particular stage to enable the Court to so transfer. The question of delay mentioned in Section 21 is only applicable where the objection as to jurisdiction is raised before an appellate or revisional authority.² The trial Court, however, is incompetent to order the return of the plaint after the passing of the decree.³

22. [S. 22.] Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

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('85) 9 Bom 259 (265) (Do.)

('84) 8 Bom 313 (318).

('75) 1 Bom 538 (543). (Appellate Court may also return.)

('68) 5 Bom H C R A C 212 (213).

('87) 10 Mad 211 (212).

('26) AIR 1926 Nag 313 (313).

[See ('88) 11 Mad 482 (485). (However, the Appellate Court is not bound to return.)]

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[See also ('84) 8 Bom 380 (389). (Refusal by High Court to return, after decision in second appeal.)]

1. Scope and applicability of the Section. — It is a general principle of law that a plaintiff, as *arbiter litis*, has a right to choose his own *forum*.¹ This Section curtails that right to a certain extent by providing that the suit can be transferred under certain circumstances from the *forum* chosen by the plaintiff to another. Very strong reasons, therefore, must be shown to deprive the plaintiff of this right to choose his *forum*;² and Courts, as a rule, ought not to lightly interfere with it.³ The mere fact that it would be more convenient to the applicant to have the action tried elsewhere is no sufficient reason to force the plaintiff out of the Court in which he is legally entitled to sue. But the totality of circumstances should indicate the preponderance of the balance of convenience in favour of the suit being proceeded with in a Court different from that in which it has been instituted.⁴

This Section assumes that the party applying for transfer does not question the jurisdiction of the Court. Consequently this Section has no application where the party applying for transfer pleads that the Court has no jurisdiction.⁵ Where, however, the plea as to want of jurisdiction has been heard and decided in plaintiff's favour and the defendant thereupon applies for transfer on the basis of *the evidence of jurisdiction*, the Section will apply.⁶

This Section has reference only to cases which, *at the option of the plaintiff*, can be brought in more Courts than one.⁷ It is less general than the provisions of Section 24.

This Section and Section 23 do not apply to a case in which the question is whether a suit should be tried by a Court subordinate to a High Court or by a High Court. In such a case the High Court may, under its inherent powers, exercise powers similar to those contemplated by these Sections.⁸

Where some of the defendants to a suit are resident within the jurisdiction of one Court and others within the jurisdiction of another Court and the suit is instituted in the former Court by leave of Court granted under Section 20 (b) *ante*, the proper remedy, where such leave has been granted without notice to the opposite party, is to

Section 22 — Note 1

1. ('24) AIR 1924 Lah 249 (250).
(24) AIR 1924 Lah 301 (305).
(79) 4 Cal L Rep 282 (284). (Where in both suits practically the same issues are triable, the plaintiff who first institutes his suit is entitled to proceed in the Court in which he has chosen to bring the suit and to have the other suit stayed.)
(28) AIR 1928 Lah 183 (184, 185).
(28) AIR 1928 Lah 159 (159, 160).
(24) AIR 1924 Lah 306 (308, 309, 310).
2. ('24) AIR 1924 Lah 306 (310).
(28) AIR 1928 Lah 159 (159, 160).
(20) AIR 1920 Lah 381 (382) : 1919 Pun Re No 167.
(94) 1894 Pun Re No 8.
(14) AIR 1914 Low Bur 37 (39) : 7 Low Bur Rul 129 (133, 134).
3. ('24) AIR 1924 Lah 249 (250).
(28) AIR 1928 Lah 183 (184, 185).
(09) 10 Cal L Jour 208 (212).
4. ('24) AIR 1924 Lah 249 (250).
(24) AIR 1924 Lah 304 (305).
(85) AIR 1935 All 979 (980).

- (25) AIR 1928 Lah 183 (184, 185).
(24) AIR 1924 Lah 306 (310).
(36) AIR 1936 Pesh 5 (6, 7).
5. ('01) 1901 All W N 136 (137).
(23) AIR 1923 Lah 288 (289).
(35) AIR 1935 All 979 (980). (Application for transfer maintainable when jurisdiction of Court is not challenged.)
(14) AIR 1914 All 351 (352).
(08) 1908 All W N 46 (47). (Section does not empower a Court to entertain a suit which otherwise it would have no jurisdiction.)
(03) 4 Ind Cas 922 (922) (Lah).
(18) AIR 1918 Oudh 441 (442) : 21 Oudh Cas 217.
(20) AIR 1920 Pat 138 (140).
(19) AIR 1919 Pat 345 (348).
6. ('27) AIR 1927 Lah 183 (184, 185).
7. ('14) AIR 1914 All 351 (352) : 12 All L Jour 596 (596).
(23) AIR 1923 Lah 288 (289).
(34) AIR 1934 All 569 (571).
[See ('29) AIR 1929 Lah 175 (176). (Under the Section both Courts must have jurisdiction over the suit.)]
8. ('34) AIR 1934 All 14 (16) : 56 All 201.

apply under this Section to have the suit transferred.⁹ Sections 22 to 25 of the Code are not affected by anything contained in Section 11 of Dekkhan Agriculturists Relief Act (XVII of 1879).

2. "Apply to have the case transferred." — An application for transfer under this Section should be made by petition and affidavits setting forth the grounds of transfer.¹ But the Court may in proper cases dispense with the affidavit.² Where there are several suits to be transferred, a separate application is necessary for each suit.³ Even before a *guardian ad litem* has been appointed to a minor defendant, any next friend of the minor may apply on his behalf under this Section for transfer of the case to another Court.⁴

3. Notice to the other parties necessary before making application. — The provision as to notice under this Section is mandatory. The words "*after notice to the parties*" indicate that the notice must be given *prior* to the making of the application and that the notice issued by the Court after the application is filed is not what is intended, so that where no notice is given before the application is made, the application must be dismissed.¹ It would seem that an application made *in the presence of the parties* may be assumed to be made after the notice required by the Section.²

4. Grounds for transfer. — See Section 24.

5. Objections must be heard before making order. — The object of notice to the parties is to see if they have any objections to the application for transfer. Where a party does not file his objections on the first day, the Court may grant him further time to do so.¹

6. Application, when to be made. — The provision as to the *time* of making the application is also mandatory and an application under the Section must be made at the earliest possible opportunity and in cases where issues are settled, at or before such settlement.¹ Issues cannot, however, be settled until after all the parties are properly represented before the Court; as for instance, where a *guardian ad litem* is to be appointed for a minor defendant.² A party taking transfer proceedings in the trial Court and then approaching the High Court cannot be said to be guilty of laches.³

7. Transfer to Court subordinate to a different High Court. — See S. 23.

8. Stay of suit. — Under Section 20 of the old Code, where a suit which might be instituted in more than one Court was instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants did not reside or carry on business or personally work for gain, the defendant or defendants might obtain an order staying the proceedings on the ground that justice was more likely

9. ('38) AIR 1938 Pesh 15 (17).

Note 2

1. ('83) 9 Cal 980 (982).
2. ('12) 14 Ind Cas 561 (561) (Lah).
3. ('70) 2 N W P H O R 147 (147, 148).
4. ('89) 16 Cal 771 (776).

Note 3

1. ('16) 1916 Lah 95 (96) : 1917 Pun Re No 11. (Section 151 cannot empower the Court to ignore the Section.)
2. ('78) 2 Cal L Rep 352 (353).
3. ('28) AIR 1928 Lah 183 (183, 184).
- [But see ('35) A I R 1935 All 979 (980).

(Notice to other party should be given before making such application but notice given even after making transfer application is sufficient.)]

2. ('78) 2 Cal L Rep 352 (353).

Note 5

1. ('78) 2 Cal L Rep 352 (353).

Note 6

1. ('25) AIR 1925 Lah 322 (322).
(25) AIR 1925 Lah 175 (175).
2. ('14) 25 Ind Cas 723 (724) (Lah).
3. ('28) AIR 1928 Mad 15 (15, 16).

to be done by the suit being instituted in some other Court.¹ This provision has now been dropped as unnecessary, because sufficient provision has been made for the *transfer* of suits in such cases.²

A Court has, of course, an inherent power to stay a suit where the ends of justice require it or to prevent the abuse of the process of the Court.³

9. Appeal. — An order under this Section is not an appealable one. See Section 104.

23. [Ss. 22, 23, 24.] (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.

To what Court application lies.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

[1877, Ss. 23 and 24; 1859, S. 13.]

Synopsis

1. Scope of the Section.
2. "Appellate Court," meaning of.
3. Applicability of Section to Chartered High Courts.
4. High Court's power to transfer to Court subordinate to a different High Court.
5. "Subordinate," meaning of. — See Section 3, *ante*.

Other Topic: When transfer should be granted. See S. 24, Note 13.

1. Scope of the Section. — This Section indicates the Courts to which applications under Section 22 should be made, and should be read along with that Section. See Notes to Section 22.

Note 8

1. ('27) AIR 1927 Bom 79 (80) : 51 Bom 26.
- ('89) 13 Bom 178 (183). (Suit in Bombay High Court—The fact that defendants and witnesses resided in Wardha, in Central Provinces, does not necessarily show that justice is more likely to be done by the suit being filed in Wardha.)
- ('84) 8 Bom 571 (574). (Costs of previous litigation in foreign Court not paid — No ground for stay of suit.)
- ('01) 1901 All W N 136 (137).
- ('08) 35 Cal 541 (542). (Two suits in two Courts under different High Courts — Stay ordered under Ss. 20 and 24 of the Code of 1882.)

('05) 9 Cal W N 748 (749). (Same matter in litigation in High Court and in Small Cause Court—Stay of small cause suit ordered under Section 20.)

('95) 3 Mad L Jour 270 (272). (Where proceedings were stayed plaintiff was entitled to reinstitute the suit in another Court without paying any additional court-fee.)

(1882) 22 Ch D 397 (406), *McHenry v. Lewis*.

(1883) 23 Ch D 225 (229, 230), *The Bruvian Guano Company v. Bockwoldt*.

2. ('27) AIR 1927 Bom 79 (80) : 51 Bom 26.
3. See S. 151 and Notes thereto.

Synopsis

1. Legislative changes.
2. Scope and applicability of the Section.
3. "On the application of any of the parties."
4. "Of its own motion."
5. "District Court," meaning of.
6. "At any stage."
7. "Suit, appeal, or other proceeding."
8. "Pending before it."
9. "Court subordinate to it"—Clause (3).
10. Notice of application is necessary.
11. Court to which proceeding is transferred must be competent to try it.
12. No transfer where Court of institution has no jurisdiction.
13. Grounds of transfer.
14. Absence of order for transfer—Effect.
15. Effect of transfer from or to a Court of Small Causes.
16. Procedure of Court of transfer.
17. Appeal.
18. Revision.

Other Topics

Adverse decision on point of law in a connected suit as ground of transfer. See Note 13, Foot-notes (15) and (16).

After hearing such of them as desire to be heard. See Note 10.

Applicability of Section 476, Criminal Pro. Code. See Note 7, Point (4).

Chartered High Courts. See Note 2, Point (12).

Defect in jurisdiction—If cured by subsequent transfer. See Note 12, Point (4).

Form. See App. H, Form No. 2.

General power of transfer. See Note 2, Point (2).

Power of transfer — Whether can be delegated. See Note 5, Point (3).

Power to stay suit. See Note 2.

Power to transfer remanded case. See Note 6, Point (3).

Re-transfer. See Note 6, Point (2).

Sub-clause (a). See Note 9.

Sub-clause (b). See Note 9.

Sub-section (2). See Note 16.

Sub-section (4). See Note 11.

Transfer from Presidency Small Cause Court to High Court. See Note 2, F-N. (11).

Transfer of applications under special Acts. See Note 7, Point (3).

Transfer of review application. See Note 11, F-N. (7).

1. Legislative changes.

- (a) The words "at any stage" are new. See Note 6.
- (b) Clause (a) of sub-section (1) is new. See Note 2.
- (c) The provision for *re-transfer* in clause (b) (iii) is new. See Note 2.
- (d) Sub-section (2) is also new. See Note 14.

2. Scope and applicability of the Section. — It has been seen in Section 22 that that Section has reference to cases which, *at the option of the plaintiff*, can be brought in more Courts than one.¹ This Section is much wider, and gives a *general* power of transfer of all suits, appeals or other proceedings, which can be exercised by the Court of *its own motion* and *at any stage* of the suit. The power exercised under this Section is more extensive than that under Section 39 inasmuch as the transfer under the latter Section can be made only to the *Courts specified therein*.² This Section, again, contemplates the transfer of a *particular* case and differs in this respect from Section 150 which relates to the transfer of the *whole business* of the Court to another Court.³

In order that this Section may apply, it is essential that —

- (a) the Court in which the suit has been instituted has *jurisdiction* to entertain it;⁴
- (b) the Court to which it is transferred is one competent to try it;⁵ and
- (c) the Court to which it is transferred is *subordinate* to the High Court or District Court which orders the transfer.⁶

Section 24 — Note 2

1. See Note 1 to S. 22.

[See also ('29) AIR 1929 Sind 170 (171): 23 Sind L R 365.]

2. ('26) AIR 1926 Mad 421 (425): 49 Mad 746.

3. ('17) AIR 1917 Mad 272 (273).

4. See note 12 below.

5. See Note 11 below.

6. See Note 9 below.

If the application for transfer to the District Judge proves ineffective, the High Court may be moved by a fresh application for transfer.⁷

Section 25 of the old Code provided only for *withdrawal* of suits from subordinate Courts and for transfer of the suits *so withdrawn*. The Calcutta High Court had held, in a case arising under that Section,⁸ that the Section was not exhaustive and that the District Court had an inherent power to transfer a case itself to a subordinate Court. The same view was assumed by the Madras High Court also.⁹ The Section has now been made very much wider than before, and it has been held by the Nagpur Judicial Commissioner's Court¹⁰ that the Section is now exhaustive of the judicial power of transferring suits.

A Court has no power under this Section to *stay* a suit. For its powers to do so under other provisions of the Code, see Sections 10, 22 and 151.

This Section applies to the Small Cause Courts.¹¹ But the High Court can exercise the powers under the Section only in its original civil jurisdiction.¹²

The High Court has jurisdiction, independently of this Section, to transfer a suit from one Court to another Court under Section 107 (b) of the Government of India Act of 1915.¹³

3. "On the application of any of the parties."—Where there are several suits pending which are sought to be transferred, an application should be made in each suit.¹ The Court may in proper cases dispense with an affidavit in support of the application.² Where there has been a delay in making the application, such delay should be explained.³

The word "parties" refers to those litigating the suit, appeal, or other proceeding of which the transfer is sought.⁴ A person acting on behalf of a minor defendant in a suit, before a guardian *ad litem* is appointed, will be a "party" within the meaning of this Section;⁵ so also a creditor in an insolvency proceeding under Chapter XX of the old Code.⁶

Even where the High Court has refused to transfer a case *suo motu*, it can do so on an application for transfer.⁷

4. "Of its own motion."—The High Court or the District Court has power to transfer, under this Section, *suo motu* without any application by a party.¹ Where a Court takes action on the application of a non-party treating him as a party erroneously, the transfer order will be deemed to have been made *suo motu*.²

7. ('10) 5 Ind Cas 771 (771) (Cal).

Note.—Where, however, no application is made to the District Judge and no communication is made to the plaintiff, High Court will not exercise any special powers for that purpose: see (1869) 11 Suth W R 189 (189).

('26) AIR 1926 Cal 326 (327).

('27) AIR 1927 Pat 383 (384). (High Court can transfer under this Section as also under its general powers of superintendence.)

8. ('09) 1 Ind Cas 913 (917) : 36 Cal 193.

[But see ('05) 32 Cal 875 (881).]

9. ('85) 8 Mad 500 (502).

10. ('16) AIR 1916 Nag 31 (32) : 13 Nag L R 81.

11. ('99) 3 Cal W N 247 (248). (Presidency Small Cause Courts.)

12. ('29) AIR 1929 Cal 358 (364) : 56 Cal 940.

13. ('85) AIR 1935 All 750 (750).

Note 3

1. ('19) AIR 1919 Pat 376 (377): 4 Pat L Jour 13.

('70) 2 N W P H O R 147 (147, 148).

2. ('12) 14 Ind Cas 561 (561) (Lah).

3. ('09) 3 Ind Cas 539 (541) (Cal).

4. ('16) AIR 1916 Nag 123 (125): 13 Nag L R 203.

5. ('89) 16 Cal 771 (776).

6. ('98) 22 Bom 778 (782, 783).

7. ('23) AIR 1923 All 153 (158).

Note 4

1. ('97) 22 Bom 778 (783).

('33) AIR 1933 Lah 671 (675) : 14 Lah 779.

('36) AIR 1936 Mad 55 (56) (F B).

2. ('16) AIR 1916 Nag 123 (126): 13 Nag L R 203.

Court⁴ unless the High Court's order is drawn up in express terms so as to disclose a clear intention of limiting those powers.⁵ Similarly, execution proceedings may now be transferred under Section 24 to a subordinate Court⁶ as the words "at any stage of the suit" will include execution proceedings also.⁷

7. "Suit, appeal or other proceeding."—It has been seen in Note 6 above that the word "suit" in this Section includes execution proceedings also.^{1a} The old Section did not contain the words "other proceedings" but it was held that the procedure of the Section applied to miscellaneous proceedings by virtue of Section 647 corresponding to the present Section 141.¹ The present Section 24 itself will include such proceedings.² The proceeding must, however, be a *civil* proceeding. An enquiry under Section 14 of the Legal Practitioners Act is not a civil proceeding and the Section therefore does not apply.³ The Section will not also apply to special proceedings which were not in contemplation when the Code of 1908 was passed. Thus, Section 24 cannot be applied to proceedings under Section 476 of the Criminal Procedure Code as amended by Act XVIII of 1923 though such proceedings are to be regarded as civil proceedings.⁴ See also the undermentioned case.⁵

8. "Pending before it."—Under Section 25 of the old Code a District Judge had no power to transfer a case pending *before himself*.¹ Clause (a) has now been added with a view to remove this disability.² The provisions of the Section can have no application to a proceeding which has terminated.³

9. "Court subordinate to it"—Clause (3).—The District Court or the High Court can order a transfer under this Section only to a Court *subordinate* to it.¹ For subordination of Courts in general, see Section 3, *ante*. Clause (3) of this Section

4. ('12) 19 Ind Cas 552 (553) : 9 Nag L R 40. (8 W R 147, Dissented from.)

('14) AIR 1914 Cal 638 (640). (Remand to District Judge without liberty to transfer—Transfer to Subordinate Judge agreed to by parties—Parties cannot resile from the position.)

('14) AIR 1914 All 236 (238).

[See also ('15) AIR-1915 Mad 446 (447).]

5. ('22) AIR 1922 All 35 (36) : 44 All 211.

[See also ('33) AIR 1933 Lah 29 (31) : 13 Lah 806. (Remand by Additional District Judge to a Sub-Judge. The proceeding may be transferred by District Judge to another Sub-Judge.)]

6. ('26) AIR 1926 Mad 421 (425) : 49 Mad 746.

[See also ('15) AIR 1915 Mad 920 (920) : 39 Mad 485. (Execution proceeding transmitted—Court has power to withdraw it.)]

7. ('25) AIR 1925 All 276 (277) : 42 All 57.

Note 7

1a. See ('36) AIR 1936 Pesh 56 (57).

1. ('87) 9 All 180 (182, 183). (Proceeding under the Indian Companies Act.)

('84) 8 Mad 548 (550) (F B). (Claim proceedings under old S. 331.)

2. See ('12) 15 Ind Cas 565 (566) : 8 Nag L R 51. (Application to set aside *ex parte* decree—Appellate Court can withdraw it.)

3. ('16) AIR 1916 Pat 115 (116, 117) : 1 Pat L Jour 576.

4. ('27) AIR 1927 All 469 (469, 470) : 49 All 460.

For powers of transfer under other Acts; see the following Acts :

S. 12, Burma Courts Act, XI of 1922. S. 11, Dekkhan Agriculturists' Relief Act, XVII of 1879. Ss. 7 and 45, Oudh Courts Act, VI of 1925. S. 8, The N W F P and Oudh Hon. Munsif's Act No. II of 1896. The Bengal, Agra and Assam Civil Courts Act, XII of 1887. The Agra Tenancy Act, III of 1926, Sch. II, List 2.

5. ('38) AIR 1938 Oudh 217 (218). (The phrase 'other proceeding' is sufficiently general to cover the case of the transfer of the disposal of one claim under the U. P. Encumbered Estates Act, from the Court of one Special Judge to the Court of another.)

Note 8

1. ('89) 13 Bom 654 (655, 656). (1900) 10 Mad L Jour 238.

('05) 32 Cal 875 (881).

2. ('14) AIR 1914 Lah 187 (190) : 1915 Pun Re No. 3.

3. ('37) AIR 1937 Nag (381) (383). (S. 24 (1) (b) has no application to a proceeding which has terminated.)

[But see ('38) AIR 1938 Oudh 217 (218).]

Note 9

1. ('19) AIR 1919 Lah 27 (28) : 1 Lah 158.

('16) AIR 1916 Nag 31 (32) : 13 Nag L R 81. ('66) 1 Agra 178 (179). (Munsif's Court is subordinate to High Court.)

declares that for the purpose of this Section, Courts of Assistant and Additional Judges shall be deemed to be subordinate to the District Court. A District Judge can therefore transfer a case pending before him to the Court of the Additional District Judge.² A junior Subordinate Judge is not subordinate to a senior Subordinate Judge within the meaning of this Section.³ The Divisional Judge of Nagpur is not subordinate to the High Court of Bombay though his decree for dissolution of marriage is subject to the confirmation of the Bombay High Court. The latter Court cannot therefore transfer the proceeding filed before it to the Nagpur Court for disposal.⁴

"Court" in this Section means the Court to which the Code applies.⁵ Thus, a suit pending in a scheduled district cannot be transferred to another Court under this Section, as the Code is *inapplicable to the scheduled districts*.⁶

This Section does not empower the District Court or the High Court to transfer a suit to any Court beyond the local limits of its own jurisdiction.⁷ Nor does it empower them to transfer cases or matters over which they themselves have no jurisdiction.⁸ The Courts having jurisdiction under the Provincial Insolvency Act are declared by Section 3 of that Act to be the District Courts. The High Court has thus no power to act under that Act. Hence it cannot transfer an insolvency proceeding pending before a District Court to the file of the High Court Judge exercising insolvency jurisdiction.⁹

10. Notice of application is necessary.—Where a Court acts under this Section *suo motu*, no notice need be given¹ though *after* the transfer is made the parties should be informed that the case has been transferred.² But where a *party applies* for transfer, the procedure as to notice becomes imperative, and a transfer or withdrawal without notice will be set aside on the ground of illegality or material irregularity.³ The notice however may be *waived* by the party concerned as the

(05) 7 Bom LR 143 (143). (High Court transferring case from Small Cause Courts of Bombay.)

('01) 4 Bom L R 970. (High Court transferring from onemamlatdar's Court to another.)

('10) 5 Ind Cas 771 (771) (Cal). (Munsif's Court is subordinate to High Court.)

('65) 4 Sath W R (Misc) 7 (7). (District Court is subordinate to High Court.)

2. ('12) 13 Ind Cas 6 (7) (Lah).

3. ('19) AIR 1919 Lah 27 (28) : 1 Lah 153.

4. ('15) AIR 1915 Bom 261 (261, 262) : 40 Bom 103. (Petition for alimony.)

5. ('94) 1894 Bom P J 175 (175).

6. (1900) 23 Mad 329 (351).

7. ('24) AIR 1924 Nag 152 (152).

('82) 5 All 60 (62).

('02) 29 Cal 493 (499).

8. See the cases in Footnote (9) below.

('04) 7 Oudh Cas 142 (143). (Partition cases under Ss. 191 and 192 of the U. P. Act 3 of 1901 — Judicial Commissioner can exercise no jurisdiction in respect of such cases.)

9. ('27) AIR 1927 Rang 105 (107) : 4 Rang 554.

('28) AIR 1928 Mad 1091 (1092) : 52 Mad 57.

Note 10

1. ('20) AIR 1920 All 249 (249).

('36) AIR 1936 Mad 55 (56) (FB).

2. ('23) AIR 1923 Lah 444 (445). (Transfer without notice—Ex parte decree set aside.)

('18) AIR 1918 Pat 341 (342) : 3 Pat L Jour 218 (S B).

[See also ('30) AIR 1930 Lah 439 (440). (Defendants not taking interest in the suit and refusing to appear even though served — Doubtful if notice was necessary.)]

3. ('16) AIR 1916 Nag 123 (125, 126) : 13 Nag L R 203.

('33) AIR 1933 All 178 (178) : 53 All 916.

('26) AIR 1926 All 17 (18).

('70) 2 N W P H C R 481 (482).

('16) AIR 1916 Cal 859 (859).

('25) AIR 1925 Lah 189 (189).

('17) AIR 1917 Lah 37 (38).

('10) 8 Ind Cas 7 (7) (Mad).

('97) 10 C P L R 94 (94).

('23) AIR 1923 Oudh 240 (240) : 26 Oudh Cas 62. (But it is not such an irregularity as to justify an interference in revision.)

('20) AIR 1920 Oudh 213 (213) : 23 Oudh Cas 216.

[See ('33) AIR 1933 Lah 635 (636). (No notice by the party before application is necessary.)]

[But see ('32) AIR 1932 Cal 265 (266). (Such transfer without notice is an irregularity — If no prejudice is proved jurisdiction of transferee Court is not affected.)]

For other cases of want of jurisdiction, as regards the *nature* of the proceeding,
2 see the undermentioned cases.⁷

There is one exception to the rule that a suit cannot be transferred to a Court not having jurisdiction to try it, and it is indicated by sub-section (4) of this Section. Under that sub-section where a small cause suit is transferred to another Court, that Court must be *deemed* for the purposes of that suit to be a Court of Small Causes. This clearly shows that a small cause suit can be transferred to a Court which is *not invested with small cause powers*.^{7a} *A fortiori*, a suit instituted in a Court of Small Causes can be transferred to another Court having small cause powers although the value of the suit exceeds the limits of the *small cause* jurisdiction of such Court.^{7b} If a small cause suit can be transferred only to another Small Cause Court or to a Court invested with small cause powers, sub-section 4 is rendered useless and unnecessary and further there is no need to *deem* the transferred Court a Court of Small Causes if it must be already one. This sub-section must, therefore, be understood to constitute an enactment saving in special circumstances the provisions of Section 16 of the Provincial Small Cause Courts Act. The Judicial Commissioner's Court of Oudh has in the undermentioned case⁸ taken a contrary view. In view of what has been said above, it is submitted that that decision is not sound in principle.

12. No transfer where Court of institution has no jurisdiction. — The word "pending" in the Section must be taken to mean "duly pending." In other words, the Section will apply only when the Court in which the suit was instituted is *competent* to try it.¹⁻² And competency for this purpose will include not only pecuniary

[See also ('35) AIR 1935 Bom 172 (173) : 59 Bom 412. (Suit instituted in District Court cannot be transferred to Sub-Court — Authorisation of latter Court by local Government to "hear" suits under S. 92 held not enough.)]

7. ('27) AIR 1927 Mad 321 (322). (Summary application in ejectment suit exclusively triable by Presidency Small Cause Court, cannot be transferred to the City Civil Court.)

('18) AIR 1918 Mad 483 (483). (Small cause suit cannot be transferred to City Civil Court — See S. 3, Madras City Civil Courts Act.)

('70) 2 N W P H O R 230 (232). (Review application should be tried by the same Judge who disposed of the matter — Therefore it cannot be transferred to another Judge.)

('14) AIR 1914 Mad 677 (677) : 38 Mad 472.

('10) 8 Ind Cas 7 (8) (Mad). (Petition under O. 39, R. 2 (3) could only be made to Court granting the injunction — Therefore the petition cannot be transferred under this Section.)

('19) AIR 1919 Nag 143 (144). ("Other proceedings" do not include an application for review.)

7a. ('32) AIR 1932 Nag 49 (49) : 27 Nag L R 307.

('32) AIR 1932 Mad 683 (684) : 55 Mad 860.

('35) AIR 1935 All 690 (691).

('35) AIR 1935 All 574 (575).

('35) AIR 1935 All 350 (351).

('34) AIR 1934 All 530 (531).

('32) AIR 1932 Bom 486 (488) : 56 Bom 387.

('34) AIR 1934 Lah 901 (901, 902). (Provincial Small Cause Courts Act (9 of 1887), S. 16 —

S. 16 is no bar to transfer under S. 24, Civil Procedure Code.)

[See also ('38) AIR 1938 Mad 745 (746). (Madras City Civil Judge is competent to try and dispose of a small cause suit if it is transferred to him.)]

('29) AIR 1929 Mad 525 (526).]

[But see ('29) AIR 1929 Mad 513 (515).

(This decision cannot be regarded as good law in view of the decision of a Division Bench in AIR 1932 Mad 683.)]

7b. ('39) AIR 1939 Cal 345 (345).

8. ('18) AIR 1918 Oudh 160 (161) : 20 Oudh Cas 350.

Note 12

1-2. ('86) 9 All 191 (202) : 13 Ind App 134 (P C). (6 Cal 30 entirely approved.)

('81) 6 Cal 30 (31).

('83) 7 Bom 487 (489).

('82) 4 All 478 (480).

('16) AIR 1916 Cal 456 (458).

('98) 25 Cal 39 (44).

('30) AIR 1930 Lah 195 (196, 197).

('28) AIR 1928 Mad 400 (400). (A transfer made in contravention would be void.)

('05) 1905 Upp Bur Rul (C P C) 28.

('34) AIR 1934 Sind 95 (95).

('32) AIR 1932 Sind 215 (215) : 26 Sind L R 277.

[See also ('31) AIR 1931 All 574 (579) : 54 All 171 (F B). (The Court from which transfer is made must be in existence at the time of transfer.)

('86) 10 Bom 274 (280).]

[But see ('34) AIR 1934 All 569 (571). (Pendency in competent Court is not necessary.)]

at B, and the witnesses all reside at B, the case may be transferred to the Court at B on the ground of convenience.⁶ On the other hand, it has been held in the under-mentioned cases⁶ that the convenience of the parties (such as the properties being situated or the witnesses residing at another place) is not a valid test under the Section and is not a good reason for depriving the plaintiff of his right to select his *forum*. It has been held by the Allahabad High Court that the only good cause which depends upon the parties is where the *parties are willing* and combined for some reason, to ask that the case may be transferred to another Court.⁷ And the Patna High Court has held that the power of transfer can be exercised only when the proceedings in one Court constitute an *abuse of the process* of the Court.⁸ There seems to be nothing in the Section itself to compel such a strict construction thereof. The words "the Court may at any stage" in fact tend to show that the broader interpretation is to be preferred. The mere fact, however, that it is convenient for the *defendant* to have the case tried elsewhere is not a valid ground of transfer unless the institution of the suit in the Court from which the transfer is asked for amounts to an abuse of the process of the Court.⁹

The following have been held to be good grounds for transfer of a case under this Section :—

(a) Reasonable apprehension of the litigant that he might not get justice in the Court in which the suit is pending.¹⁰

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| <p>(‘97) 24 Cal 183 (186). (Cheapness of trial and balance of convenience.)</p> <p>(‘72) 10 Beng L R 168 (176).</p> <p>(‘66) 1 Ind Jur (N S) 396.</p> <p>(‘33) AIR 1933 Lah 1033 (1034).</p> <p>(‘27) AIR 1927 Lah 14 (15). (Transfer to be made only where preponderance of convenience necessitates it.)</p> <p>(‘23) AIR 1923 Lah 383 (383).</p> <p>(‘12) 15 Ind Cas 845 (846); 1912 Pun Re No. 101. (Connected appeals—Some appeals lying in Chief Court—Latter can order other appeals before lower Court to be transferred to itself.)</p> <p>(‘09) 4 Ind Cas 922 (922) (Lah). (No balance of convenience—No transfer will be made.)</p> <p>(‘38) AIR 1938 Mad 745 (746). (Delay of 12 days in applying for transfer is not sufficient to warrant refusing a remedy which should ultimately be convenient to both parties.)</p> <p>(‘32) AIR 1932 Nag 49 (49); 27 Nag L R 307. (Two suits—Same transaction—Common question of fact.)</p> <p>(‘28) AIR 1928 Oudh 89 (89). (Where suit will be decided more expeditiously and economically if left where it is, no transfer will be ordered.)</p> <p>(‘24) AIR 1924 Oudh 410 (411).</p> <p>(‘23) AIR 1923 Oudh 30 (31).</p> <p>(‘20) AIR 1920 Pat 138 (141, 142).</p> <p>(‘36) AIR 1936 Pesh 5 (6, 7).</p> <p>(‘14) AIR 1914 Low Bur 37 (39); 7 Low Bur Rul 129 (133, 134).</p> <p>(‘10) 8 Ind Cas 449 (450) (Low Bur). (No balance of convenience and no grounds that ends of justice will be served by transfer—Transfer was refused.)</p> | <p>(‘80) 5 Cal 766 (767, 768).</p> <p>(‘22) AIR 1922 All 65 (66); 44 All 278.</p> <p>(‘21) AIR 1921 Cal 210 (211); 48 Cal 53.</p> <p>(‘24) AIR 1924 Lah 304 (305).</p> <p>(‘14) 25 Ind Cas 723 (724) (Lah). (Under S. 23.)</p> <p>(‘27) AIR 1927 Nag 219 (220).</p> <p>6. (‘19) AIR 1919 All 397 (398); 41 All 381.</p> <p>(‘24) 2 Pat L Rep 111 (113).</p> <p>(‘93) 1893 All W N 58 (58).</p> <p>(‘14) AIR 1914 Sind 147 (147); 8 Sind L R 43.</p> <p>7. (‘19) AIR 1919 All 397 (398); 41 All 381.</p> <p>8. (‘20) AIR 1920 Pat 365 (366).</p> <p>9. (‘15) AIR 1915 Mad 608 (611).</p> <p>(‘33) AIR 1933 Lah 635 (636).</p> <p>(‘89) 18 Bom 178 (181, 182).</p> <p>(‘28) AIR 1928 Lah 159 (160). (Convenience of defendant alone not a good ground.)</p> <p>(‘24) AIR 1924 Lah 306 (310). (Suit brought in bad faith for working injustice on defendant is a good ground of transfer.)</p> <p>(‘20) AIR 1920 Lah 381 (381); 1919 Pun Re No. 167.</p> <p>10. (‘23) AIR 1923 Lah 564 (565).</p> <p>(‘34) AIR 1934 All 448 (449). (Judge discussing the case with an influential relation of the defendant outside Court.)</p> <p>(‘33) AIR 1933 Lah 915 (915). (Reasonable ground for party thinking that the Judge is prejudiced against him.)</p> <p>(‘31) 32 Pun L R 388 (389). (Definite expression of opinion by Judge as to same account books in prior proceedings.)</p> <p>(03) 1903 Pun Re No. 88, p. 389.</p> <p>(‘33) AIR 1933 Oudh 154 (155); 8 Luck 347. (Fear that Judge may not be able to approach the case remanded to him with an open mind as he had already decided on all the evidence on record.)</p> |
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5. (‘89) 16 Cal 771 (776). (Property situated in another place.)

- (b) Judge having a pecuniary interest or other interest sufficient to create a bias,¹¹ or being related to one of the parties.^{11a}
- (c) Importance and the difficulty of the question involved in the case.¹²
- (d) Where interests of justice require a transfer.^{12a}

See also the undermentioned case.^{12b}

The following have been held not to be sufficient grounds for transfer:—

- (a) Party having influence in the locality where the suit is instituted.¹³
- (b) Judge not being acquainted with the character in which disputed signatures in a case are written.¹⁴
- (c) Judge having decided another similar case in one way¹⁵ or the fact that the points for decisions in both cases are analogous.¹⁶
- (d) Prejudice of Judge against party's pleader, unless it is likely to affect the judicial attitude towards the party.¹⁷
- (e) Expression of opinion by a Judge as to the character of the plaintiff elicited by the conduct of the party himself.¹⁸
- (f) Judge being subordinate to the Commissioner in his executive capacity where the Commissioner's order is challenged.¹⁹
- (g) The conduct of the Judge where parties agreed to the decision of the case by the Judge on a local inspection and did not wish to let in any evidence, and the Judge proceeded to act accordingly.²⁰

See also the undermentioned cases.²¹

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| <p>(28) 109 Ind Cas 402 (402) (Lah). (Expression of opinion by Judge.)</p> <p>11. ('95) 19 Bom 608 (610).
 ('97) 1897 Bom P J 107. (Judge, a member of the Municipality which is a party to the suit.)
 ('95) 1895 Bom P J 158 (159). (Judge holding interview with parties at his residence with a view to settle the dispute is insufficient to create bias.)
 ('12) 16 Ind Cas 859 (860) (Cal). (Having personal knowledge of facts.)
 ('12) 14 Ind Cas 458 (459) (Cal). (Personal interest.)
 ('84) 10 Cal 915 (917). (Officer directing litigation in executive capacity is disqualified to deal with it as Judge.)
 ('78) 10 Beng L R 168 (176). (Conduct of Judge.)
 (1865) Bourke O O 273. (Personal interest.)
 ('83) 1888 Pun Re No. 7. (Judge entering into business transactions with party in respect of subject-matter of suit.)
 ('08) 2 Low Bur Rul 281 (282). (Personal interest—Judge should follow the procedure under S. 33 of the Lower Burma Courts Act 1900.)</p> <p>11a. ('32) AIR 1932 Sind 206 (207).</p> <p>12. ('86) 9 All 180 (184, 185).
 ('72) 9 Beng L R App 10 (12).
 ('97) 24 Cal 183 (186).
 ('66) 1 Ind Jur (NS) 94 (227).
 [But see ('10) 8 Ind Cas 444 (444) (Low Bur).]</p> <p>12a. ('34) AIR 1934 Lah 539 (540). (Judge having expressed opinion in another case on point in dispute—Case should be transferred to another Court in the interests of justice.)</p> | <p>(36) AIR 1936 Mad 55 (56) (FB).</p> <p>12b. ('38) AIR 1938 Mad 745 (745). (Same parties filing suits against each other in different Courts on same cause of action—Suits should be tried by same Court.)</p> <p>13. ('27) AIR 1927 Lah 80 (80).
 ('24) AIR 1924 Oudh 372 (373): 27 Oudh Cas 401. (Refusal of pleaders to accept brief from defendant—Plaintiff having engaged several pleaders—No transfer will be made.)</p> <p>14. ('98) 20 All 395 (396).</p> <p>15. ('12) 15 Ind Cas 569 (569) (Cal).
 ('26) AIR 1926 Lah 345 (345).
 ('38) AIR 1938 Nag 126 (127).</p> <p>16. ('94) 1894 Pun Re No. 8, p. 13 (14).
 ('21) AIR 1921 Lah 357 (357).
 ('30) AIR 1930 Lah 176 (176). (Previous decision on same point of law.)</p> <p>17. ('26) AIR 1926 Mad 359 (360).
 ('34) AIR 1934 Lah 593 (594). (Mere incidents between Judge and party's counsel do not justify transfer.)</p> <p>18. ('16) AIR 1916 Mad 763 (763).</p> <p>19. ('33) AIR 1933 Pat 638 (639).</p> <p>20. ('28) AIR 1928 All 497 (498, 499).</p> <p>21. ('38) AIR 1938 Lah 95 (96). (Application for transfer not bona fide having been made after Court informs counsel of order before it is pronounced—Party not having any real apprehension that case would not be decided on its merits—Transfer should not be ordered.)
 ('36) AIR 1936 Pat 345 (345, 346). (Three suits tried by same Court and decided by one judgment—Two appeals filed before District Judge and one before High Court—Application to transfer all appeals to High Court not granted.)</p> |
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14. Absence of order for transfer—Effect. — Want of jurisdiction in the trying Court will not be presumed by reason of the absence of an *order of transfer* on the record.¹ Where certain issues were remitted to the trial Court and prior thereto the territorial jurisdiction of the Court to which they were remitted had been transferred, the order remitting the issues will be taken to operate as a transfer of the case to it.² An omission to assign *reasons for the transfer* will not vitiate the proceedings in the Court to which the case has been transferred.³

15. Effect of transfer from or to a Court of Small Causes. — It has been held by all the High Courts except the Bombay High Court that the words "Court of Small Causes" in sub-section (4) of this Section include a Court vested with the powers of a Court of Small Causes.¹ The Bombay High Court has held that the words mean a Court properly and strictly so called, and does not include a Court invested with the jurisdiction of a Court of Small Causes.²

Where a small cause suit is transferred to another Court under this Section, that Court is to be deemed to be a Court of Small Causes for the purposes of such suit and its procedure is to be governed by the provisions of the Provincial Small Cause Courts Act.³ And therefore the trial thereof can only be under the Small Cause Courts Act and no appeal will lie from the decision therein;⁴ and this will be so notwithstanding an express direction by the District Judge that the suit is to be tried as a regular suit, as such an order is without jurisdiction.⁵

The word "suit" in this Section includes execution proceedings, as has been seen in Note 6 above and therefore a Court to which such proceedings are transferred from a Court of Small Causes is a Court of Small Causes for the purpose of such proceedings.⁶

Note 14

1. ('88) 10 All 119 (121, 122).
2. ('10) 7 Ind Cas 864 (864) (Mad).
3. ('65) 3 Suth W R 147 (149).

Note 15

1. ('17) AIR 1917 All 484 (485) : 38 All 425.
('82) AIR 1932 Bom 486 (487) : 56 Bom 387.
('17) AIR 1917 All 62 (64) : 39 All 214.
('29) AIR 1929 Cal 354 (356) : 56 Cal 588.
('18) AIR 1918 Cal 187 (187). (Dissenting from 31 Cal 1057.)
('16) AIR 1916 Mad 891 (894) : 17 Ind Cas 425 (427) : 38 Mad 25.
('18) AIR 1918 Oudh 160 (161) : 20 Oudh Cas 350.
2. ('98) 23 Bom 382 (384).
[See however observations in ('08) 31 Bom 314 (318) (FB), which was a case under S. 203 of the old Code.]
3. ('17) AIR 1917 All 484 (485) : 38 All 425 (428).
('93) 18 Bom 61 (64).
('25) AIR 1925 Lah 561 (562, 563).
('99) 1899 Pun Re No. 69, p. 303 (310).
('89) 1889 Pun Re No. 77, p. 293 (294).
('30) AIR 1930 Nag 133 (134). (The Court will have same powers as first Court.)
[See ('32) AIR 1932 Nag 49 (49) : 27 Nag L R 307 (309).]
4. ('28) AIR 1928 All 609 (609). (Consequently no bar to revision.)
('17) AIR 1917 All 484 (485) : 38 All 425 (428).
('39) AIR 1939 All 452 (453). (Transfer to

Munsif prior to abolition of Small Cause Court—Decision of Munsif not appealable.)

- ('31) AIR 1931 All 574 (578, 579) : 54 All 171 (FB). (This result will not follow if there is no transfer under this Section but the case is tried under S. 35, Small Cause Courts Act.)
('29) AIR 1929 All 50 (51) : 50 All 810.
('18) AIR 1918 All 290 (292) : 40 All 525. (Even though the Munsif had no Small Cause power.)
('17) AIR 1917 All 62 (64) : 39 All 214.
('16) AIR 1916 All 110 (111).
('14) AIR 1914 All 229 (230).
('91) 13 All 324 (325, 326).
('83) 5 All 274 (275).
('29) AIR 1929 Cal 354 (357) : 56 Cal 588. (Trial as regular suit, still no appeal lies.)
('03) 1903 Pun Re No. 83.
('97) 1897 Pun Re No. 58, p. 257 (258).
('35) AIR 1935 Nag 42 (42) : 31 Nag L R 170.
('97) 10 C P L R 94 (95).
('99) 2 Oudh Cas 143 (144).
('23) AIR 1923 Pat 49 (50) : 1 Pat 696.
('19) AIR 1919 Pat 376 (377) : 4 Pat L Jour 13. (But where there was no Small Cause Court at the time of filing the suits, the transferred suits could only be tried as ordinary civil suits.)
5. ('16) AIR 1916 Mad 891 (894) : 17 Ind Cas 425 (428) : 38 Mad 25.
 6. ('26) AIR 1926 Lah 465 (465).

This sub-section will only apply, however, where the suit or proceeding is transferred *under* Section 24. If the transfer is made under any *other* provision of law, the Court to which it is transferred cannot be deemed to be a Court of Small Causes^{6a} and no finality can attach to its decision.⁷ Thus, where a small cause decree is transferred for execution to another Court under other provisions of the Code (*e.g.*, Sections 38, 39, 42, O. 21 R. 4, *etc.*), its orders in execution will, if they fall under Section 47 of the Code, be open to appeal,⁸ though no second appeal will lie by virtue of Section 102.

This sub-section does not deal with the case where a suit is transferred from the original side to the small cause side of a Court. It has been held that in such cases the suit will retain its character as an original suit and will have to be tried as such.⁹

The sub-section only applies where a suit is transferred from a *Court of Small Causes*. But where the Court from which a suit is transferred is not a Small Cause Court, the mere fact that the suit is of a *nature* cognisable by a Small Cause Court will not make the sub-section applicable, and where the Court to which the suit is transferred is not a Small Cause Court, its decision will be appealable.¹⁰ Similarly, the sub-section cannot apply where the Small Cause Court in which a suit was instituted has ceased to exist or the officer invested with Small Cause Court powers (before whom the suit was instituted) has been transferred from the district and there is no other officer possessing such powers.¹¹ In such cases, if the suit is tried by an ordinary Court, the decision of such Court will be appealable.¹²

16. Procedure of Court of transfer.—A District Court which withdraws a case for trial before itself may, after such withdrawal, proceed in accordance with any of the recognized modes of procedure laid down in the Code; it can even make over the case to an arbitrator for decision.¹ It can amend the issues first framed and can frame additional issues and go into the whole case except upon any question upon which there has been a judicial finding already.² Where a conditional order of attachment is passed by a Court and then the suit is transferred to another Court, the

6a. ('35) AIR 1935 All 765 (766) : 57 All 957.

(U. P. Hon. Munsifs Act, S. 8—Suit filed in Munsif's Court on Small Cause side transferred to Honorary Munsif's Court—Latter is not Small Cause Court—On application of defendant, suit transferred by District Judge to Additional Munsif's Court having no small cause powers—Appeal lies from his decision as transfer is not from Small Cause Court.)

7. ('21) 64 Ind Cas 335 (336) (Lah). (Transfer under S. 23 of the Provincial Small Cause Courts Act.)

('15) AIR 1915 All 219 (221) : 37 All 450. (Transfer of case to regular side.)

('35) AIR 1935 All 141 (141). (U. P. Honorary Munsifs Act, S. 8—Case pending in Small Cause Court transferred to Honorary Munsif's Court by District Judge—S. 24 (4), Civil P. C., does not apply and appeal to Subordinate Judge lies from decision of Honorary Munsif.)

('24) AIR 1924 All 761 (762). (Do.)

('20) AIR 1920 All 352 (352). (Do.)

('19) AIR 1919 All 222 (222). (Do.)

('09) 31 All 1 (2).

('14) AIR 1914 Bom 302 (302) : 38 Bom 190. (Judge having small cause as well as regular jurisdiction transferring small cause case to regular side—Decree is appealable.)

('84) 8 Bom 230 (234).

('17) AIR 1917 Oudh 104 (104). (United Provinces Munsifs Act II of 1896, S. 8—S. 24 (4) is inapplicable to transfer from Small Cause Court to Honorary Munsif's.)

8. ('07) 11 Cal WN 861 (862). (Transfer to regular side for execution.)

('16) AIR 1916 All 293 (294). (S. 42, C. P. C.)

9. ('35) AIR 1935 Mad 284 (285). (*Held*, that the District Court had power to so transfer the suit but the suit would retain its character as an original suit.)

10. ('35) AIR 1935 All 574 (575).

11. ('36) AIR 1936 Lah 883 (885).

12. ('37) AIR 1937 Oudh 398 (399) : 13 Luck 369. (AIR 1931 All 574 (F B) relied on.)

12. ('36) AIR 1936 Lah 883 (885). ('37) AIR 1937 Oudh 398 (399).

Note 16

1. ('89) 1889 Pun Re No. 167.

2. (1865) 3 Suth W R 147 (150).

25. (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the *Provincial Government*,^a which^b may, by notification in the *Official Gazette*,^c transfer such suit, appeal or proceeding to any other High Court:

Provided that no suit, appeal or proceeding shall be transferred to a High Court without the consent of the Provincial Government of the Province in which that High Court has its principal seat.^d

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

[Compare 1882, Ss. 20, 21.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Governor-General in Council."

b. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "who."

c. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India."

d. Inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

Synopsis

1. Scope and object of the Section. | 2. Appeal from decree in transferred Court.

Other Topics

Transfer of case from one High Court to another. See Note 1.

Reasonable grounds for objection. See Note 1, F-N (2).

1. Scope and object of the Section. — This Section is new and proceeds on the analogy of Section 527 of the Criminal Procedure Code which enables the Governor-General in Council to transfer a case from one High Court to another. The Section does not apply to an objection to a particular Judge personally, e. g. that previously while at the bar, he has advised one of the parties. In such a case, all the difficulties would be met by the case being tried by another Judge of the same High Court. Consequently the objection in question must be one which applies to the High Court as a whole.¹

2. Appeal from decree in transferred Court. — The appeal from the decree in the transferred case does not lie to the original High Court, but only to the appellate side of the High Court to which the case was transferred.¹

Section 25 — Note 1

1. ('24) AIR 1924 Bom 90 (97, 98).

Note 2

1. ('21) AIR 1921 Mad 687 (687).

INSTITUTION OF SUITS

26. [S. 48.] Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

Institution of suits.

[See O. 4, R. 1.]

Synopsis

1. Legislative changes.
2. Institution of suit.
3. Plaint, meaning of.
4. Place of presentation. See O. 4 R. 1, Note 4.
5. Person to whom plaint should be presented. See O. 4 R. 1.
6. Time of presentation. See O. 4 R. 1.
7. Presentation of plaint with deficient court-fee or with other defect.
See Notes to S. 149 and O. 7 Rr. 1 and 11.
8. Presentation of plaint in Revenue Courts. See O. 4 R. 1.

Other Topics

Holiday. See O. 4, R. 1, Note 6, Pt. (7) and also O. 20 R. 1.

Pauper suit. See S. 149, Note 10 and also O. 33.

Plaint—Presentation at Judge's private residence. See O. 4 R. 1, Note 6, Pt. (2).

Suit instituted on wrong side. See O. 4 R. 1, Note 4, F-N (1).

1. Legislative changes. — The words "or in such other manner as may be prescribed" are new. No rules have, however, been framed prescribing any other manner of instituting suits.

2. Institution of suit. — As seen already in Note 5 to Section 2 (2) *ante*, a suit must commence with the presentation of a *plaint*.^{1a} Thus, an application for leave to sue in *forma pauperis* is not a suit until the leave is granted and the suit is registered under O. 33 R. 8.¹

A suit is instituted when the plaint is *presented* and not when it is registered,² though for the purpose of issuing summons to the defendant the suit cannot be said to be *duly* instituted until it is registered.³ A re-presentation of the plaint after amendment is not a fresh institution of the suit,⁴ though a presentation to a proper Court after being returned for want of *jurisdiction*, will be a fresh institution. Where two suits are filed on the same day, the presumption is that they were presented in the order in which they were registered.⁵ But the filing of a plaint is not a judicial proceeding and there is no presumption as in the case of judicial proceedings, of its having taken place at the *earliest period* of the day on which it was filed.⁶

Section 26 — Note 2

1a. ('36) 164 Ind Cas 442 (443) (Cal). (No other mode of instituting a suit has up to now been prescribed — Presentation by pleader — Vakalat not signed by plaintiff — Matter can be regularised only by the order of the Court condoning the defect.)

1. ('83) 7 Bom 373 (376).
('32) AIR 1932 Lah 374 (375) : 13 Lah 672.
See also Note 5 to S. 2 for fuller discussion.

2. ('21) AIR 1921 Cal 277 (279).
(1900) 27 Cal 814 (818, 820).
('67) 7 Suth W R 241 (241).

[See ('73) 19 Suth W R 159 (159).]

3. ('22) AIR 1922 Cal 234 (235).

4. ('78) 2 All 832 (834, 835).

('67) 7 Suth W R 157 (158).

('95) 19 Bom 320 (323).

('70) 5 Bom L R 198 (198) : 27 Bom 330.

('75) 23 Suth W R 447 (447).

('71) 16 Suth W R 47 (48).

('66) 6 Suth W R 39 (39).

('66) 5 Suth W R 207 (207).

('65) 3 Suth W R 20 (21).

('07) 1907 Pun Re No. 123, p. 600 (605, 606).

('92) 15 Mad 417 (417).

5. ('94) 16 All 165 (173).

('76) 1 All 650 (651).

6. ('13) 21 Ind Cas 602 (603) : 9 Nag L R 155.

A suit against a minor is taken to be instituted when the plaint is presented and not when the guardian *ad litem* is appointed.⁷

3. Plaint, meaning of. — A plaint in law means “a private memorial tendered to a Court in which the person sets forth his cause of action; the exhibition of an action in writing.”¹ It ought to be in the language of the Court.² A written statement claiming a set-off, will be deemed, to that extent, a plaint.³ For the particulars necessary to be mentioned in a plaint, see Order 7, *infra*.

4. Place of presentation. — See O. 4 R. 1, Note 4.

5. Person to whom plaint should be presented. — See O. 4 R. 1.

6. Time of presentation. — See O. 4 R. 1.

7. Presentation of plaint with deficient court-fee or with other defect. — See Notes to Section 149 and O. 7 R. 1 and 11.

8. Presentation of plaint in Revenue Courts. — See O. 4 R. 1.

SUMMONS AND DISCOVERY

27. [S. 64.] Where a suit has been duly instituted, a

Summons to defendants.

summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

[1877, Ss. 64 and 68; 1859, S. 41. See O. 5.]

Synopsis

1. “Duly instituted.”
2. “Summons may be issued.” See O. 5 R. 1.
3. “Manner of service.” See O. 5 R. 10.

Other Topics

Appearance. See Order 9.
 Fresh summons. See O. 5 R. 1, Note 5.
 In the manner prescribed. See O. 5.
 Institution of suit against a dead man. See Note 1, Pt. (3).
 Service by post. See O. 5 R. 10; Note 2.
 Substituted service. See O. 5 R. 20.
 Summons when not to issue. See O. 5 R. 1, Note 1.

1. “Duly instituted.” — Section 26 enacts that a suit shall be instituted by the *presentation* of a plaint or in such other manner as may be prescribed. But it cannot be said to have been *duly* instituted until, after scrutinising the plaint, the Court registers it as suit.¹ When a plaint is returned for presentation to a competent Court the suit is to be considered as instituted on the date of presentation to such proper Court.² A suit against a dead person is not one which can be said to have

7. (82) 4 All 37 (39).

Note 3

will not exclude plaints in English language.)
 3. ('92) 15 Mad 29 (34).

1. ('99) 22 Mad 494 (502).

Section 27 — Note 1

('21) AIR 1921 Sind 166(168):17 Sind L R 223.

1. ('22) AIR 1922 Cal 234 (235).

2. ('67) 8 Suth W R 495 (496). (This, however,

2. ('28) AIR 1928 Bom 421 (422): 52 Bom 548.

been duly instituted, and the Court has no jurisdiction at all in the matter.³

2. "Summons may be issued." — See O. 5 R. 1.

3. "Manner of service." — See O. 5 R. 10.

28. [S. 85.] (1) A summons may be sent

Service of summons
where defendant resides
in another province.

for service in another province to such Court
and in such manner as may be prescribed by

rules in force in that province.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

[1877, S. 85; 1859, S. 59.]

Service of summons where defendant resides in another province. —

See O. 5 Rr. 21 and 23.

29. [S. 650A.] Summonses issued by any Civil or Revenue

Service of foreign
summonses.

Court situate beyond the limits of British India
may be sent to the Courts in British India and
served as if they had been issued by such Courts:

Provided that the Courts issuing such summonses have been established or continued by the authority of the Central Government or of the Crown Representative, or that the Provincial Government by whose Courts a summons is to be served has by notification in the Official Gazette declared the provisions of this Section to apply to Courts of the Province.^a

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original proviso.

Synopsis

1. Legislative changes. | 2. Notifications.

Other Topics

Continued by authority. See Note 2.

Such Courts. See Note 2.

1. Legislative changes. — This Section corresponds to the first part of Section 650 A of the old Code. The second part of that Section has been omitted.

2. Notifications. — For notifications issued under the Section, see General Statutory Rules and Orders, Vol. I, pp. 642-655 and Vol. IV, pp. 682-684.

3. ('70) 12 Suth W R 45 (46).

('08) 31 Mad 86 (89). (Even the plaint cannot be amended

31

31. The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

Summons to witness.

Summons to witness. — See Orders 16 and 18, *infra*.

32

32. The Court may compel the attendance of any person to whom a summons has been issued under Section 30 and for that purpose may —

Penalty for default.

- (a) issue a warrant for his arrest;
- (b) attach and sell his property;
- (c) impose a fine upon him not exceeding five hundred rupees;
- (d) order him to furnish security for his appearance and in default commit him to the civil prison.

[See O. 16, Rr. 10 to 13, 17 and 21.]

1. Applicability of the Section. — By Section 30 the Court is authorised to issue summonses to persons only when their attendance is required to give evidence, etc., and by Section 32 the Court is given the power to enforce the "attendance" of such persons for that purpose, by imposing penalties. A fine can therefore be imposed on a person only if he has been required to *attend* the Court in connection with a case,¹ and not on a person who, after his failure to attend on the date for which he was summoned, is not required to give evidence, etc., and has not been called upon to *appear* on a subsequent date,² nor on a person who has been ordered and not summoned to *produce a document*.³

JUDGMENT AND DECREE

33

33. [S. 198.] The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

Judgment and decree.

[1877, S. 198; 1859, S. 183. See O. 20.]

Synopsis

1. Scope and applicability of the Section.
2. "After the case has been heard."
3. Judgment to be based on case set up by parties.
4. Evidence taken before another Judge. See Notes under O. 20 R. 1.
5. "A decree shall follow."

Section 32 — Note 1

1. ('29) AIR 1929 All 850 (853, 854).
- ('20) AIR 1920 Pat 131 (133) : 5 Pat L Jour 550 (555). (Where the production of the docu-

ments was ordered it was held that this Section had no application.)

2. ('29) AIR 1929 All 850 (853, 854).
3. ('20) AIR 1920 Pat 131 (136) : 5 Pat L Jour 550 (555).

Other Topics

Form of decree. See App. D, Sch. 1.

Relief not consistent with pleas. See O. 6 R. 7.

Setting aside decree. See Order 9 and Order 32 for discussion of suits by minors for setting aside decrees against them.

'Shall pronounce judgment.' See Note 5.

Subsequent events. See O. 41 R. 33 and O. 8 R. 8.

1. Scope and applicability of the Section. — This Section should be read with the provisions of Order 20 in the First Schedule. The Section does not apply to the Judicial Commissioner of Peshawar in the exercise of his original civil jurisdiction — Section 46 (2) of the N.-W. F. P. Law and Justice Regulation VII of 1901.

The High Court of Patna has held that this Section merely states that a decree shall follow the judgment and that it does not preclude the High Court from making a rule to the effect that in suits for money no decree need be drawn up if neither party has to recover anything unless the Judge otherwise directs.¹

Under the Agra Tenancy Act III of 1926, List II, Schedule 2 and Section 135 of the Oudh Rent Act XXII of 1886, no decree need be prepared in the case of applications under the said Acts, unless prescribed by rule to the contrary.

2. "After the case has been heard." — The judgment in a case should be pronounced only after the case has been fully heard.¹ The failure of a Judge to give the parties an opportunity of putting their case before him vitiates the judgment.²

3. Judgment to be based on case set up by parties. — The judgment should be based on the contention raised by the parties or on the points involved therein. The Court has no power to go beyond the contentions of the parties and make out a case not raised by them.¹

4. Evidence taken before another Judge. — See Notes under O. 20 R. 1.

5. "A decree shall follow." — This Section casts on the Court the duty of preparing and passing a decree. A party or his pleader is under no obligation to move the Court to draw up a decree.¹ Where, after pronouncing judgment in a suit, the Court fails to draw up a decree, the remedy of the party who wants the decree, whether for appeal or execution, is to apply for it to the Court and if the application is refused, to move the High Court in revision. But until the decree is drawn up, there can be neither appeal nor execution.² It has been held in the undermentioned cases³ that the failure of the Court to draw up a decree should not be allowed to deprive a party of his right of appeal, it being the duty of the Court to prepare and pass a decree.

Section 33 — Note 1

1. ('34) AIR 1934 Pat 266 (269) : 13 Pat 371.

Note 2

1. ('07) 4 Low Bur Rul 256 (258).
('75) 23 Suth W R 77 (77).
2. ('20) AIR 1920 Lah 246 (247).

Note 3

1. ('22) AIR 1922 Cal 203 (215).
('25) AIR 1925 Oudh 142 (142).
('31) AIR 1931 Rang 177 (177).

('09) 5 Low Bur Rul 46 (48).

Note 5

1. ('14) AIR 1914 Bom 23 (25) : 38 Bom 331.
('24) AIR 1924 Nag 271 (274) : 20 Nag L R 131.
2. ('12) 15 Ind Cas 935 (937) : 8 Nag L R 92.
('83) 5 All 520 (526).
('10) 34 Bom 182 (188).
('05) 32 Cal 483 (491).
('20) AIR 1920 Lah 395 (396) : 1 Lah 223.
See also Note 9, O. 6 R. 2.
3. AIR 1919 Lah 53 (54) : 1919 Pun Re No. 66.

- 3 It is submitted that this view is not correct on principle. See also Note 8 to Section 2 (2) and Note 4, O. 41 R. 1.

Where a judgment is passed in favour of a party and it is stated therein that he shall not get a decree unless he produces a succession certificate, a decree cannot be passed till a succession certificate is produced.⁴ (See Section 214 of the Indian Succession Act, XXXIX of 1925.)

As to contents of decree, see O. 20 R. 6.

INTEREST

34. [S. 209.] (1) Where and in so far as a decree is for the payment of money,² the Court may, in the decree, order interest at such rate as the Court

Interest.

deems reasonable³ to be paid on the principal sum adjudged, from the date of the suit to the date of the decree,⁴ in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit,⁶ with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment,⁵ or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent¹⁷ with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

[1877, S. 209; 1861, S. 10.]

Synopsis

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Scope of the Section. 2. "Decree for the payment of money." 3. Award of interest under the Section is a matter of discretion. 4. Interest from date of suit to date of decree. 5. Interest from date of decree to date of payment. 6. Interest prior to suit — General. 7. Agreement express or implied to pay interest. 8. Mercantile usage. | <ol style="list-style-type: none"> 9. Right to interest under statutory provisions. 10. Interest as damages. 11. Mortgage suits. See O. 34 R. 11. 12. Interest, whether payable after tender. 13. Interest on mesne profits. See O. 20 R. 12. 14. Interest on arrears of rent. 15. Interest on costs. See Section 35. 16. Rule of damdupat. 17. Decree silent as to interest — Sub-section (2). 18. Court-fee. |
|---|--|

(¹⁵) AIR 1915 Cal 272 (274).

(²⁹) AIR 1929 Sind 225(227):24 Sind LR 167.

4. (²⁰) AIR 1920 Nag 148 (149).

[See (³¹) AIR 1931 Bom 407 (408). (Limitation for execution will not run until succession certificate is produced.)

Other Topics

Accounts suit. See Note 10 F-N (6).
 Cases under Interest Act. See Note 9 and Note 7 F-N (6).
 Compound interest. See Note 3 F-N (12) and Note 6 F-N (4).
 Contribution suit. See Note 10 Pt. 7.
 Court's power to reduce rate of interest in harsh and unconscionable bargains. See Note 7.
 Interest on damages—See Note 2.
 Interest on legacies. See Note 9 Pt. (2).

Interest when allowed and disallowed. See Note 6.
 Notice. See Note 12 Pt. (4).
 Post diem interest. See Note 9.
 "Reasonable." See Note 3 and Note 4 Pt. (2).
 Separate suit for interest. See Note 17.
 Stipulation amounting to penalty. See Note 7.
 Stipulation for enhanced interest. See Note 7.
 Suit for unliquidated damages. See Note 2.

1. Scope of the Section.—This Section provides for the award of interest in cases of money decrees. It applies only —

- (a) where the decree is *for the payment of money*, and
- (b) as regards interest *after the date of the suit*.

The award of interest in respect of decrees for the enforcement of a mortgage or charge is provided for in O. 34 R. 11. As regards interest *prior to the date of suit*, it is a matter of *substantive law* and is outside the scope of this Section.¹

The Section classifies the interest awardable after the date of the suit into two classes —

- (a) Interest on the *principal* sum adjudged from the date of suit to date of decree.
- (b) Interest on the *aggregate* sum of the principal sum and interest, from date of decree to date of realisation or to such earlier date as the Court thinks fit.

There is no analogy between the award of interest under this Section and the award of mesne profits under O. 20 R. 12. The former may be awarded as an inducement to prompt satisfaction of the decree and as a penalty for non-compliance with it. Such interest is no part of the claim or relief as in the case of mesne profits.²

Future interest which is awardable under this Section is really in the nature of damages granted by the Court on account of the plaintiff being kept out of the money due to him under the decree.³

2. "Decree for the payment of money." — For a full discussion as to what is a "decree for the payment of money," see Section 73, *post*.¹

The Madras High Court has held that the word "money" is not confined to an *ascertained sum* but will include also unliquidated damages and that interest on such damages can be awarded under this Section.² The same view has been taken by the Bombay High Court in the undermentioned case³ and by the Oudh and Sind Judicial Commissioners' Courts.⁴ In a later case, however, the Bombay High Court has decided that no interest can be allowed on damages before judgment.^{4a} In *Crowdson v. Ganesh Das*, A. I. R. 1920 Calcutta 737, Mr. Justice Mookerjee was of

Section 34 — Note 1

1. ('10) 7 Mad L Tim 108 (108).
- ('20) AIR 1920 Cal 737 (739) : 32 Cal L Jour 239 (253).
- ('38) AIR 1938 P C 67 (70) : I L R (1938) 2 Cal 72 : 32 Sind L R 374 (PC).
- ('31) AIR 1931 Nag 161(164):27 Nag L R 312.
2. ('06) 33 Cal 1232 (1235).
3. ('33) AIR 1933 Lah 352(354) : 14 Lah 591.

Note 2

1. See Note 6 to Section 73.
2. ('26) AIR 1926 Mad 1021 (1023). (Interest from date of suit.)
3. ('25) AIR 1925 Bom 547 (556). (Interest from date of suit was decreed.)
4. ('11) 9 Ind Cas 221 (222) (Oudh). (Suit for compensation for use and occupation.)
- ('31) AIR 1931 Sind 121 (124) : 25 Sind L R 104. (From date of suit.)
- 4a. ('31) AIR 1931 Bom 386 (387).

opinion that interest *pendente lite* cannot be awarded when the claim is for an unliquidated amount of damages. A contrary view, however, has been taken in a later case of the Calcutta High Court in which it has been held that the Court has power to award interest on damages, but that in such cases the Court should *state its reasons* for so doing.⁵

3. Award of interest under the Section is a matter of discretion. — The award of interest under this Section after the date of suit is entirely in the discretion of the Court.¹ This discretion is not excluded either by the fact that there is an agreement to pay a certain rate of interest till realisation,² or by there being no contract to pay any interest,³ or by the fact that the plaintiff does not claim interest,⁴ or by the rule of *damdupat*.⁵ It is not necessary for the award of interest in the decree that the judgment should have made any reference to it.⁶ To hold otherwise would render the words "in the decree" a mere surplusage, for it does not require a rule of procedure to enable a Court to embody in its decree a relief granted by the judgment.⁷

The discretion under this Section must, however, be exercised on sound judicial principles⁸ and, when so exercised, it will not be interfered with in appeal.⁹

5. ('24) AIR 1924 Cal 637 (638).

Note 3

1. ('28) AIR 1928 Lah 954 (956).

('31) AIR 1931 PC 104 (107): 58 Ind App 141: 58 Cal 1281 (PO).

('82) AIR 1932 All 245 (246).

('32) AIR 1932 All 128 (130): 53 All 54.

('86) 12 Cal 569 (579) (FB).

('70) 14 Suth W R 62 (62).

('32) AIR 1932 Lah 312 (314).

('15) AIR 1915 Lah 113 (114): 1915 Pun Re No. 22.

('36) AIR 1936 Nag 28 (29): 31 Nag L R Sup. 121. (Debtor paying certain amount to creditor during pendency of insolvency and before order of adjudication—Application by receiver subsequently appointed claiming refund of amount—Court has power to grant interest under S. 34, Civil P. C., from application for refund till realisation. Note:—S. 34 will apply to such a case by virtue of S. 5 of the Provincial Insolvency Act.)

('29) AIR 1929 Nag 6 (8).

('04) 17 C P L R 38 (40).

('19) AIR 1919 Oudh 248 (249): 22 Oudh Cas 287 (289). (It is not excluded by S. 141 of the Oudh Rent Act.)

2. ('86) 12 Cal 569 (579) (FB).

('78) 3 Bom 202 (203).

('91) 18 Cal 164 (180): 17 Ind App 201 (PO).

('83) 9 Cal W N 421 (437): 32 Cal 582.

3. ('24) AIR 1924 Nag 348 (352).

('35) AIR 1935 Cal 347 (356): 62 Cal 175.

4. ('95) 22 Ind App 199 (201): 17 All 511 (PO).

('32) AIR 1932 Bom 319 (325, 326).

('34) AIR 1934 All 805 (807).

('31) AIR 1931 Bom 549 (549): 55 Bom 657.

('21) AIR 1921 Lah 125 (126): 2 Lah 256.

('36) AIR 1936 Pat 191 (192).

5. ('24) AIR 1924 Nag 348 (353).

('25) AIR 1925 Nag 193 (194).

('29) AIR 1929 Nag 355 (356).

6. ('85) 7 All 755 (756).

('16) AIR 1916 All 303 (304). (Interest on costs).

7. ('93) 15 All 121 (122, 123).

8. ('19) AIR 1919 Cal 144 (150): 23 Cal W N 336 (344).

('81) 3 All 91 (107): 7 Ind App 196 (PO). (Inordinate and unusual rate of interest ought not to be allowed.)

('30) AIR 1930 Lah 733 (734, 735). (The discretion must be reasonable.)

('21) AIR 1921 Pat 367 (369).

9. ('25) AIR 1925 P C 280 (288): 5 Pat 135: 52 Ind App 418 (PO).

('22) AIR 1922 P C 46 (48) (PO).

('35) AIR 1935 Cal 39 (68).

('32) AIR 1932 Lah 25 (26). (Interest at contract rate allowed.)

('25) AIR 1925 Lah 308 (309).

('23) AIR 1923 Lah 513 (514).

('33) AIR 1933 Oudh 128 (129): 8 Luck 315.

('32) AIR 1932 Oudh 255 (263): 8 Luck 40.

('38) AIR 1938 Pat 600 (603): 17 Pat 350.

(Court of appeal will not interfere with the discretion exercised by the trial Court merely on the ground that reasons for the award or refusal to award such interest have not been given.)

('37) AIR 1937 Pat 628 (632): 16 Pat 557.

(Circumstance justifying omission to award not referred to by Court — Interference on appeal merely on this ground is not justified.)

('35) AIR 1935 Pat 306 (341): 14 Pat 70. (Where the lower Court did not award interest under this Section on the ground that the suit was considerably delayed by the plaintiff, it was held by the High Court that the lower Court was right in not allowing interest *pendente lite* but was wrong in not allowing future interest.)

[See ('35) AIR 1935 Lah 307 (311). (Held, that the Appellate Court could grant interest *pendente lite* though lower Court had refused it.)]

Ordinarily, future interest should not be refused except for sufficient reasons,¹⁰ such as the wrongful conduct of the party,¹¹ or the award of a high rate of interest upto date of suit.¹²

Where the lower Court has not considered the question of interest at all, the Appellate Court may grant it.¹³

Section 141 of the Oudh Rent Act, which provides that an under-proprietor or tenant shall be liable to pay interest on the arrears of rent at the rate of one *per cent. per mensem*, does not control the discretion vested in the Court under this Section to allow future interest at such rate as the Court deems reasonable.¹⁴ See also the undermentioned cases.¹⁵

4. Interest from date of suit to date of decree. — The plaintiff is not entitled *as of right* to the contract rate after suit.¹ The Court, as has been seen already, has full discretion over the matter.² As a rule, however, the Court should award the contract rate till date of decree except where it would be inequitable to do so.³ In the case cited below,^{3a} the Court granted compound interest from the date of the suit to the date of the final decree in view of the fact that the plaintiff was long kept out of his money. Where interest at contract rate is refused, the Court should give its reasons for such refusal.⁴ In an action, however, for dissolution of a partnership and for accounts, interest should be allowed only from the date of final decree

10. ('19) AIR 1919 Cal 144 (150).
 ('84) AIR 1934 Lah 32 (93).
 ('28) AIR 1928 Nag 115 (116).
 ('26) AIR 1926 Nag 109 (115): 22 Nag LR 49.
 [See ('33) AIR 1933 Lah 440 (441).
 ('32) AIR 1932 Lah 312 (314). (Long delay in bringing suit is a circumstance which will weigh with the Court in not granting future interest.)]
11. ('79) 4 Cal 322 (326).
 ('14) AIR 1914 Lah 326 (327): 1914 Pun L R No. 199, p. 657. (Delay in trial due to plaintiff's erroneous act.)
12. (1900) 1893-1900 Low Bur Rul 332.
 ('19) AIR 1919 All 1 (5): 42 All 230. (Compound interest charged — Total amount of such interest exceeding one-third of amount of claim — Future interest refused.)
 ('76) 25 Suth W R 323 (323). (Stipulation for compound interest—Award of 6 per cent. from date of suit held proper.)
13. ('27) AIR 1927 Lah 679 (680).
 ('36) AIR 1936 Lah 668 (669). (Judge not applying his mind to question of future interest — There is no exercise of discretion—Interest can be granted in appeal.)
14. ('34) AIR 1934 Oudh 239 (240).
15. ('35) AIR 1935 All 505 (506) (FB). (Case under S. 225 of Agra Tenancy Act of 1926.)
 ('35) AIR 1935 Pat 98 (101): 14 Pat 400. (Mortgage — Interest from date of decree to date of realization is not governed by Santhal Parganas Regulation (S. 6 speaking something like rule of "damdupat") but by Section 34.)
16. ('81) 3 All 91 (107): 7 Ind App 196 (PC).
 ('35) AIR 1935 Cal 39 (68).
 ('32) AIR 1932 Lah 312 (314): 16 Lah 476.
 ('36) AIR 1936 Pat 191 (193).
2. ('22) AIR 1922 P C 46 (48) (PC).
 ('13) 37 Bom 326 (338): 40 Ind App 68 (FO).
 ('05) 9 Cal W N 421 (437): 32 Cal 582.
 ('32) AIR 1932 Lah 312 (314). (Absence of specific claim in plaint—No bar to granting of interest.)
 ('30) AIR 1930 Lah 733 (734, 735).
 ('30) AIR 1930 Mad 721 (723): 53 Mad 475.
 ('38) AIR 1938 Pat 600 (603): 17 Pat 350.
 See also Note 3 above.
 [See ('34) AIR 1934 Lah 98 (94)].
3. ('26) 96 Ind Cas 310 (311) (Lah).
 ('25) AIR 1925 Cal 268 (269).
 ('15) AIR 1915 All 313 (314).
 ('35) AIR 1935 Cal 39 (68): 61 Cal 711.
 ('20) AIR 1920 Cal 881 (881).
 ('13) 18 Ind Cas 747 (748) (Cal).
 ('30) AIR 1930 Lah 733 (734).
 ('32) AIR 1932 Mad 109 (110): 55 Mad 458.
 ('18) AIR 1918 Mad 558 (560).
 ('18) AIR 1918 Oudh 224 (224).
 ('14) AIR 1914 Oudh 289 (290).
 ('34) AIR 1934 Pat 134 (139): 13 Pat 200.
 ('33) AIR 1933 Pat 207 (208).
 [See ('35) 18 Nag L Jour 323 (324). (In the absence of any cogent reason, interest pendente lite should be allowed in suits other than mortgage suits. When the plaint contains a prayer for such interest from the date of plaint, the Court is not justified in ignoring the same; in the absence of any agreement to the contrary the Court should allow future interest at the court rate.)]
- 3a. ('36) AIR 1936 Rang 141 (144).
4. ('16) AIR 1916 Mad 918 (918).
 [See also ('31) AIR 1931 Nag 91 (93).]

Note 4

1. ('16) AIR 1916 Mad 918 (918). (Dissenting from 12 Mad 485 which can be considered to be no longer good law.)
2. ('24) AIR 1924 Mad 33 (37).

as it is impossible to say, before the final decree, if anything is due to the plaintiff co-partner.⁵

See also the undermentioned case.⁶

5. Interest from date of decree to date of payment. — This is also within the discretion of the Court.¹ As a rule, however, the interest after the date of the decree will be granted at a lower rate than that allowed for the period before the date of the decree. The reason is that the plaintiff getting the *security* of a decree has his interest reduced in the generality of cases.² But there is nothing to prevent a Court from granting, in a proper case, the contract rate of interest upto realisation.³ Where interest at 24 per cent. was granted upto the date of decree, the Lahore High Court refused further interest after the date of the decree.⁴

The interest granted under this head is referred to in the Section as "further interest" and is awardable on the aggregate of the principal and interest as on the date of the decree;^{4a} but it is not *compound* interest but only interest on a fixed sum declared to be due by the decree.⁵

6. Interest prior to suit — General. — It has been already seen that interest prior to suit is a matter of substantive law and is outside the scope of the Section.¹ It will be useful, however, to briefly note the principles governing the award of such interest.

The right to interest, prior to suit, arises in one of the three following ways —

- (1) *Agreement* express or implied between the parties (see Note 7 below).
- (2) *Mercantile usage* (see Note 8 below).
- (3) *Statutory provisions*² (see Note 9 below).

5. ('30) AIR 1930 PC 185 (187); 57 Ind App 245; 24 Sind L R 328 : 58 Cal 208 (PC).

('32) AIR 1932 Sind 126 (127); 26 Sind L R 385.

6. ('35) AIR 1935 Mad 458 (459). (Partition suit dismissed for default — Subsequent suit — Plaintiff can get interest only from date of plaint.)

Note 5

1. 2 Hyde 106 : Cor 12.

('33) AIR 1933 Lah 352 (353, 354); 14 Lah 591.

('35) AIR 1935 Cal 39 (68) : 61 Cal 711. (No contract to pay interest—Interest awarded as damages — Held that post decree interest at same rate ought not to be awarded.)

('75) 23 Suth W R 309 (310).

('69) 11 Suth W R 455 (456).

('35) 18 Nag L Jour 323 (324). (In the absence of any reasons to the contrary Court should allow future interest at Court rate.)

('38) AIR 1938 Pat 600 (603) : 19 Pat 202.

('35) AIR 1935 Pesh 58 (59). (Transaction between bank and firm — Rate charged rather below than above ordinary rate—Future interest to be granted.)

('36) AIR 1936 Rang 141 (144). (Courts are entitled to give interest in their discretion. This can be given under S. 34, C. P. C., and also under S. 73, Contract Act.)

See also Note 3 and Note 4 above.

2. ('91) 18 Cal 164 (180) : 17 Ind App 201 (PC).

('33) AIR 1933 Lah 1011 (1013).

('81) 3 All 91 (107) : 7 Ind App 196 (PC).

('69) 11 Suth W R 455 (456).

(1883) 25 Ch D 338 (349, 350), In re Sneyd, Ex parte Fewings.

3. ('99) 5 Cal W N 653 (654).

('34) AIR 1934 Bom 86 (89). (Court has jurisdiction to give compound interest after decree.)

('35) AIR 1935 P C 165 (168) : 63 Cal 1 : 62 Ind App 265 (PC). (The stipulated rate of interest can be awarded up to the date of realisation or actual payment and a debtor should not be allowed to keep the money of his creditor at a low rate of interest by merely bringing an unsuccessful appeal.)

('14) AIR 1914 Oudh 289 (290).

4. ('28) AIR 1928 Lah 811 (811).

4a. ('35) AIR 1935 Cal 39 (67) : 61 Cal 711.

5. (1864) 1 Suth W R (Misc) 15 (15).

Note 6

1. See Note 1 above.

('36) AIR 1936 Rang 141 (143). (In a suit for accounts of moneys received by the defendant, interest before date of suit may be awarded.)

[See also ('13) 35 All 378 (379).

('74) 6 N W P H C R 358 (362, 363, 365) (FB).]

2. ('18) AIR 1918 P C 53 (56) : 40 All 497 (P C).

No interest can be allowed on *damages* for any period prior to suit.³ Nor, unless there is a contract to the contrary, will any but simple interest be allowed as a general rule.⁴

7. Agreement express or implied to pay interest. — The Usury Laws Repeal Act XXVIII of 1855, Section 2, has abolished all usury laws, and consequently where there is a stipulation to pay interest at a particular rate, that rate must be allowed, however high it may be.¹ The Court has no *discretion* on the matter as it has in the case of interest *pendente lite*.² There are however certain exceptions to the above rule —

- (1) Where the circumstances under which the agreement is entered into are such as to render it void or voidable under the Contract Act, *e.g.*, fraud or undue influence or want of free consent, the rate agreed upon will not be enforced.³
- (2) Where the rate agreed upon amounts to a *penalty*, it will not be enforced, but the Court has power to grant reasonable compensation instead under Section 74 of the Contract Act. The Court's equitable jurisdiction to grant relief against penalty is not excluded by the Usury

3. ('70) 7 Bom H C R A C 89 (98).
 ('82) AIR 1932 Oudh 165 (167) : 8 Luck 35.
 ('81) AIR 1931 Bom 386 (387).
 ('85) 11 Cal 221 (226).
 ('80) AIR 1930 Lah 374 (378).
 ('83) AIR 1933 Oudh 259 (260, 261). (Suit for damages — Interest thereon prior to suit should not be awarded.)
 ('82) AIR 1932 Sind 9 (16) : 26 Sind LR 167.
 ('81) AIR 1931 Sind 121 (124) : 25 Sind L R 104. (Agreement or mercantile usage, if relied upon, must be proved.)
 ('11) 15 Ind Cas 757 (768) : 5 Sind L R 192. (1893) 1893 A C 429 (437), London Chatham and Dover Ry. Co. v. South Eastern Ry. Co. (Damages for detention of debt.)
 [See also ('66) 4 Bom H C R A C 55 (56).]
4. ('05) 7 Bom L R 772 (790).
 ('83) AIR 1933 Mad 171 (172).
 ('04) 28 Bom 371 (377). (Courts do not lean towards compound interest.)
 [See also ('29) AIR 1929 Pat 340 (341). (No compound interest can be allowed unless there is a contract, express or implied.)]

Note 7

1. ('84) 6 All 68 (64).
 ('20) AIR 1920 Cal 881 (881).
 ('66) 11 Moo Ind App 120 (127) (P C).
 ('89) 1889 All W N 167 (167).
 ('19) AIR 1919 Cal 413 (414) : 23 Cal W N 980 (981). (30 per cent. allowed.)
 ('06) 10 Cal W N 640 (642).
 ('04) 31 Cal 233 (239).
 ('03) 7 Cal W N 876 (877).
 ('02) 29 Cal 823 (825, 826).
 ('83) 9 Cal 309 (314).
 ('74) 21 Suth W R 352 (357). (Interest at 75 per cent. allowed.)
 ('73) 20 Suth W R 317 (327).
 ('66) 6 Suth W R 254 (255).
 ('01) 1901 Pun L R No. 151, page 383.
 ('82) 1882 Pun Re No. 40. (36 per cent.)

- ('79) 1879 Pun Re No. 145.
 ('77) 1877 Pun Re No. 5.
 ('02) 25 Mad 343 (346).
 ('88) 1 C P L R 57 (57).
 ('25) AIR 1925 Oudh 535 (535).
 [See ('98) 15 All 339 (352) : 20 Ind App 116 (P C).]
2. ('70) 15 Suth W R 396 (397).
3. ('99) 2 C P L R 23 (24). (Pressure of money. 75 per cent. compound interest held unconscionable.)
 ('89) 1889 Pun Re No. 135.
 ('07) 29 All 303 (306, 307). (Transaction so unconscionable as to amount to a want of free consent.)
 ('03) 25 All 284 (285).
 ('87) 9 All 228 (229). (Pressing necessity—High rate of compound interest—Ample security—Long delay in suing.)
 ('87) 9 All 74 (81).
 ('84) 1884 All W N 280 (281).
 ('07) 31 Bom 348 (352). (Unconscionable transaction relieved under S. 16 of the Contract Act.)
 ('78) 3 Bom 131 (133).
 ('66) 4 Bom H C R A C 202 (205). (Terms extortionate and unfair.)
 ('13) 17 Cal L Jour 221 (225).
 ('06) 33 Cal 683 (688).
 ('06) 10 Cal W N 640 (642).
 ('02) 29 Cal 823 (825, 826).
 ('98) 2 Cal W N 333 (335).
 ('86) 12 Cal 225 (239) : 12 Ind App 215 (P O).
 ('77) 2 Cal 202 (207, 208). (Rate exhorbitant—Consideration grossly inadequate—Nothing to show defendant understood transaction.)
 ('74) 21 Suth W R 352 (357).
 ('73) 20 Suth W R 317 (327).
 ('79) 1879 Pun Re No. 145.
 ('79) 1879 Pun Re No. 110.
 ('77) 1877 Pun Re No. 5.
 (1862) 1 Mad H C R 81 (82).

(XXIX of 1925) provide for payment of interest at 4 per cent. per annum on general legacies remaining unpaid, in certain cases, and 6 per cent. per annum in other cases.² Again, Section 1 of the Interest Act (XXXII of 1839) enacts that the Court shall award interest at a rate not exceeding the *current* rate on all *debts* or "*sums certain*"—

(1) where such sums are payable by virtue of a *written instrument* at a *certain time*, from the time when the sums were payable,

or

(2) where such sums are payable otherwise, from the time when *demand for payment* shall have been made in *writing* so that such demand shall give notice to the debtor that interest will be claimed from the date of such demand until payment.³

The "*sums certain*" do not include *provisional* payments to be made by one party to another.⁴ Nor does it include unliquidated damages⁵ or unascertained sums.⁶

10. Interest as damages.—Where there is no agreement, express or implied, to pay interest, and it is not allowed by any statute or mercantile usage, no interest can

- ('88) AIR 1938 P C 67 (70) : I L R (1938) 2 Cal 72 : 32 Sind L R 374 (P C).
[See also ('81) AIR 1931 Cal 140 (141) : 58 Cal 290.
('29) AIR 1929 Pat 365 (366).]
2. ('02) 25 Mad 361 (365).
('06) 29 Mad 155 (160).
3. (1854) 6 Moo Ind App 232 (249) (P C).
('30) AIR 1930 Bom 444 (445).
('19) AIR 1919 All 51 (52). (No agreement in writing—No demand in writing—No interest is claimable.)
('04) 26 All 299 (309) : 31 Ind App 116 : 7 Oudh Cas 116 (P O).
('87) 1887 All W N 287 (287) : 10 All 83. [Printed heading in bill that interest will be charged is sufficient demand.]
('31) AIR 1931 Cal 140 (144) : 58 Cal 290.
('20) AIR 1920 Cal 737 (739).
(1900) 27 Cal 814 (818).
('99) 26 Cal 955 (960, 961). (Date of payment need not be mentioned in the document.)
('98) 25 Cal 54 (57). (Certificate of Administrator General admitting a debt is not a "written instrument" within the Section.)
('76) 24 Suth W R 457 (459). (No demand—Interest can only be given from the date of the suit.)
('68) 1 Beng L R (O O) 41 (41).
('83) AIR 1933 Lah 212 (212).
('82) AIR 1932 Lah 616 (618) : 13 Lah 516.
('15) AIR 1915 Lah 181 (184). (No agreement in writing — No demand in writing — No interest is claimable.)
('13) 20 Ind Cas 299 (300) : 1913 Pun Re No. 30.
('01) 1901 Pun L R No. 181, p. 466. (Demand for retrospective interest may imply demand for prospective interest.)
('33) AIR 1933 Mad 320 (321) : 56 Mad 391.
('21) AIR 1921 Mad 76 (79).
('16) AIR 1916 Mad 498 (499) : 38 Mad 464 (465). (Debts include debts payable in kind.)
('16) AIR 1916 Mad 127 (130).
('13) 21 Ind Cas 543 (544) (Mad). (Interest may be allowed on damages from date of a written demand for interest. It is not allowable legally on unliquidated damages.)
('08) 31 Mad 250 (251).
(1900) 23 Mad 41 (45). (Letter demanding payment with interest sufficient.)
('97) 20 Mad 481 (481). (Oral contract — No agreement or usage either.)
('76) 1 Mad H C R 369 (372).
('26) AIR 1926 Nag 64 (65). (No written demand—Not entitled to interest.)
('23) AIR 1923 Nag 197 (198) : 19 Nag L R 24. (Co-sharers not demanding share of profits.)
('19) AIR 1919 Nag 62 (64). (No security; 1 per cent. per mensem is reasonable.)
('83) AIR 1933 Oudh 259 (261).
('29) AIR 1929 Oudh 420 (421).
('31) AIR 1931 Pat 394 (402) : 10 Pat 528.
('29) AIR 1929 Pat 365 (366).
(1878) 15 Eq 394 (397). Alison, ex parte. (A summons is a demand.)
[But see ('14) AIR 1914 Lah 147 (147) : 20 Ind Cas 194 (194) : 1914 Pun Re No. 9. (Printed headline in the tradesman's bill that interest would be charged on all arrears after a certain period is not such a demand as is contemplated by the Interest Act.)
('01) 1901 Pun Re No. 55. (Headlines in order form that interest will be charged is not sufficient demand.)]
4. (1893) 1893 App Cas 429 (436), London Chatham and Dover Ry. Co. v. South Eastern Ry. Co.
('59) 7 Moo Ind App 263 (280) (P C). (Contingent contracts are not within the scope of the Act.)
('99) 26 Cal 955 (960).
5. ('70) 7 Bom H C R A C 89 (98). (Interest not to be awarded on unliquidated damages.)
('72) 9 Bom H C R 7 (11). (Do.)
('20) AIR 1920 Cal 737 (739). (Depreciation in value of goods is not a debt or a sum certain.)
(1874) 18 Eq 154 (167), Hill v. South Staffordshire Ry Co.
6. ('19) AIR 1919 Mad 164 (165) : 42 Mad 661. (Unascertained sum claimed as profits of trade)

34 be awarded *as interest*.¹ But it may be awarded as damages in proper cases.² Thus, interest may be awarded by way of damages in cases where money due is wrongfully withheld,³ or where money is levied in execution of a decree or order subsequently reversed,⁴ or where money is paid on behalf of others under compulsion.⁵ In cases of breach of contract where the non-payment of money due is itself the breach of contract and nothing else is proved to make out the claim for compensation for such breach, no interest can be awarded in addition to the recovery of money withheld.^{5a} But, if by reason of the breach the plaintiff has sustained special loss or damage for which the mere repayment of the amount due would not be adequate compensation, the Court can award interest as part of the damages.^{5b} A mere detention of a debt will not however entitle the creditor to interest by way of damages.⁶ Nor will a

Note 10

1. ('12) 16 Cal L Jour 264 (269, 270).
('32) 186 Ind Cas 719 (720) (Lah).
('34) AIR 1934 Pat 99 (104) : 12 Pat 869. (Hindu widow's suit for maintenance not entitled to interest prior to suit but interest after suit under S. 34 may be granted.)
[See also ('78) 2 Cal L Rep 349 (351).]
2. ('18) AIR 1918 Cal 448 (449) : 22 Cal W N 488 (490).
('23) AIR 1923 Lah 632 (633) : 4 Lah 406.
('16) AIR 1916 P C 46 (48, 49) : 38 All 581 : 43 Ind App 294 (P C).
('15) AIR 1915 P C 116 (118) : 42 Cal 914 : 42 Ind App 91 (P C).
('31) AIR 1931 All 403 (404). (Interest awarded on equitable grounds.)
('91) 13 All 330 (336).
('35) AIR 1935 Cal 347 (355) : 62 Cal 175.
('35) AIR 1935 Cal 39 (68) : 61 Cal 711.
('30) AIR 1930 Cal 357 (360) : 57 Cal 953.
('01) 5 Cal W N 356 (360).
('78) 3 Cal 654 (661) : 5 Ind App 31 (P C).
('72) 17 Suth W R 179 (179). (In suit for contribution).
('19) AIR 1919 Mad 164 (164) : 42 Mad 661 (665, 667).
('95) 18 Mad 331 (335, 336).
('35) AIR 1935 Oudh 170 (175). (Six per cent. is not excessive by way of damages).
('28) AIR 1928 Oudh 89 (92).
[See also ('32) AIR 1932 All 505 (506).]
[But see ('33) AIR 1933 Pat 196 (199) : 12 Pat 216.]
3. (02) 4 Bom L R 205 (211). (Interest upon the amount of a policy of insurance after the date of a formal demand.)
('30) 129 Ind Cas 691 (698) (Lah).
('70) 14 Moo Ind App 209 (233) (P C).
('33) AIR 1933 All 455 (456).
('33) AIR 1933 All 186 (188) : 55 All 164.
('33) AIR 1933 All 147 (149). (Premium payable in respect of a lease.)
('30) AIR 1930 Cal 357 (360) : 57 Cal 953.
('19) AIR 1919 Cal 538 (539). (Sums collected by defendant and not accounted for. Note :—The Oudh Judicial Commissioner's Court has held that where a claim is not based on contract, interest cannot be allowed even as damages. See (1926) AIR 1926 Oudh 147 (147). The view is, it is submitted, open to question.)
- ('78) 1 Cal L Rep 236 (238).
('71) 16 Suth W R 297 (298).
(1865) 9 Suth W R 147 (151). (Interest may be claimed on the interest of Government promissory notes withheld by another.)
(1864) 1864 Suth W R Sup Vol 174 (174).
('35) AIR 1935 Lah 775 (779). (Where a contractor has completed the work he has undertaken to do but his bill is unreasonably delayed, he is entitled to be compensated for the delay. Interest at 6 per cent. held was not excessive.)
('35) AIR 1935 Lah 685 (686).
('35) AIR 1935 Lah 552 (553).
('33) AIR 1933 Mad 844 (845, 846).
[But see ('20) AIR 1920 Cal 912 (913) : 31 Cal L Jour 348 (350).]
4. (1854) 6 Moo Ind App 1 (26, 27) (P C).
('98) 20 All 430 (432).
('86) 8 All 262 (283). (Interest on cost refunded.)
('79) 4 Cal 229 (230). (Do.)
('74) 13 Beng L R App 44 (46).
('73) 20 Suth W R 49 (49).
('71) 15 Suth W R 74 (75).
('66) 6 Suth W R 285 (285). (Where, however, money is simply deposited into Court under a decree, the depositor is not entitled to interest as damages on the reversal of the decree.)
('96) 1896 Pun Re No. 82.
('86) 9 Mad 506 (508).
('18) AIR 1918 Oudh 119 (120) : 20 Oudh Cas 327 (328).
[See also ('29) AIR 1929 Lah 316 (316, 317).]
5. 2 Hay 278. (Payment of Government revenue.)
('03) 6 Oudh Cas 346 (350).
('81) 1881 Pun Re No. 98. (Surety made to pay amount.)
5a. ('33) AIR 1933 Mad 729 (734) : 57 Mad 205.
('29) AIR 1929 Nag 170 (172) : 25 Nag L R 81.
[See ('33) AIR 1933 Lah 212 (212).]
('33) AIR 1933 Lah 127 (127).]
- 5b. ('33) AIR 1933 Mad 729 (734) : 57 Mad 205.
[See ('33) AIR 1933 Lah 556 (557).]
6. (1868) L R 2 Ch App 488 (491, 492), Turner v. Barkin Shaw.
('99) 21 All 223 (227) : 26 Ind App 45 (P C).
(Part of purchase money left unpaid as security for vendor satisfying incumbrance — Interest is not payable.)

claimant for contribution be awarded such interest if he has slept over his rights for a long time.⁷ Similarly, where the dower to which a Mahomedan widow is entitled is fixed at a sum very much higher than the entire estate belonging to the husband, interest on the dower was refused.⁸

As to the *rate* of interest allowable as damages, see the undermentioned cases.⁹

11. Mortgage suits. — See Order 34 Rule 11.

12. Interest, whether payable after tender.—The general principle of the law of tender is embodied in Section 38 of the Contract Act under which, where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance. A tender of the amount due will stop the running of interest from the date of tender,¹ but it does not extinguish the debt.² But the tender must be a proper and a legal one. Thus, a tender contrary to the provisions of Section 61 of the Bengal Tenancy Act,³ or a deposit in Court without notice to the opposite party,⁴ or without getting a guardian *ad litem* appointed where the payee is a minor,⁵ is not a proper tender.

A tender before suit, in order to be effectual, must be accompanied by a deposit after the institution of suit.⁶ Otherwise, the creditor will be entitled to interest, at a suitable rate, from the date of institution of the suit to the date of realisation.⁷

A tender must be unconditional⁸ and of the full amount.⁹ A deposit, however, made in full satisfaction of the debt, but accepted by the Court in part satisfaction only, will stop the running of interest on that part.¹⁰ The rule that a tender of a part of the amount due must be treated as never made, applies only when it is *admitted* that a larger amount is due and not when it is *bona fide* asserted otherwise.¹¹ Where the judgment-debtor deposits the decree amount in Court, it has been held that he is not liable to pay interest on the decree amount from the date of the deposit to the date when the decree-holder has notice of the same.¹² Nor is he liable to pay interest

(‘75) 28 Suth W R 325 (327). (Agent’s liability to pay interest on principal’s money retained by him.)

(‘71) 16 Suth W R 148 (148). (Interest on balance of accounts in a suit therefor will not be allowed in the absence of agreement therefor.)

7. (‘79) 19 Suth W R 98 (99).

[See also (‘30) AIR 1930 Cal 385 (387) : 57 Cal 114.]

8. (‘06) 3 Cal L Jour 541 (543).

9. (‘26) AIR 1926 Nag 363 (364). (6 per cent may be a proper rate.)

(‘09) 13 Cal W N 118 (121). (Contribution suit — 12 per cent. was awarded.)

(‘17) AIR 1917 Cal 188 (194) : 21 Cal W N 564 (570). (Restitution matter—Interest at 6 cent. was considered proper.)

(‘23) AIR 1923 Lah 632 (633) : 4 Lah 406.

(‘35) AIR 1935 Mad 783 (783). (Restitution—6 per cent. allowed.)

(‘05) 28 Mad 355 (357). (Restitution — 6 per cent. considered proper.)

Note 12

1. (1862) 1 Mad H C R 124 (126).

(‘07) 34 Cal 305 (321).

(1812) 3 Camp 296 (297), *Dent v. Dunn*.

(‘06) 2 Nag L R 62 (63). (Tender not proper — Interest will not cease to run.)

(‘07) 4 Low Bur Rul 108 (109).

2. (‘07) 34 Cal 305 (321).

3. (‘03) 7 Cal W N 720 (723).

4. (‘71) 16 Suth W R 304 (304).

5. (‘08) 27 Bom 23 (30).

6. (‘92) 16 Bom 141 (149, 150).

(‘32) AIR 1932 Mad 109 (111) : 55 Mad 458.

(‘83) 9 Cal 33 (35, 37).

(‘15) AIR 1915 Mad 210 (216) : 38 Mad 959.

(‘07) 4 Low Bur Rul 108 (109).

[But see (‘26) AIR 1926 Cal 810 (311).

(Refusal on tender; no deposit necessary.)]

7. (‘83) 9 Cal 33 (35, 37).

(‘07) 4 Low Bur Rul 108 (109).

8. (‘78) 2 Cal L Rep 183 (184).

9. (‘83) 9 Cal 33 (35, 37). (Amount insufficient to cover costs—Not a valid tender.)

(‘30) AIR 1930 Oudh 208 (209).

(‘78) 3 Cal 468 (471, 472).

(‘67) 7 Suth W R 20 (20). (As to payment into Court by way of security until final decision — See O. 24 Rr. 1-4.)

(‘03) 6 Oudh Cas 135 (140, 141). (Sec. 84 of Transfer of Property Act.)

10. (‘69) 12 Suth W R 50 (51).

11. (‘92) 16 Bom 141 (149).

12. (‘91) 1 Mad L Jour 534 (535).

[See also (‘35) AIR 1935 Mad 342 (344).

(When deposit made on the challenge of the plaintiff and in the presence of the plaintiff no notice is required.)]

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sues *B* for the recovery of Rs. 495 made up of Rs. 250 principal and interest Rs. 245, the Court may award interest *pendent lite* and up to the date of realisation, though the total amount of interest awarded by the decree exceeds the principal of Rs. 250. The rule applies only so long as the matter is in the realm of *contract*. It ceases to apply when the matter has passed into the realm of *judgment*. So in mortgage suits the rule applies to the interest payable *till* the date *fixed in the decree* for the payment of the mortgage money, but not to the interest that may be payable subsequently.²¹

17. Decree silent as to interest—Sub-section (2). — Where the decree does not provide for interest it will, under sub-section (2) of this Section, be deemed to have been refused,¹ unless it can be shown that the silence was due to oversight or mistake.² This will be so even if the decree is based upon a confession of judgment which provided for interest.³ Interest not awarded by the decree cannot therefore be awarded either in execution⁴ or by way of amendment of the decree.⁵ Where, however, the judgment-debtor, in consideration of the forbearance shown by the creditor, agrees in Court to pay him interest, the creditor, in virtue of such promise, is entitled to ask the Court to execute his decree for the decree amount with interest from the date of such promise.⁶ Similarly if interest is allowed in execution by way of *compromise*, the Appellate Court will not interfere.⁷

- (25) AIR 1925 Nag 193 (194).
24. ('31) AIR 1931 Nag 89 (89).
(30) AIR 1930 Pat 442 (449): 10 Pat 63.
(29) AIR 1929 Nag 117 (117).
(21) 59 Ind Cas 121 (122) (Nag).
(12) 15 Ind Cas 824 (825): 5 Sind L R 245.
[See ('36) AIR 1936 P C 63 (64, 65): 15 Pat 210: 63 Ind App 114 (PC).
(29) AIR 1929 Nag 355 (356). (Where maximum limit of interest is reached before suit, Court has discretion under this Section to award interest from date of suit.)]
[But see ('22) AIR 1922 Nag 155 (156): 17 Nag L R 200.]
- Note 17**
1. ('13) 87 Bom 326 (339): 40 Ind App 68 (PC).
(75) 1875 Bom P J 225.
(89) 1883 All W N 128 (128): 5 All 589.
(71) 3 N W P H O R 819 (320).
(18) AIR 1918 Cal 151 (153): 27 Cal L Jour 576 (578). (S. 34, Cl 2.)
(05) 32 Cal 494 (501). (Interest on costs.)
(96) 28 Cal 357 (360). (Do.)
(79) 5 Cal 27 (30, 31).
(77) 3 Cal 351 (352). (Interest on Costs.)
(74) 21 Suth W R 195 (196). (Do.)
(72) 18 Suth W R 109 (104). (Do.)
(71) 16 Suth W R 302 (303). (Do.)
(70) 14 Suth W R 324 (324).
(68) 10 Suth W R 175 (175). (Bond under S. 52 of Act XVI of 1864 enforceable as decree — No provision for interest — No interest will be allowed.)
(13) 20 Ind Cas 319 (320) (Lah). (Decree silent — No oral agreement as to interest can be proved.)
(78) 1878 Pun Re No. 11.
(38) AIR 1938 Mad 522 (523). (Decree for maintenance creating charge is decree for payment of money and S. 34, sub-clause 2, applies to it.)
 2. ('18) AIR 1918 Low Bur 136 (137): 9 Low Bur Rul 78 (81).
 3. ('86) 1886 Pun Re No. 13.
 4. ('68) 1868 Pun Re No. 81.
(34) AIR 1934 Pat 192 (194): 13 Pat 21.
(93) 22 Bom 42 (46).
(75) 24 Suth W R 193 (195): 2 Ind App 219 (PC).
(74) 21 Suth W R 147 (147). (Interest on costs.)
(73) 20 Suth W R 477 (477).
(72) 18 Suth W R 253 (254).
(72) 17 Suth W R 19 (20).
(71) 15 Suth W R 415 (415).
(71) 15 Suth W R 335 (335).
(71) 6 Beng L R App 33 (33). (Interest on costs.)
(68) 10 Suth W R 60 (61).
(66) 6 Suth W R Misc 109 (111).
(66) 5 Suth W R Misc 28 (28).
(1864) 1864 Suth W R Sup Mis 37 (37).
(31) AIR 1931 Mad 650 (652): 54 Mad 955 (FB).
 5. ('93) 15 All 121 (123).
 6. ('66) 5 Suth W R Misc 1 (2).
(84) 7 Mad 400 (401).
(12) 17 Ind Cas 936 (939) (Cal).
 7. ('77) 3 Cal 602 (609): 5 Ind App 78 (PC).
(77) 3 Cal 161 (173): 4 Ind App 137: 1877 Pun Re No. 1 (PC). (Parties agreeing to submit the matter to the discretion of the Court executing the decree.)

Where the Court awards interest but no *rate* is mentioned, the decree-holder will be entitled to interest at the court rate which is usually 6 per cent.,⁸ though it may differ according to particular circumstances of the case.⁹ Where a Court has awarded interest by its decree at a particular rate, it cannot be reduced or denied in execution proceedings.¹⁰

Sub-clause (2) of the Section was introduced by Act VII of 1888. In some of the cases arising under the old Code before the date of the said Act, it had been held that interest though not awarded by the decree could be granted later on in execution¹¹ or in a separate suit.¹² In view of this sub-section the said cases are no longer law. Where, however, the decree is not for a *definite sum* of money but is one for accounts and partition, Section 34 (2) does not apply and a suit for interest is not barred.¹³

18. Court-fee. — Section 11 of the Court Fees Act does not apply to the interest awarded by the decree under Section 34¹ and no additional court-fee is therefore payable on such interest.² In an appeal against a decree awarding a sum of money and future interest, no court-fee is payable on the interest *pendente lite* unless a specific ground of appeal is taken in respect of such award.³

COSTS

35. [Ss. 218 to 222.] (1) Subject to such conditions and limitations as may be prescribed,² and to the provisions of any law for the time being in force,³ the costs of and incident to all suits⁴ shall be in the discretion⁵ of the Court, and the Court shall have full power to determine by whom⁹ or out of what property¹⁶ and to what extent²⁶ such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event,⁷ the Court shall state its reasons in writing.

8. ('24) AIR 1924 Mad 102 (102).

9. ('71) 7 Beng L R App 30 (31). (Various sums of money in part satisfaction of decree paid with interest at 12 per cent. for periods subsequent to the decree—*Held*, that rates should be allowed.)

('73) 19 Suth W R 46 (47). (3 per cent. allowed.)

('72) 18 Suth W R 103 (103). (Court should see from other parts of the decree or other papers on record what the rate of interest was intended to be given.)

('72) 17 Suth W R 414 (414). (12 per cent. being the usual rate was allowed.)

('67) 7 Suth W R 375 (376). (12 per cent.)

('80) 6 Cal L Rep 231 (233). (Usual rate allowed.)

10. ('73) 19 Suth W R 46 (47).

('79) 3 Cal L Rep, 523 (524). (Delay in taking out execution is no ground for refusing inter-

est awarded by decree.)

('94) 16 All 270 (273). (Decree under S. 88, Transfer of Property Act, providing for future interest—Order under S. 89 need not specifically mention interest.)

11. ('68) 10 Suth W R 60 (61). (Amendment of decree.)

('66) 5 Suth W R Misc 12 (13).

('72) 18 Suth W R 34 (34).

(1865) 2 Suth W R Misc 21 (21).

12. ('78) 3 Cal 602 (609) : 5 Ind App 78 (PC). (Followed in AIR 1926 Cal 505).

13. ('25) AIR 1925 Bom 406 (409) : 49 Bom 282.

Note 18

1. ('05) 27 All 559 (561). (Mortgage decree.)

2. ('92) 17 Bom 41 (42).

('75) 12 Bom H O R 227 (228).

[See ('06) 33 Cal 1232 (1235).]

3. ('34) AIR 1934 All 805 (807).

discretion exercised on sound legal principles^{1a} and not by caprice or chance or humour.² No hard and fast rule can, however, be laid down, the exercise of the discretion depending upon the circumstances of each particular case.³ The circumstances will include the length of trial, the complicated questions involved, and the conduct of the parties both before and after suit.⁴ But it will not include grounds which are not *relevant* to the action.⁵

The discretion under the Section is very wide⁶ and extends to disallowance of the costs of the successful party,⁷ and even to make him pay the costs of the losing party,⁸

- ('78) 7 Bom 19 (33) : 9 Ind App 86 (PC). (It is a sound rule not to vary an order as to costs when there is no substantial alteration in the lower Court's decree. Rules of the Supreme Court, Order 65 Rule 1.)
- ('03) 7 Cal W N 647 (649).
- ('85) 11 Cal 767 (776).
- ('29) AIR 1929 Lah 129 (134) : 10 Lah 816.
- ('04) 27 Mad 341 (343).
- (1913) 1 K B 587 (588), *Kierson v. Thompson*.
- (1905) 49 Sol Jour 618, *Lickhampton Quarries Co. v. Obelterham Rural District Council*.
- (1881) 18 Ch D 76 (84, 85), *Dicks v. Yates*.
- (1887) 34 Ch D 24 (35), *In re Mills Estate*.
- 1a. ('33) AIR 1933 Bom 304 (306).
- (1891) 1891 App Cas 173 (179), *Sharpe v. Wakefield*. (Cited in 28 Bom 513.)
2. ('20) AIR 1920 Cal 1009 (1013) : 24 Cal W N 352 (357).
- ('80) 5 Cal 259 (264, 265).
- (1854) 6 Moo Ind App 53 (87) (P C).
- ('08) 10 Bom L R 821 (834) : 33 Bom 334.
- ('66) 3 Mad H C R 113 (114, 115).
- (1886) 17 Q B D 373 (376), *Huxley v. West London Ex. Ry*.
3. (1885) 29 Ch D 366 (419), *Badische Anilin v. Levinstein*.
- ('28) AIR 1928 Sind 173 (174). (Costs disallowed, as suit was based on an immoral contract.)
- (1865) 10 Moo Ind App 229(251)(PC). (Partial variation as to interest alone made—Privy Council gave no costs to either party.)
- ('92) 1892 All W N 215 (216). (Appeal against remand—Costs to abide result—Proper order.)
- ('81) 6 Cal 394 (406) : 7 Ind App 240 (P C). (Plaintiff failed as to part of his appeal—The Privy Council gave no costs to either party.)
- (1865) 3 Suth W R P C 33 (36) (PC). (Appeal dismissed on wholly different grounds than those relied upon below—So no costs.)
- ('30) AIR 1930 Lah 789 (791). (Wrong order passed suo motu—Court of revision in setting it aside ordered parties to bear their own costs.)
- ('18) AIR 1918 Mad 816 (821) : 5 Mad L W 672 (681). (Bona fide institution of proceedings by Temple Committee—Plaintiff not to be penalized.)
- (1885) 54 L J P 75 (75), *The Friedeberg*.
4. ('21) AIR 1921 Cal 185 (190, 191) : 48 Cal 427.
- ('33) AIR 1933 Rang 337 (338). (Case decided on preliminary point—No examination of witness and argument also not very long—*Held*, full ad valorem costs were excessive.)
- ('30) AIR 1930 Bom 152 (152). (Refusal to furnish details except after suit is not misconduct.)
- ('25) AIR 1925 Cal 569 (570). (Antecedent conduct.)
- ('12) 16 Cal W N 805 (810). (Conduct which led up to the litigation.)
- ('23) AIR 1923 Pat 420 (422, 423). (Gross mismanagement leading to suit.)
- (1900) 1 Q B D 360 (362), *Bostock v. Ramsay Urban District Council*. (Conduct which led to the suit.)
- (1877) 4 K & J 41 (44) : 70 E R 18 (19), *Purser v. Darbey*.
- (1866) 1 Ch App 137 (141), *Caton v. Caton*.
- (1859) 6 H L C 633, *Cranworth in Clarke v. Hart*.
5. (1903) 24 T L R 25, *Edmund v. Martell*.
6. ('20) AIR 1920 Mad 567 (568) : 43 Mad 61.
- ('28) AIR 1928 Nag 171 (171, 172). (Awarding greater or less costs than are normally applicable to particular suit—Reasons should be stated.)
- ('02) 1902 All W N 98 (98). (Court can vary amount of costs of adjournment granted.)
- (1888) 36 W R (Eng) 257 (258), *Neaves v. Spooner*. (Discretion extends to quantum of costs also.)
- (1881) 17 Ch D 772 (774), *Willmott v. Barber*. (Court may order costs to be paid by parties in definite proportions, or it may order one party to pay to the other a fixed sum in lieu of taxed costs.)
7. ('92) 19 Cal 253 (266) : 19 Ind App 48 (PC).
- ('23) AIR 1923 Oudh 8 (8). (Interest claimed very high—Costs disallowed.)
- ('10) 12 Cal L Jour 368 (375). (Failure to add a party entailing a remand will disentitle appellant to his costs.)
- ('68) 9 Suth W R 103 (104). (Special appeal—Appellant failing on certain points though decree modified on other points—Costs disallowed.)
8. (1880) 13 Ch D 228 (231), *Fane v. Fane*.
- (1879) 4 Q B D 611 (612, 613, 614), *Harris v. Patherick*.
- ('34) AIR 1934 All 948 (950). (Successful party guilty of delay ordered to pay costs of other side caused by such delay.)
- ('39) AIR 1939 Bom 198 (200). (Offer of a proper compromise refused.)
- ('36) AIR 1936 Cal 593 (618). (Pending suit affected by new enactment—Costs may be given to unsuccessful party provided his claim is a good one under the law as it was before the new enactment.)

and to apportion the costs between the parties.⁹

The following are the leading principles to be remembered in the exercise of the discretion under this Section —

1. The successful party is entitled to his costs. In other words *costs follow the event*. See Note 7.

2. Where each party is partly successful, the Court should *apportion* the costs between them.¹⁰

3. A person wrongfully or unnecessarily made a party is entitled to his costs.¹¹ But a person who intervenes for no sufficient reason and defends the case separately should be made to bear his costs even if the plaintiff is unsuccessful in his action.¹²

4. When both parties are guilty of acts of *bad faith*, the proper order will be to deprive both of them of their costs.¹³ Where, in the lower Court, each party was ordered to bear his own costs and only one of them appealed from the direction as to costs, the Appellate Court cannot order the appealing party to pay the costs of the non-appealing party incurred in the lower Court.¹⁴

('94) 21 Cal 680 (689).

('93) 20 Cal 762 (771). (Thus the Court may allow to a party the costs of the appeal though costs in the original suit may follow the event.)

9. (1863) 10 Moo Ind App 563 (576) (P C).

('28) AIR 1928 Mad 16 (17). (Alienations set aside in a suit by reversioner—Costs of plaintiff must be proportionate to the value of the property.)

10. ('94) 17 Mad 293 (296).

('75) 24 Suth W R 69 (69). (Partial decree in favour of plaintiff — Saddling plaintiff with defendant's costs is not proper.)

('25) AIR 1925 Cal 297 (299).

('23) AIR 1923 Cal 306 (307). (The general practice in the mofussil is such.)

('71) 15 Suth W R 465 (467). (Plaintiff entitled to some part of his claim ought not to be deprived of the benefit of decree by such an order as to costs as would make him liable to the defendant for more than he would himself recover.)

('67) 7 Suth W R 159 (159).

('67) 7 Suth W R 127 (129).

1 Hay 277.

1 Hay 141.

('88) AIR 1938 Nag 530 (534). (Costs should be proportionate to success and failure.)

('36) AIR 1936 Oudh 52 (55) : 11 Luck 575.

(Suit decreed for only portion of amount claimed—Plaintiffs are entitled only to proportionate costs.)

11. ('79) 4 Bom 619 (622).

('24) AIR 1924 Mad 476 (478).

('91) 13 All 290 (295).

('74) 22 Suth W R 35 (36).

('69) 12 Suth W R 444 (445).

('69) 11 Suth W R 48 (48).

('69) 11 Suth W R 19 (19).

('68) 10 Suth W R 194 (195).

(1865) 2 Suth W R 152 (152).

(1865) 2 Suth W R 33 (34).

('30) AIR 1930 Mad 913 (913).

('30) AIR 1930 Mad 195 (197). (Chairman, in an election petition, against whom no relief was asked.)

('01) 24 Mad 377 (386, 387) : 28 Ind App 46 (P C).

('82) 4 Mad 134 (137).

('36) AIR 1936 Nag 285 (288) : I L R (1937) Nag 61.

[But see ('83) 1883 Bom P J 231 (231).

('29) AIR 1929 Mad 738 (741) : 52 Mad 845.

(Where no costs were allowed to a respondent made as an unnecessary party.)

12. ('21) AIR 1921 Cal 222 (224) : 48 Cal 352.

[See also ('96) 20 Bom 167 (171, 172). (When the assignee decree-holder comes into the appeal of his own motion as respondent or actually supports the decree.)

13. ('15) AIR 1915 Lah 310 (310). (When both parties are guilty of making false allegations.)

('32) AIR 1932 All 128 (130) : 53 All 54.

('29) AIR 1929 All 134 (136, 137). (Parties not producing all material documents.)

('92) 19 Cal 253 (266) : 19 Ind App 48 (P C). (Plaintiff asking too much, defendant conceding too little.)

('87) 14 Cal 99 (108) : 13 Ind App 116 (P C). (Both parties advancing pleas far in excess of their legal rights.)

('37) AIR 1937 Mad 223 (227). (Plaintiff and defendant both guilty of improper conduct—Plaintiff successful—Defendant ordered to pay to plaintiff the institution fee but each party ordered to bear his own costs in other respects.)

(1914) 2 Ch 653 (664), *Petty v. Parsons*. (Both parties taking unreasonable view as to their right.)

(1913) 82 L J K B 340 (344), *Port of London Authority v. Cairu Line*. (Both sides trying to avoid real question.)

(1874) 18 Eq 556 (565), *Mumford v. Stohwassar*. (Both parties were guilty of negligence.)

14. ('29) AIR 1929 Lah 177 (178).

6. Discretion cannot be delegated.—The Court cannot delegate its discretion under this Section to the Taxing Officer.¹

7. Principle that costs shall follow the event.—The general rule is that a successful party is entitled to his costs unless he is guilty of *misconduct* or there is *other good cause* for depriving him of it.¹ A plaintiff who substantially succeeds in his case is within the rule, although he may not have got the precise form of relief

Note 6

1. (1886) 35 W R (Eng) 545 (546), Lambton v. Farkinson.

Note 7

1. ('85) 13 Ind App 20 (31) (PC).
(1889) 14 App Cas 27 (32), Cooper v. Whittingham.
(1854) 6 Moo Ind App 289 (308).
(‘31) AIR 1931 All 23 (25) : 52 All 991 (Income-tax Reference.)
(‘21) 61 Ind Cas 112 (122) (All).
(‘19) AIR 1919 All 453 (455) : 40 All 558 (562). (What is sufficient ground.)
(‘36) AIR 1936 Bom 24 (29, 30) : 60 Bom 297. (Person disputing liability as contributory, failing—Costs of contest should be paid by him.)
(‘35) AIR 1935 Bom 403 (407) : 60 Bom 193. (Corporation proposing to act illegally—Voter obtaining injunction against it—Voter should be awarded costs of petition and hearing.)
(‘28) AIR 1928 Bom 265 (268) : 47 Bom 637.
(‘13) 15 Bom L R 130 (174, 175). (Plaintiff guilty of misconduct in commencing the suit or in the course of the trial can be deprived of his costs even if successful.)
(‘87) 11 Bom 272 (282). (Non-payment of earnest money into Court by the defendant—Defendant bound to pay costs of the suit.)
(‘39) AIR 1939 Cal 387 (393) : 1 L R (1938) 2 Cal 492.
(‘99) 26 Cal 361 (370). (Notwithstanding respondent taking a long time to argue a futile preliminary objection that no appeal lies.)
(‘98) 25 Cal 187 (189) : 24 Ind App 191 (P O). (Though heard *ex parte*, successful respondent in appeal is entitled to his costs.)
(‘89) 16 Cal 173 (183, 184) : 15 Ind App 186 (PC).
(‘83) 9 Cal 797 (802) : 10 Ind App 113 (P O).
(‘78) 3 Cal 473 (484).
(‘66) 5 Suth W R 3 (7) (P O).
(1865) 2 Suth W R 33 (34). (As a general rule costs should be awarded as an indemnity against the expenses to which parties who have no interest in the suit are unnecessarily made co-defendants.)
(‘30) 122 Ind Cas 378 (379) (Lah).
(‘23) AIR 1923 Lah 302 (302).
(‘21) AIR 1921 Lah 104 (105). (Pre-emption suit—Vendee not denying pre-emptor's right, even prior to suit, is no ground for depriving him of right to costs ; see also O. 20 R. 14.)
(‘28) AIR 1928 Mad 346 (348).
(‘26) AIR 1926 Mad 1084 (1086). (The plaintiff suing a party not liable to be sued—The

defendant should get his costs on the failure of the suit.)

(‘20) AIR 1920 Mad 890 (892) : 10 Mad L W 540 (543). (A maintenance suit by a pauper widow.)

(‘04) 27 Mad 341 (342).

(‘30) 122 Ind Cas 378 (379) (Nag).

(‘86) AIR 1936 Pesh 48 (51). (The mere existence of conflict of judicial opinion does not preclude a litigant from obtaining costs when successful.)

(‘37) AIR 1937 Sind 159 (160). (Plaintiff guilty of misconduct—*Held*, he was entitled only to institution fees.)

(‘36) AIR 1936 Sind 52 (53).

(1913) 108 L T 416, Hudsons v. De Halfert. (It is not a judicial exercise of the discretion to order a party who has been completely successful and against whom no misconduct was alleged to pay the costs of proceedings.)

(1918) 29 T L R 507, Levy v. Johnson.

(1903) 2 K B 756 (762, 763), Civil Service Co-operative Society v. General Steam Navigation Co.

(1908) 1 K B 282 (284), Beaumont v. Senior.

(1902) 1 K B 625 (628), Andrew v. Grove. (A County Court Judge has no power to order a successful defendant to pay the costs of the plaintiff except those which have been caused by defendant's misconduct.)

(1893) 1 Q B D 564 (567, 568), Forster v. Farquhar.

(1893) 3 Ch 489 (501), Walter v. Steinkopff.

(1885) 14 Q B D 821 (826, 827), Lund v. Campbell.

(1884) 1 T L R 165, Pool v. Lewin.

(1883) 24 Ch D 231 (236, 237), Upmann v. Forester.

(1880) 15 Ch D 501 (504), Cooper v. Whittingham—(There may be misconduct in commencing the proceedings or some miscarriage in the procedure or other misconduct which will induce the Court to refuse the costs.)

[See (‘32) AIR 1932 Mad 779 (784) : 56 Mad 289. (Plaintiff's suit dismissed—Appeal also dismissed—Suit justified, but not appeal—Defendant given costs of appeal only.)

Ann. Pr. (1905), O. 65 R. 1, p. 943.

Supreme Court Practice, O. 65 R. 1.]

[See also (1936) AIR 1936 Rang 316 (317).

(Suit dismissed in trial Court but remanded in appeal—It is a fair order to direct that cost of appeal should abide the final result of the appeal.)]

35 he wanted² or the whole of the amount claimed.³ Similarly, when the plaintiff succeeds only on part of his claim but fails on the most important heads of controversy, the *defendant* will be entitled to the whole costs of the suit.⁴ The fact that a party succeeded on a technical plea in bar,⁵ such as limitation⁶ or the Gaming Act,⁷ or on the admissions⁸ or mistakes⁹ of the opposite party, or the fact that the witnesses of the successful party gave exaggerated¹⁰ or false evidence,¹¹ or that the Court was not satisfied with them,¹² is not a ground to disallow costs. Similarly, the fact that the successful plaintiff refused to go to arbitration,¹³ or refused a tender which the Court considers insufficient,¹⁴ or the fact that defendant remained *ex parte*,¹⁵⁻¹⁶ or that the unsuccessful party had no previous information of the objection,¹⁷ or that the unsuccessful party was led to institute proceedings through the error of Court,^{17a} is not a ground for disallowing costs to the successful party.

As has been seen already, the Court may disallow a successful party his costs if he is guilty of misconduct or there is other good cause for depriving him of it and the Court must give reasons in writing, for so depriving him of it.¹⁸ The facts must

2. ('94) 18 Bom 474 (494, 495).
('68) 9 Suth W R 61 (63).
('10) 37 Cal 760 (779). (Respondent successful on all points except quantum of damages.)
('23) AIR 1923 Lah 513 (514).
('15) AIR 1915 Lah 346 (349) : 1915 Pun Re No. 71. (Pre-emptor is entitled to get his costs although the vendee succeeds in getting much more than what was offered by the pre-emptor.)
[See ('28) AIR 1928 Bom 539 (545). (Suit for decree against defendant personally—Decree passed against assets of deceased in defendant's hands—Defence partly frivolous—In circumstances of case parties were ordered to bear their own costs.)]
3. ('20) AIR 1920 Cal 1009 (1013) : 24 Cal W N 352 (366).
('29) AIR 1929 Lah 129 (135) : 10 Lah 816.
('16) AIR 1916 Oudh 279 (281).
4. (1893) 1 Q B D 564 (570), Forster v. Farquhar.
('66) 10 Moo Ind App 454 (476) (P C). (Slight modification as to the rate of interest in appeal not sufficient to deprive the respondents of the costs of appeal.)
('36) AIR 1936 Cal 277 (279). (Plaintiff's claim found to be substantially false—Defendant's claim for set-off allowed in full—Award of costs to defendant and refusal to plaintiff is justified.)
('27) AIR 1927 Cal 947 (949).
('32) AIR 1932 Mad 470 (471) : 55 Mad 636. (Plaintiff given only half costs.)
(1912) 3 K B 174 (177), Mentors Ltd. v. Evans.
(1891) 2 Q B 194 (207), Roberts v. Jones.
[But see ('75) 14 Suth W R 312 (315)].
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('14) AIR 1914 Cal 746 (751) : 18 Cal W N 106 (113). (Do.)
('19) AIR 1919 All 453 (455) : 40 All 558 (562). (Minority pleaded.)
('75) 5 N W P H C R 20 (23). (Suit is dismissed for multifariousness.)
('86) 12 Cal 271 (272). (Jurisdiction.)
('66) 1 Ind Jur (N S) 38. (Do.)
2 Hay 188 : Marsh 311. (Do.)
6. (1906) 95 L T 145, Elms v. Hedges.
7. (1903) 72 L J K B 152 (152), Granville v. Firth.
8. ('04) 27 Mad 341 (349).
('21) AIR 1921 Lah 104 (105).
9. ('91) 13 All 290 (295).
10. (1904) 91 L T 132, Lipman v. Pulman.
11. ('27) AIR 1927 Mad 474 (475).
12. (1913) 108 L T 416, Hudsons Ltd. v. De Halfert.
13. (1888) 5 T L R 88, Beckett v. Stiles.
14. (1886) 55 L T 161, Fennessay v. Day and Martin.
('77) 3 Cal 468 (472).
('39) AIR 1939 Cal 131 (134) : I L R (1938) 2 Cal 337. (Plaintiff not accepting tender of part payment—Costs of suit cannot be refused—A creditor is under no obligation to reduce the costs of proceedings for the benefit of the debtor by accepting a tender of part payment and thus bringing the amount for which proceedings have to be taken within the jurisdiction of a less costly tribunal.)
- 15-16 ('25) AIR 1925 Cal 569 (570).
17. (1884) 27 Ch D 260 (268), Wittman v. Oppenheim.
(1883) 25 Ch D 182 (192), Goodhart v. Ilyett.
('89) 11 All 328 (329). (Appellant had no previous notice of a preliminary objection as to maintainability of appeal.)
- 17a. ('86) 9 All 11 (19).
18. See Cyclopædia of Law and Procedure, Vol. XI Heading "Costs", pages 27, 28.
('28) AIR 1928 Oudh 224 (225).
('66) 1 Moo Ind App 470 (480) (P C). (No materials to exercise its discretion upon—Successful party is not to be deprived of costs.)
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show something which makes it more just that an exceptional order should be made than that the case should be left to the operation of the general rule.¹⁹ The following instances will illustrate the grounds on which a successful party may be disallowed his costs:—

- (1) Where the action brought by the party is frivolous or vexatious.²⁰
- (2) Where he omits to make a clear statement of his case.²¹

- (12) 23 Mad L Jour 638 (645). (The fact that questions of law raised are not easy of solution, is not a good ground for not allowing the costs of a successful litigant.)
- (34) AIR 1934 Oudh 10 (11). (Appeals successful—But appellant judgment-debtor evading satisfaction of decree—Costs in both Courts disallowed.)
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- (1903) 2 K B 756 (765), *Civil Service Co-operative Society v. General Steam Navigation Co.* (No materials to exercise its discretion upon—Successful party is not to be deprived of costs.)
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- (34) AIR 1934 Mad 224 (226).
- (1855) 6 Moo Ind App 232 (250). (An irregularity in the lower Court in respect of the admission of evidence.)
- (34) AIR 1934 All 948 (950). (Defendant for the first time in his appeal producing a document on account of which the decree is reversed—Defendant though succeeding is liable for costs up to the date of production.)
- (36) AIR 1936 Bom 342 (343). (Suit on promissory note—Money produced in Court—Non-payment due to absence of succession certificate—Defendant is not liable for costs.)
- (26) AIR 1926 Bom 189 (195). (Rule that costs follow event may be departed from in a proper case according to the circumstances.)
- (36) AIR 1936 Cal 493 (496) : 63 Cal 1146. (Suit under S. 53 (2), Patents and Designs Act, for damages and injunction restraining defendant from infringing plaintiff's copyright—Costs—Plaintiff unable to prove claim for damages—Defendant giving unconditional undertaking not to infringe copyright—Plaintiff should ask for judgment in form of order embodying undertaking—Plaintiff failing to do so—He is not entitled to costs subsequently incurred.)
- (18) AIR 1918 Cal 180 (182).
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- (1884) 13 Q B D 262 (267, 268), *Jones v. Curling*.
- (1893) 1 Q B 564 (568), *Forster v. Farquhar*. (Misconduct is not the sole ground for not giving costs.)
20. (1888) 4 T L R 715, *Macgregor v. Clay*.
- (1889) 5 T L R 272, *Wood v. Cot*.
- (03) 25 All 287 (295) : 30 Ind App 66 (P C). (Mortgagor in suit for redemption baselessly pleaded entire discharge of the mortgage debt.)
- (70) 2 N W P H C R 73 (75).
- (90) 17 Cal 620 (630, 631). (Conduct of a suit made oppressive and suit itself instituted without demand.)
- (76) 1 Cal 385 (388). (Suit for defamation.)
- (05) 1905 Pun L R No. 72, p. 266 (268).
- (1893) 1 Q B 564 (568), *Forster v. Farquhar*.
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21. ('05) 9 Cal W N 844 (847).
- (33) AIR 1933 All 216 (217). (Remand due to appellants not presenting case properly in lower Court—Costs of appeal were saddled on them.)
- (22) AIR 1922 P O 176 (178) (P O). (Failure to bring to the notice of the lower Court the proper statute.)
- (82) 8 Cal 332 (337) : 9 Ind App 1 (P O). (Joinder of tenable with untenable grounds of appeal.)
- (32) AIR 1932 Lah 452 (455) : 13 Lah 375.
- (31) 32 Pun L R 378 (379). (Counsel not assisting Court.)
- (27) AIR 1927 Lah 723 (724).
- (26) AIR 1926 Lah 464 (464).
- (17) AIR 1917 Lah 1 (3) : 1916 Pun Re No. 95. (Pleadings not clear.)
- (30) AIR 1930 Mad 218 (221) : 53 Mad 480. (Failure to present case properly in trial Court.)
- (26) AIR 1926 Mad 642 (643). (Failure to bring to Court's notice authorities on law.)
- (25) AIR 1925 Oudh 561 (564, 565) : 28 Oudh Cas 203. (Grounds of appeal badly drafted.)
- (1878) 8 Ch D 372 (374), *Moet v. Pickering*. (But the mode in which counsel argues the case is not a good cause.)

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20. (1888) 4 T L R 715, *Margreger v. Clay.*
 (1889) 5 T L R 272, *Wood v. G.*
 ('03) 25 All 257 (255) : 30 Ind App 60 (P C). (Mortgagor in suit for redemption, knowingly pleaded entire discharge of the mortgage debt.)
- (70) 2 N W P H C R 73 (75).
 ('90) 17 Cal 620 (630, 631). (Conduct of a suit made oppressive and suit itself initiated without demand.)
- (76) 1 Cal 355 (355). (Suit for declaratory relief)
- (05) 1905 Pun L R No. 72, p. 264 (278).
 (1893) 1 Q B 564 (565), *Forster v. Farquhar.*
 (1893) 68 LT 146, *O'Connor v. Star News paper.*
 (1888) 6 T L R 738, *Mason v. G.R.*
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- (22) AIR 1922 P C 176 (178) (P C). (Failure to bring to the notice of the lower Court the proper statute.)
- (82) 6 Cal 302 (307) : 9 Ind App 14 (P C). (Joinder of tenants with non-party as parties of appeal.)
- (32) AIR 1932 L.h 432 (433) : 17 Cal 175.
 ('31) 32 Pun L R 375 (376) (P C). (Failure to assist Court.)
- (27) AIR 1927 Lah 733 (734).
 ('26) AIR 1926 Lah 464 (464).
 ('17) AIR 1917 Lah 1 (3) : 1916 Pun L R No. 95. (Pleadings not clear.)
- (30) AIR 1930 Mad 218 (221) : 50 Mo L J 4-5. (Failure to present case properly in lower Court.)
- (26) AIR 1926 Mad 642 (643). (Failure to bring to Court's notice authorities on law.)
- (25) AIR 1925 Oudh 561 (564, 565) : 2 Oudh Cas 203. (Grounds of appeal badly drafted.)
- (1878) 8 Ch D 372 (374), *Moss v. Lindsey.* (But the mode in which circumstances of the case is not a good cause.)

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- (3) Where the contentions are often changed.²²
- (4) Where he causes unnecessary delay in the conduct of the litigation.²³
- (5) Where he makes dishonest pleas and untrue statements.²⁴
- (6) Where he causes unnecessary matter to be printed in the record or introduces unnecessary things therein.²⁵
- (7) Where a proper tender²⁶ or the offer of a proper compromise²⁷ is refused.
- (8) Where he is guilty of fraudulent conduct in inducing litigation.²⁸
- (9) Where he acts unscrupulously or with malice or malevolence.²⁹
- (10) Where he raises objection at a very late stage.³⁰
22. ('11) 33 All 344 (355, 356) : 14 Oudh Cas 133 : 38 Ind App 101 (P C). ('84) 11 Cal 244 (250) : 12 Ind App 7 (P C). (Introduction of unnecessary and irrelevant matter.)
23. ('70) 13 Moo Ind App 560 (572) (P C). ('85) 8 Mad 219 (229) : 12 Ind App 16 (P C). (Do.)
- ('16) AIR 1916 P C 110 (119) : 44 Cal 186 : 43 Ind App 219 (P C).
- ('31) AIR 1931 P C 289 (293) : 58 I A 361 : 55 Mad 93 (PC). (Following AIR 1916 P C 110.)
- ('30) AIR 1930 P C 42 (44) (PC). (Costs of Privy Council disallowed because of unexplained delay in production of appeal.)
- ('22) AIR 1922 P C 361 (361) (PC). (As it suited appellants for commercial reasons to delay the hearing of the ex parte appeal.)
- ('22) AIR 1922 P C 17 (19) : 44 All 185 : 49 Ind App 60 : 25 Oudh Cas 8 (P C). (Dilatoriness.)
- ('21) AIR 1921 P C 6 (7) : 45 Bom 718 : 48 Ind App 181 (P C). (Appeal to Privy Council—Appellant not allowing Privy Council to determine the suit finally—Costs were reserved though appellant successful.)
- ('34) AIR 1934 All 918 (950). (Delayed production of document—Party guilty of delay, though successful, directed to pay costs of other side.)
- ('89) 11 All 372 (374).
- ('01) 25 Bom 230 (236). (Costs incurred consequent to failure of raising preliminary issues at proper time.)
- ('22) 65 Ind Cas 709 (710) (Cal).
- ('20) AIR 1920 Cal 428 (433) : 24 Cal W N 110 (115, 116).
- ('04) 31 Cal 332 (339) : 31 Ind App 57 (P C).
- ('72) 17 Suth W R 358 (359).
- ('36) AIR 1936 Pat 68 (70). (Party prolonging suit deliberately.)
- [See ('33) AIR 1933 All 853 (854). (Delay in making application.)]
24. ('17) AIR 1917 P C 80 (84). (False allegations.)
- ('16) AIR 1916 Cal 675 (676) : 43 Cal 190 (193). (Do.)
- ('78) 2 Bom 9 (19). (Applicant for letters of administration having concealed the existence of claims was ordered to pay the costs of the application.)
- ('15) AIR 1915 Mad 210 (217) : 38 Mad 959. (False allegations.)
- ('33) AIR 1933 Pat 220 (223).
- ('25) AIR 1925 Oudh 301 (303). (False allegations.)
25. ('19) AIR 1919 P C 83 (84) : 47 Cal 415 : 46 Ind App 299 (P C).
- ('04) 31 Cal 382 (389) : 31 Ind App 57 (P C).
26. ('18) AIR 1918 Cal 464 (465).
- ('09) 4 Ind Cas 820 (820) : 1907-09 Upp Bur Rul, Contract Act, page 17. (Refusal of invalid tender is not misconduct.)
- ('79) 4 Cal 572 (575).
- ('78) 1 Cal L Rep 470 (472) : 3 Cal 468.
- ('81) 3 Mad 224 (229).
- ('35) AIR 1935 Pat 101 (102). (Rent suit—Tender of correct amount by tenant—Landlord is not entitled to costs.)
27. (1886) 55 L T 161, Fennessy v. Day.
- ('39) AIR 1939 Bom 198 (202). (Innocent infringement of design—Suit for injunction and damages—Offender at early stage of suit, admitting infringement, undertaking not to infringe proprietor's rights in future and offering to pay profits made by infringement—Proprietor electing to continue suit—Decree passed only in terms of offer—Proprietor is liable to pay offender's costs incurred after date of offer.)
28. ('17) AIR 1917 P C 80 (84) (P C).
- (1886) 2 T L R 881, Sutcliffe v. Smith.
- ('85) 13 Ind App 20 (31) (P C). (Both parties used fabricated documents—No order as to costs was made.)
- ('10) 14 Cal W N 1031 (1038).
- ('98) 25 Cal 371 (395).
- ('97) 24 Cal 265 (270).
- ('71) 16 Suth W R 291 (293).
- ('71) 15 Suth W R 348 (350).
- ('22) AIR 1922 Oudh 271 (273) : 25 Oudh Cas 237.
29. ('72) 18 Suth W R 14 (15).
- ('67) 2 Agra 351 (360).
- ('12) 15 Cal L Jour 162 (166).
- ('86) 12 Cal 18 (24) : 12 Ind App 197 (P C).
- ('30) AIR 1930 Mad 154 (158). (Conduct not creditable or straightforward.)
30. ('29) AIR 1929 Lah 246 (246). (Preliminary objection as to jurisdiction.)
- ('38) AIR 1938 Lah 104 (104) : 15 Lah 78. (Appeal succeeding on objection not raised in lower Courts—Costs were disallowed.)
- ('70) 14 Moo Ind App 203 (208) (PC). (Where appeal was confined only to the validity of a vakalatnama.)

- (11) Where he adopts a wrong procedure for vindicating his rights.³¹
- (12) Where he abuses his right to select his own *forum*.³²⁻³³
- (13) Where the case of the opposite party fails owing to the fact that the decision on the basis of which the case was filed was, subsequent to the institution thereof, overruled.³⁴
- (14) Everything which increases the litigation and the costs and which places an unnecessary burden on the opposite party is a good cause to deprive a party of his costs.³⁵
- (15) Where a suit has been necessitated by the conduct of a third party, *e.g.*, a Returning Officer, each party may be ordered to pay his own costs.³⁶

It has been seen already that the expression "costs shall follow the event" means that the party who, on the whole succeeds in the action, gets the general costs of the action; but where the action involves *several issues* and the costs of a particular issue can be *separated* from the costs of the suit, it is usual to allow them to the party who is successful on that issue irrespective of the ultimate result of the suit.³⁷

8. Mortgage suits. — See Order 34 Rule 10.

9. By whom costs are to be paid—General. — As a general rule an order for costs can be made only against a *party* to the proceeding¹ and the Court is also bound

- (‘83) AIR 1933 All 120 (122). (Appeal successful on point of law not taken in Courts below—Parties were ordered to bear their own costs.)
- (‘28) AIR 1928 Bom 516 (520) : 52 Bom 640. (Succeeding on a new plea in second appeal.)
- (‘75) 12 Bom H C R 23 (49). (New point taken in appeal.)
- (‘81) 6 Cal 406 (418). (Plea of res judicata taken very late after all the evidence was closed.)
- (‘73) 19 Suth W R 22 (23). (Objection as to admissibility of document taken only in special appeal.)
- (‘67) 7 Suth W R 490 (490). (Plea as to want of jurisdiction, taken in special appeal.)
- (‘33) AIR 1933 Rang 38 (39). (Failure of applicant's advocate to place his principal argument before Court—Costs disallowed.)
- (‘29) AIR 1929 Rang 148 (150): 7 Rang 75. (Do.)
31. (‘82) 8 Cal 916 (919). (Irregularly preferring an appeal instead of making an application.)
- (‘68) 9 Suth W R 296 (296). (Wrong institution of fresh suit instead of appealing from execution order.)
- (‘22) AIR 1922 P C 17 (19) : 44 All 185 : 49 Ind App 60 : 25 Oudh Cas 8 (PC).
- (‘28) AIR 1928 Bom 539 (545). (Suit filed as a summary suit when it ought to have been a regular suit.)
- Cor 128. (Wrong institution of fresh suit instead of appealing from execution order.)
- 32-33. (1891) 2 Q B 194 (203), *Roberts v. Jones*.
- (‘21) AIR 1921 Bom 34 (35) : 45 Bom 1236.
- (‘18) AIR 1918 Lah 246 (247) : 1918 Pun Re No. 81. (Appellant selecting a wrong forum.)
- (1891) S T L R 55, *Hill v. Morris*.
34. (‘20) AIR 1920 Mad 567 (568): 43 Mad 61 (64).
- (‘23) AIR 1923 Bom 206 (206, 207) : 47 Bom 559.
- (‘30) AIR 1930 All 167 (168).
- (‘90) 1890 All W N 183 (183).
- 1 Y and C Ch C 7 (12), *Robinson v. Rosher*.
35. (‘20) AIR 1920 Cal 1009 (1013) : 24 Cal W N 352 (359).
- (‘24) AIR 1924 Mad 692 (693).
- (‘24) AIR 1924 All 808 (809): 46 All 733. (Appeal dismissed as non-appealable — Respondent deprived of costs as order was bad on merits.)
- (‘34) AIR 1934 Mad 665 (669). (Circumstances showing that suit might have been avoided if plaintiff had availed himself of certain prior litigation— Costs of suit in first Court not allowed though costs of appeal allowed.)
- (1889) 14 App Cas 27 (32), *Huxley v. West London Extension Ry. Co.*
36. (‘20) AIR 1920 Cal 669 (673) : 47 Cal 524 (536, 537).
37. (‘93) 20 Cal 762 (769, 770).
- (‘33) AIR 1933 Nag 49 (50) : 29 Nag L R 8.
- (1918) 1918 App Cas 717 (728), *Reid Hewitt and Co. v. Joseph*.
- (1885) 14 Q B D 821 (826), *Lund v. Campbell*.
- (1884) 13 Q B D 598 (600), *Goutard v. Carr*.
- (1882) 8 Q B D 648 (649), *Abbot v. Andrews*.
- (1881) 6 Q B D 521 (523, 524), *Gallis v. De Silva*.
- (1880) 5 Ex D 180 (183), *Myers v. DeFries*.
- Note 9**
1. (‘76) 2 Cal 233 (259) : 4 Ind App 23 (PC).
- (‘73) 11 Beng L R 37 (39): 20 Suth W R 123.
- (‘36) AIR 1936 Lah 382 (384). (Bar Association declaring certain persons *touts*—Inquiry by District Judge thereon — Association invited to assist in inquiry — Persons not found *touts* — Association ordered to pay costs of inquiry to persons—Association held not party and hence order illegal.)

to decide *which* of the parties shall bear the costs.² It is also a general rule that it is the *unsuccessful* party that will have to bear the costs.³ Similarly, a party by whose act or by the act of whose counsel a difficulty has arisen, must pay the costs occasioned by that difficulty.⁴ But the Court has a discretion in a proper case to order that each party should bear his own costs⁵ or that one defendant should pay the costs of another defendant.⁶ In exceptional cases, the Court may make even a *stranger* to a suit liable for the costs of the litigation,^{6a} as for instance, where the party on the

- ('90) AIR 1930 Mad 195 (196). (Where no right to relief is alleged to exist against a party, he is not a proper party to the suit and an order should not be passed making him liable for costs, e. g. Chairman of Municipal Council in an election petition.)
- ('86) AIR 1936 Pat 151 (151). (Pro forma defendant not to be ordered to pay costs.)
- [See also ('88) 7 Bom 484 (486). (Under the last Code the words were, "Any other party to the suit," in S. 219 which are omitted now.)
- (1838) 4 M and W 194 (196), *Hayward v. Giffard.*]
2. ('74) 23 Suth W R 89 (90).
- ('86) AIR 1936 All 127 (128). (Appeal allowed—All respondents contesting as well as non-contesting should be made liable for costs of appeal.)
3. ('66) 3 Mad H C R 113 (115).
- ('85) 12 Cal 179 (181). (A plaintiff thus cannot get costs against a person against whom he has no cause of action.)
- ('89) 9 Cal 797 (802) : 10 Ind App 113 (PC). (Appellant, whose claim was opposed in the lower Court on an entirely wrong ground was held entitled for the whole costs notwithstanding that he succeeded only partially.)
- ('36) AIR 1936 Lah 607 (608) : 17 Lah 520. (Prior mortgagee suing his mortgagor impleading puisne mortgagee—Puisne mortgagee contesting claim—Costs can be saddled on all the defendants including puisne mortgagee.)
- ('31) AIR 1931 Bom 554 (556) : 55 Bom 649.
- ('36) 162 Ind Cas 848 (849) (Nag). (Suit partly contested and partly non-contested—Order for costs against ex parte defendants only not justified.)
4. ('04) 6 Bom L R 790 (799) : 30 Bom 173. (1902) 1902 App Cas 465 (471), *Neale v. Gordon Lennox.*
- ('25) AIR 1925 Bom 471 (472). (Privy Council appeal presented but not prosecuted—Costs of petition for leave to appeal to Privy Council are to be paid by appellant.)
- ('03) 27 Bom 124 (125). (Want of prosecution.)
- ('04) 6 Bom L R 301 (303).
- ('05) 32 Cal 62 (72). (Party securing dismissal of suit on untenable ground.)
- 2 Hyde 86 (88) : *Bourke*, 238. (Costs attendant on adjournment occasioned by a transfer of case from the undefended to the defended board must be borne by the party making the application.)
- ('80) 4 Bom L R 818 (820). (The plaintiff not having pressed an essential issue which was not framed or tried and the Appellate Court having referred it back for trial, each party was made to bear his own costs.)
- [See also ('31) AIR 1931 Cal 76 (78, 79) : 58 Cal 561. (New plaintiff added—Court should provide for costs of defendant being paid by that plaintiff who had no just claim.)]
5. ('88) AIR 1938 Pat 613 (618) : 17 Pat 594. (Where a suit is dismissed but the defendant does not succeed in establishing his case, the Court will not give him costs, but will order each party to bear his own costs.)
- ('36) AIR 1936 Pat 570 (571). (Guardian for minor respondents dying during pendency of appeal—Court not appointing guardian ad litem under O. 32 R. 11—Appeal does not abate—Decree passed by such Court set aside and case remanded to it for retrial—But respondents held not liable for costs of appellant in second appeal—Each party to bear his own costs.)
- ('28) AIR 1928 Cal 819 (820) : 56 Cal 507 (FB). (New question of law arising out of amendment of law—No order made as to costs on the issue.)
6. ('17) AIR 1917 Sind 47 (52) : 11 Sind L R 1 (11). (Relief claimed against either of two defendants who were disputing their liability.)
- (1881) 17 Ch D 600 (608), *Rudow v. Great Britain, etc., Assurance Society.*
- Marsh* 608. (A defendant colluding with plaintiff will be ordered to pay costs of the co-defendant.)
- ('38) AIR 1938 Mad 117 (124) : 1 L R (1938) Mad 233. (In proper case, unsuccessful defendant can be ordered to pay successful defendant's costs directly.)
- ('30) AIR 1930 Mad 913 (913). (Where parties are unnecessarily impleaded at the instance of the defendant, the Court can direct the latter to pay the costs of the added parties.)
- ('36) AIR 1936 Nag 285 (288) : 1 L R (1937) Nag 61.
- (1903) 2 K B 533 (538), *Sanderson v. Blyth.* (Where defendants are sued in the alternative a successful defendant may be given costs against the unsuccessful defendant.)
- [But see ('08) 1908 Pun W R No. 57, p. 217].
- 6a. ('34) AIR 1934 Nag 250 (250).
- ('36) AIR 1936 Pat 151 (152). (Suit against principal and pro forma defendants—Former admitting but latter unsuccessfully contesting suit—Latter can be appropriately saddled with costs.)

record is a mere puppet in the hands of the stranger;⁷ but great caution must be exercised before any such order is passed.⁸ Where *A* and *B* claiming under separate and distinct causes of action join and sue *X* and the suit is decided in favour of *A* and against *B*, *A* is entitled to recover the whole costs of his suit from *X* and the latter can recover from *B* the costs occasioned by his joinder as co-plaintiff.⁹ Again, where *A* and *B* jointly defend an action by *X* against them and the suit is decided in favour of *A* and against *B*, *A* is entitled to recover half the costs incurred in the joint defence from *X*.¹⁰ Where *X* sues *Y* and *Z* in the *alternative* and a decree is passed against *Z* with costs, but the suit as against *Y* is dismissed, the Court has power to order *Z* to pay in addition to the costs payable by him to *X*, the costs of *Y*. The reason is that if it is reasonable to join both *Y* and *Z* because it is uncertain as to which of the two is the really guilty one, then the reasonable costs of the defendant who has succeeded in defending himself, should be borne by the man who is to blame.¹¹

A solicitor who purports to act for a non-existing party is personally liable for the costs of the opposite party.¹²

10. Account suits. — In suits for accounts also, the general rule that costs follow the event applies.¹ It will follow the result of the account unless the defendant has falsely denied his liability to account.² Thus, where in a suit by a principal against an agent the latter denied the relationship itself, the Privy Council ordered him to pay the whole costs without regard to the result.³

The general rule as to costs in a suit for accounts is that they are to be given at the time of the *final* decree. Hence, where the preliminary decree completely omits to mention the subject of costs, it must be assumed that the Court intended to reserve the question of costs until the time of the final decree and the order of the Court which passed the final decree granting costs should be taken as meaning that the costs granted are the costs of the *whole* suit.⁴

7. ('12) 16 Ind Cas 381 (382) (Cal).
(84) 8 Bom 391 (394). (Improperly setting the Court in motion.)

('30) AIR 1930 All 225 (241): 52 All 619 (FB).
(Costs can be awarded against non-parties, but Section does not apply to misconduct of advocates.)

('83) 7 Bom 484 (486).

('72) 9 Beng L R 210 (213, 214).

('70) 14 Suth W R (O J) 1 (5).

('66) 1 Ind Jour (N S) 282.

('30) AIR 1930 Mad 577 (579): 53 Mad 708.

(When he really represents the claimants.)

(1838) 4 M & W 194 (197), Hayward v. Giffard.

[See also ('31) 32 Pun L R 540 (542). (Person financing plaintiff added as co-plaintiff and ordered to pay costs.)]

8. ('75) 22 Suth W R 35 (35).

[See ('94) 21 Cal 904 (910). (Where a mortgagee, not a party to a partition suit was charged with proportionate costs for having obtained a benefit under the decree.)]

9. (1886) 17 Q B D 625 (635), Viscount Gort v. Rowney.

10. (1903) 1 K B 282 (284), Beaumont v. Senior.

11. (1914) 3 K B 181 (187), Besterman v. British Motor Cab Co. Ltd.

('33) AIR 1933 Bom 106 (107): 57 Bom 589.

(1903) 2 K B 533 (538, 539), Sanderson v. Blyth Theatre Co.

(1907) 1 K B 264 (269), Bullock v. The London General Omnibus Co.

(1879) 11 Ch D 82 (86), Child v. Stenning.

(1869) L R 4 C P 212 (223), Spedding v. Nevell.

(1861) 124 RR 530: 30 L J Q B 257, Pow v. Davis.

12. ('33) AIR 1933 Bom 317 (319, 322): 58 Bom 1.

Note 10

1. 1 Bro P C 1(2), Pitt v. Page. (But where the account is intricate or doubtful, there shall be no costs.)

(1718) 6 Vin Abr 367, p. 1 (23), Lyre v. Parnel.

(1718) 6 Vin Abr 365, p. 1 (18), East India Co. v. Ekins.

('30) AIR 1930 All 72 (72). (Costs can be awarded even in the preliminary decree.)

('29) AIR 1929 Cal 719 (723).

2. ('87) 14 Cal 147 (159): 13 Ind App 123 (PC).

('34) AIR 1934 Pat 146 (147). (Costs must be decided at the time of the final decree.)

('17) AIR 1917 Cal 557 (557).

(1857) 24 Beav 207 (21), Bigginden v. Bigginden.

3. ('87) 14 Cal 147 (159): 13

4. ('39) AIR 1939 Lah 255 (

146, Foll.)

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17. Administration suits. — A plaintiff in an administration suit may be granted his costs out of the estate.^{1a} Where a person entitled either to a legacy or share encumbers it or does anything which causes additional expense beyond what is actually necessary for the due administration of the estate, the additional expense will be thrown upon the legacy or share. When therefore orders for costs are made in administration suits, the correct course is to make them in such a form that the person who has not *encumbered* his share shall be relieved as far as possible in the matter of costs created by the fact that another co-sharer has assigned or encumbered his share.¹ Where a person intervenes in an administration suit for his benefit, it is not proper to make the claimant pay an additional bill of costs of the intervenor, where the character and scope of the suit was not changed by such intervention.²

The Administrator-General is in the position of an interpleader-plaintiff and is entitled to recover his costs from the losing claimant and, failing such recovery, from out of the estate.³

See also the undermentioned cases⁴ as to when the costs of the Advocate-General appearing in an administration suit or a suit to construe a will may be ordered to be paid out of the estate.

18. Suits for construction of wills. — In suits for the construction of wills, where such construction was necessitated by a reasonable doubt¹ or by difficulties caused by the testator himself,² costs will be usually made payable out of the estate.³ Where the construction is not so difficult as to have required the assistance of the Court,⁴ or where, though the suit is one ostensibly for the construction of a will, is really one to oust a person in possession, and the plaintiff fails,⁵ the estate will not be made liable for the costs. Where in a suit for the construction of a will, the Advocate-General appears in support of a bequest under the will in favour of a charity, his costs should be allowed out of the estate.⁶

19. Suits by or against minors. — Where a proceeding is conducted on behalf of a minor *bona fide*, but ends unsuccessfully, costs will, as a rule, be made payable out of the estate of the minor.¹ Where, however, the suit or proceeding is

Note 17

1a. (94) 21 Cal 832 (837).

(95) AIR 1935 Bom 178 (181) : 59 Bom 397.
(General principles as to when such costs may be ordered to come out of estate discussed.)

[See (89) AIR 1939 Rang 108 (109) : 1938 Rang L R 252. (Although the Official Referee has jurisdiction to give or deprive any person of costs of reference, he cannot direct that the costs are to be paid out of the property which is the subject-matter of the administration suit—Whether it is to be done or not is a matter for the Judge and not for the Official Referee.)

1. (29) AIR 1929 Cal 477 (478) : 56 Cal 447.

2. (21) AIR 1921 Cal 222 (224) : 48 Cal 352.

3. (86) 10 Bom 350 (357).

(86) 13 Cal 193 (196, 197). (No agreement between plaintiff and Administrator General that costs should come out of estate will be of any avail to the plaintiff, especially when the estate is not before the Court.)

4. (86) AIR 1936 Bom 13 (15).

(95) AIR 1935 Bom 178 (181) : 59 Bom 397.

Note 18

1. (89) 16 Cal 383 (396) : 16 Ind App 29 (P O).

(90) 17 Cal 122 (130) : 16 Ind App 166 (P O).

(86) AIR 1936 Mad 388 (393, 397).

2. (88) 15 Cal 725 (750) : 15 Ind App 127 (P O).

(32) AIR 1932 P C 269 (275) : 60 Cal 554 : 59 Ind App 419 (P O).

(14) AIR 1914 P C 149 (150) : 41 Cal 1007 : 41 Ind App 176 (P O).

(06) 3 Cal L Jour 224 (234, 235).

(14) AIR 1914 Mad 304 (304) : 39 Mad 476 (478).

(25) AIR 1925 Sind 195 (201) : 19 Sind L R 220.

3. (09) 11 Bom L R 75 (81), (Attitude of respondents correct and that of petitioner justifiable—Costs of both were made payable out of estate.)

[See also (35) 29 Sind L R 366 (374).]

4. (94) 21 Cal 683 (694).

5. (97) 24 Cal 406 (412).

6. (36) AIR 1936 Bom 13 (15).

Note 19

1. (1814) 3 C and B 59, Oxford v. Churchill.
Trevelyan on Minors, Edn. 4, (1912), p. 282.

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19 **17. Administration suits.** — A plaintiff in an administration suit may be granted his costs out of the estate.^{1a} Where a person entitled either to a legacy or share encumbers it or does anything which causes additional expense beyond what is actually necessary for the due administration of the estate, the additional expense will be thrown upon the legacy or share. When therefore orders for costs are made in administration suits, the correct course is to make them in such a form that the person who has not *encumbered* his share shall be relieved as far as possible in the matter of costs created by the fact that another co-sharer has assigned or encumbered his share.¹ Where a person intervenes in an administration suit for his benefit, it is not proper to make the claimant pay an additional bill of costs of the intervenor, where the character and scope of the suit was not changed by such intervention.²

The Administrator-General is in the position of an interpleader-plaintiff and is entitled to recover his costs from the losing claimant and, failing such recovery, from out of the estate.³

See also the undermentioned cases⁴ as to when the costs of the Advocate-General appearing in an administration suit or a suit to construe a will may be ordered to be paid out of the estate.

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19. Suits by or against minors. — Where a proceeding is conducted on behalf of a minor *bona fide*, but ends unsuccessfully, costs will, as a rule, be made payable out of the estate of the minor.¹ Where, however, the suit or proceeding is

Note 17

- 1a. (94) 21 Cal 832 (837).
(‘35) AIR 1935 Bom 178 (181) : 59 Bom 397.
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[See (‘39) AIR 1939 Rang 108 (109) : 1938 Rang LR 252. (Although the Official Referee has jurisdiction to give or deprive any person of costs of reference, he cannot direct that the costs are to be paid out of the property which is the subject-matter of the administration suit—Whether it is to be done or not is a matter for the Judge and not for the Official Referee.)]
1. (‘29) AIR 1929 Cal 477 (478) : 56 Cal 447.
2. (‘21) AIR 1921 Cal 222 (224) : 48 Cal 352.
3. (‘86) 10 Bom 350 (357).
(‘86) 13 Cal 193 (196, 197). (No agreement between plaintiff and Administrator General that costs should come out of estate will be of any avail to the plaintiff, especially when the estate is not before the Court.)
4. (‘36) AIR 1936 Bom 13 (15).
(‘35) AIR 1935 Bom 178 (181) : 59 Bom 397.

Note 18

1. (‘89) 16 Cal 883 (896) : 16 Ind App 29 (P C).
(‘90) 17 Cal 122 (130) : 16 Ind App 166 (P C).
(‘96) AIR 1936 Mad 989 (893, 897).
2. (‘88) 15 Cal 725 (750) : 15 Ind App 127 (P C).
(‘32) AIR 1932 P C 269 (275) : 60 Cal 551 : 59 Ind App 419 (P C).
(‘14) AIR 1914 P C 149 (150) : 41 Cal 1007 : 41 Ind App 176 (P C).
(‘06) 3 Cal L Jour 224 (234, 235).
(‘14) AIR 1914 Mad 301 (301) : 39 Mad 476 (478).
(‘25) AIR 1925 Sind 195 (201) : 19 Sind LR 220.
3. (‘09) 11 Bom L R 75 (81). (Attitude of respondents correct and that of petitioner justifiable—Costs of both were made payable out of estate.)
[See also (‘35) 29 Sind L R 366 (374).]
4. (‘91) 21 Cal 683 (691).
5. (‘97) 24 Cal 405 (412).
6. (‘86) AIR 1936 Bom 13 (15).

Note 19

1. (1514) 3 C and B 59, *Oxford v. Churchill*.
Trevelyan on Minors, Edn. 4, (1912), p. 252.

unnecessary or improper,² or the next friend or guardian is guilty of a breach of duty or other improper conduct,³ costs may be made payable by the next friend or guardian *personally*. The words "by whom" in Section 35 are wide enough to cover guardians and next friends.⁴ In the case cited below,^{4a} it was held by the Bombay High Court that where a suit by a next friend on behalf of a minor is dismissed, the defendant is entitled to get his costs from the *next friend* irrespective of any question as to the suit being for the benefit of the minor, although the next friend can afterwards reimburse himself for such costs from the estate of the minor. As a *general* rule, a minor cannot be made to pay costs *personally*.^{4aa}

Where some of the defendants to a suit are minor co-parceners of a Hindu joint family, the Court may order that such defendants should be liable for costs only to the extent of their interest in the joint family property and should not be *personally* liable.⁵

20. Official Liquidator and Official Assignee. — The costs of an unsuccessful litigation incurred by a liquidator, whether in a voluntary or compulsory winding up, are payable to the party entitled, out of the assets of the company, in priority to the costs of the liquidation.¹ The costs incurred in a *bona fide* application by the liquidator will be a first charge on the estate.² See also the case cited below.^{2a}

A trustee in bankruptcy or the Official Assignee is personally liable for costs in the same way as any other party.³ He should, as a general rule, get a guarantee of indemnity from the parties who set him in motion.⁴ Otherwise, if the estate is insufficient to pay the costs in full, he would have to *personally* pay the deficiency.⁵ The circumstance that he has obtained the leave of the Court would only entitle him to claim reimbursement out of the estate or from the creditors in whose interest he was acting, but will not take away the personal liability for the costs ordered.⁶ In an appeal against an order of adjudication, the Official Assignee, if successful, is like any other party entitled to his costs.⁷

21. Partition suits. — A partition suit is brought generally for the benefit of all the parties to it and therefore as a rule it will not be right to require one of the parties alone to bear the costs of the litigation.¹ According to the Bombay and Calcutta

(1934) AIR 1934 Cal 474 (477) : 61 Cal 227.
2. Trevelyan on Minors, Edn. 4, (1912), p. 281.

(186) 10 Bom 248 (253).

(185) 11 Cal 218 (218, 219). (When a minor legatee by next friend sued without a proper order under O. 1 R. 8.)

(1935) AIR 1935 Mad 886 (887) : 59 Mad 415.

3. (184) 8 Bom 391 (393, 394).

Trevelyan on Minors, Edn. 4, (1912) p. 282.

(1929) AIR 1929 Mad 782 (782). (Minor attaining majority but guardian continuing to represent him—Guardian is liable for costs.)

(1930) AIR 1930 All 577 (578) : 52 All 907. (Compensatory costs under S. 35-A are costs.)

[But see (181) 3 Mad 263 (264). (Where it was held that costs against a guardian cannot be awarded except under S. 458, (O. 32 R. 11).]

(1929) AIR 1929 All 18 (25) : 50 All 773.]

4. (1929) AIR 1929 Mad 782 (782).

(1934) AIR 1934 Cal 474 (477) : 51 Cal 227.

[See also (1935) AIR 1935 Mad 886 (887) : 59 Mad 415.]

4a. (1935) AIR 1935 Bom 112 (119) : 59 Bom 35.

4aa. (1935) AIR 1935 Bom 112 (118) : 59 Bom 35.

5. (1936) 162 Ind Cas 848 (849) (Nag).

Note 20

1. (1928) AIR 1928 Bom 252 (259) : 52 Bom 477.

2. (199) 11 All 349 (360).

2a. (1934) AIR 1934 Lah 746 (748). (Creditor's application for liquidation of company made not bona fide — He should be saddled with costs.)

3. (1929) AIR 1929 Mad 105 (106) : 52 Mad 263.

(1932) AIR 1932 All 288 (289) : 54 All 444.

(1919) AIR 1919 Cal 937 (839).

(1931) AIR 1931 Nag 143 (144).

(1880) L R 6 App Cas 482 (486) (PC), Pitts v. La Fontaine.

(1874) L R 9 Ch App 479 (480), Ex parte Angerstein.

Halsbury's Laws of England, Vol. 2, p. 128, para. 218.

4. (183) 7 Bom 484 (486).

5. (183) 7 Bom 484 (486).

6. (1929) AIR 1929 Mad 105 (108, 109) : 52 Mad 263.

7. (190) 14 Bom 189 (195).

Note 21

1. (193) 20 Cal 762 (769, 770).

(1969) 12 Suth W R 160 (161).

High Courts, the parties to a partition suit will ordinarily have to bear their own costs up to the preliminary decree.² But the Bombay High Court has held that the institution fee should be borne proportionately by all the parties.³ The Madras High Court has held that such costs should come out of the *estate* where neither party has been guilty of any unfair contention.⁴ See also the case cited below^{4a} in which the objection to partition was based on a clause in the will (under which all the parties claimed) placing a restriction on partition and in which it was held by the Calcutta High Court that the defendant who raised the objection should not be made liable for the costs but that such costs should come out of the estate. Where, however, one party has been successful in a matter the costs of which are *severable* from the general costs of the suit, he will be entitled to such costs under the ordinary principle that a successful party is entitled to his costs.⁵

Of course, the Court has always a discretion to saddle a party with the costs of the suit where he unreasonably contests the plaintiff's right to claim a partition⁶ or raises any other vexatious contentions.⁷ Likewise the plaintiff will be saddled with costs if he brings the suit unjustifiably.⁸ Where co-sharers are made consenting defendants only to enable the plaintiff to obtain a complete decree for partition, it is the plaintiff that ought to pay the co-sharers' costs of appearance.⁹

Where one of the parties to a partition suit bears all the costs which are to be borne by all the parties, the former is entitled to get the Court's order directing the others to pay their respective shares, but until such order is made execution cannot issue against them for such costs.¹⁰

22. Partnership suits.—The costs in partnership suits will ordinarily be made payable from the assets of the partnership except where there are no assets in which case the partners will have to bear it in proportion to their shares.¹ But when any partner denies the partnership or places obstacles to the taking of accounts, he will be made to pay the costs.² An order for costs out of the estate of a deceased partner will be invalid where he has not been properly represented in the suit.³

23. Probate cases.—The costs of taking out probate must primarily come out of the residuary estate and allotment should be made for the same before distribution.¹

2. ('15) AIR 1915 Cal 618 (619); 42 Cal 451 (453, 454). (Such an order may be made even though some of the defendants have not appealed from the decree ordering costs to the plaintiff.)
- ('23) AIR 1923 Bom 464 (466).
- ('36) 40 Cal W N 1237 (1246).
- ('15) AIR 1915 Cal 357 (362). (*Held* in the circumstances of the case that the plaintiff must pay the costs of the defendant.)
- ('10) 6 Ind Cas 109 (111) (Cal).
- ('09) 10 Cal L Jour 503 (516). (Defendant contested the right of the plaintiff to claim partition — Opposition of defendant unfounded — Defendant was ordered to pay the costs.)
- ('07) 34 Cal 878 (882).
- ('69) 3 Beng L R App 120 (121).
- [See also ('35) AIR 1935 Cal 792 (799).
- ('30) AIR 1930 Pat 336 (336); 9 Pat 773.]

3. ('23) AIR 1923 Bom 464 (466).

4. ('20) AIR 1920 Mad 149 (150); 11 Mad L W 5 (6). (Dissenting from 34 Cal 878 and AIR 1915 Cal 618).

[See also ('93) 1893 Bom P J 715 (725).]

- 4a. ('36) 40 Cal W N 1237 (1246).
5. ('93) 20 Cal 762 (769, 770).
6. ('30) AIR 1930 Lah 229 (230).
- ('09) 10 Cal L Jour 503 (516).
- ('36) 40 Cal W N 1237 (1246).
- ('31) AIR 1931 Cal 573 (574).
7. ('13) 21 Ind Cas 746 (748) (Mad).
8. (1863) 1 Hyde 122 (122).
9. ('70) 14 Suth W R 94 (95).
10. ('91) 18 Cal 199 (200).

Note 22

1. ('81) 7 Cal 428 (434).
2. ('81) 7 Cal 428 (434).
- ('81) 6 Cal 811 (812).
3. ('92) 16 Bom 515 (517, 519).

Note 23

1. ('97) 21 Bom 75 (76).
- ('95) 19 Bom 770 (775).
- [See also (1900) 4 Cal W N 600 (602). (High Court can order the awarding of costs in the lower Court — Case of revocation of probate.)]

As in other cases, this rule may be departed from where the party is guilty of misconduct or there is other good cause for doing so.²

24. Representative suits. — The order for costs in a representative action should clearly specify whether it is the representative party alone or the representative and the parties represented by him that should bear the costs.¹ The power conferred by O. 22 R. 3 (2) on the Court of original jurisdiction to award costs against the estate of a deceased plaintiff may also be taken to be conferred on the Appellate Court.² In a representative suit involving a caste question the costs of both the plaintiff and the defendant may, in a proper case, be ordered to be paid out of the caste property.³

25. Trust cases. — See Note 16 above.

26. To what extent costs are to be paid. — The Court has full power to determine to what extent the costs in a suit or proceeding are to be paid,¹ but it cannot award any costs not *actually incurred* in the suit or proceeding.² Nor is a successful party entitled to anything more than the *necessary and reasonable* costs incurred in the litigation and costs cannot be considered to be reasonable if, by diligence, the expenditure thereof could have been avoided.³ Where it is difficult to

2. (1900) 1900 Pun Re No. 63, p. 241 (275). (Caveator unreasonably protracting proceeding.)
- (‘98) 25 Cal 553 (555). (Two wills — Separate probate taken out—Costs of probate of both wills were charged on estate.)
- (‘10) 7 Ind Cas 301 (313, 314) (Bom). (Unfounded allegations and inimical attitude towards propounder.)
- (‘09) 13 Cal W N 557 (563, 564). (A beneficiary who successfully resists an attempt by another beneficiary to prove a false will.)

Note 24

1. (‘17) AIR 1917 Bom 141(148):42 Bom 556 (578).
2. (‘82) 8 Cal 440 (441).
3. (‘85) AIR 1935 Bom 268 (282).

Note 26

1. (‘14) AIR 1914 Lah 268 (269) : 1914 Pun Re No. 35. (No excessive costs to be awarded if plaint is rejected at an early stage.)
- (‘96) 20 Bom 167 (172).
2. (‘87) 1887 All W N 227 (228).
- (1864) 1864 Suth W R Gap Misc 11 (12).
3. (‘94) 18 Mad 128 (129).
- (‘32) AIR 1932 Mad 408 (409). (Rate of maintenance modified—Costs to be proportionate on the amount awarded.)
- (‘25) AIR 1925 P O 169 (170) : 47 All 459 (P O). (Respondent lodging a case but absent at hearing—Appeal dismissed — Costs up to lodging should be allowed.)
- (‘29) AIR 1929 All 873 (874, 875). (Diet money of witnesses of plaintiff, though not examined if defendant has not disclosed his defence is correctly charged.)
- (‘29) AIR 1929 All 214 (218) : 51 All 509. (Plaintiff finding difficulty in valuing his claim — Claim allowed less — Plaintiff was allowed full costs.)
- (‘68) 3 Agra (Rev) 5 (5). (Only legal stamp duty and not stamp duty levied under mistake will be allowed.)

- (‘30) AIR 1930 Bom 24 (27) : 54 Bom 62. (Travelling charges of witness are proper, though he is a defendant in the suit and his evidence is necessary.)
- (‘25) AIR 1925 Bom 432 (432). (When a suit is dismissed against several defendants costs should be taxed on the basis of suit valuation.)
- (‘21) AIR 1921 Bom 71 (72) : 45 Bom 1177. (Such costs as are necessary to enable him to place his case properly before the Courts.)
- (‘29) AIR 1923 Cal 315 (315). (Travelling charges of witnesses are proper.)
- (‘66) 5 Suth W R 63 (66) : 10 Moo Ind App 476 (P O). (Privy Council disallowed costs of unnecessary matter in record.)
- (‘36) AIR 1936 Lah 681 (681). (In awarding costs, the Court should not include the costs of witnesses who were summoned but were not produced at all.)
- (‘28) AIR 1928 Lah 800 (801). (Costs incurred in procuring attendance of witnesses can be included.)
- (‘10) 1910 Pun L R No. 76, p. 230. (Full costs incurred in getting a just claim decreed.)
- (‘69) 1869 Pun Re No. 41.
- (‘28) AIR 1928 Mad 216 (217).
- (‘21) AIR 1921 Mad 544 (545) : 48 Mad 895. (Actual amount paid to legal adviser in suits to enforce contracts of indemnity.)
- (‘20) AIR 1920 Mad 615 (618) : 38 Mad L Jour 470 (476). (In a suit for damages for breach of covenant for title, plaintiff can claim costs of litigation in which he was damnified.)
- (‘11) 34 Mad 479 (481). (Costs incurred in compelling plaintiffs vendees to discharge debts undertaken.)
- (‘24) AIR 1924 Oudh 218 (222).
- (‘14) AIR 1914 Oudh 115 (122). (The court-fee paid on part of the claim subsequently withdrawn cannot be allowed as costs.)

apportion costs between the parties in view of the peculiar nature of the disputes between the parties, each party may be allowed to bear his own costs.⁴ Where a suit contains several distinct items against separate defendants, the amount of costs allowed to each depends upon the claims against them.⁵ Where a suit against the Government is dismissed, costs should be taxed in the usual way without reference to any private arrangement between Government and its legal advisers with regard to their remuneration.⁶

Where a person is allowed to continue an appeal on an application under O. 22 R. 10, and the appeal is dismissed with costs, he is liable for the full costs of the respondents and not merely for the costs incurred after the date of his application under O. 22 R. 10.^{6a}

For the mode of taxing costs in various cases, see the taxing rules of the various High Courts and also the undermentioned cases.⁷

4. ('11) 21 Mad L Jour 730 (742).
('29) AIR 1929 Mad 493 (495). (Claim for moral damages — One hundredth of claim allowed — Conduct of defendants not satisfactory — Each party was ordered to bear his own costs.)
5. ('70) 13 Suth W R 320 (321).
('67) 7 Suth W R 300 (301). (Decree for possession is jointly and equally against three parties — Each is liable for costs proportionate to his interest.)
6. ('94) 17 Mad 162 (165).
('16) AIR 1916 Bom 258 (260) : 40 Bom 588 (597, 598).
('92) 15 Mad 405 (411).
(1865) 34 Beav 584 (585). *Raymond v. Lakeman*.
[See also ('66) 6 Suth W R Misc 35 (35).]
- 6a. ('33) AIR 1933 Mad 411 (413) : 56 Mad 469.
7. ('68) 9 Suth W R 288 (289). (Usual scale allowable to defendant depends on what plaintiff claims against him.)
('97) 21 Bom 42 (45). (Pleadings' fees will depend on percentage on the maintenance awarded to widows in a partition suit.)
('36) AIR 1936 All 652 (653). (Pleadings' fees — Application for inclusion in decree of certain amount as pleadings' fees — Judge has to be satisfied that payment has been made before amount is included in decree.)
('36) AIR 1936 All 489 (492). (Receiver as legal practitioner conducting his own case — Legal fees cannot be taxed as costs.)
('10) 5 Ind Cas 121 (121) (All). (In a suit which is withdrawn and not contested at all, the Court is right in awarding only half the pleadings' fee as costs to the defendant.)
('80) 1 All 709 (710). (Pre-emption suit.)
('38) AIR 1938 Bom 10 (14, 15). (Proceedings in mofassil Courts — Taxation of costs — Duty of Taxing Officer in cases of doubt — Bombay High Court Rules (O. S.), Rule 767.)
('36) AIR 1936 Bom 272 (273) : 60 Bom 696. (Bombay Pleadings Act, Sec. 20 (c) — Parties engaging two pleaders before appeal actually is heard, but not before date fixed in notice under O. 41 R. 12, C. P. Code — Parties are entitled to fees of two pleaders.)
- ('35) AIR 1935 Bom 439 (446). (Pleadings' fees — Suit for administration and distribution of fund alleged to be trust — Plaintiff not asking and valuing his own share but praying for administration and distribution of the whole — He must pay pleadings' fees on whole amount to be fixed at market value of securities in which the fund is invested at the date of the suit.)
- ('35) AIR 1935 Bom 119 (120). (A person cannot appear in two different capacities by separate solicitors or separate counsel and claim costs in two capacities from the unsuccessful party.)
- ('25) AIR 1925 Bom 355 (356).
- ('09) 33 Bom 667 (668). (Attorney and client.)
- ('09) 33 Bom 256 (257, 258). (Appeal in probate matter — Pleadings' fee is Rs. 30.)
- ('08) 32 Bom 428 (432). (Attorney's costs for business not transacted in Court — Rule 544 of the High Court Rules does not empower the Court to order costs to be paid.)
- ('08) 32 Bom 262 (271). (Long cause — Two counsel — Costs.)
- ('31) AIR 1931 Cal 523 (523, 524) : 58 Cal 505. (It is an objectionable practice to assess junior counsel's fees according to their market value — There must be a recognized scale and the scale followed in England, viz. two thirds of the senior counsel's fees may be followed in India.)
- ('24) AIR 1924 Cal 874 (875). (Calcutta High Court Rules, App. Side Rules, R. 25, Ch. IX.)
- ('21) AIR 1921 Cal 185 (192) : 48 Cal 427. (Award of costs as in an important cause — Reasons should be given.)
- ('09) 36 Cal 493 (501). (Refreshers — Calcutta High Court Rules.)
- ('07) 6 Cal L Jour 453 (456).
- ('02) 29 Cal 595 (602). (An attorney is not entitled to any reward for services rendered to his client beyond his just and fair professional remuneration.)
- ('02) 29 Cal 63 (67, 68). (Where a client discharges his attorney, the latter is entitled to his costs, but where attorney discharges himself, he has no such right.)

27. Separate costs, when may be allowed.—Separate costs should not be allowed to *defendants* if their defence is a *common* one.¹ The filing of separate written statements, if unnecessary, will not affect the rule.² Where the defences raised are, however, different, separate costs can be awarded.³

Where there are several *plaintiffs*, they cannot be allowed separate costs even if they are represented by separate pleaders.⁴

28. Separate suit for costs.—Where a Court has jurisdiction to pass an order as to costs and makes no order as to costs,¹ or awards a particular

('99) 26 Cal 769 (771). (Attorney—Taxation of costs.)

('99) 26 Cal 465 (508). (Suit for damages against Railway Company—Costs should be allowed as between attorney and client.)

('97) 24 Cal 891 (894). (Costs of two counsel allowed.)

('95) 22 Cal 952*n* (953*n*). (Refreshers—Calcutta High Court Rules.)

('95) 22 Cal 943 (950, 952). (Attorney's costs for business not transacted in Court—Rule 544 of the High Court Rules does not empower the Court to order costs to be paid.)

('86) 12 Cal 551 (553). (Attorney and client—Refreshers—Calcutta High Court Rules.)

('71) 7 Beng L R App 50 (51). (Attorney and client.)

('70) 14 Suth W R 255 (257).

('70) 14 Suth W R 143 (144). (Case remanded on payment of all costs—Costs will include stamp on plaint and pleader's fee for second trial.)

('69) 2 Beng L Rep 249 (251). (Application to file an award—Costs should be as in a regular suit.)

('67) 8 Suth W R 55 (55). (Pleader's fee.)

('66) 5 Suth W R 91 (95) : 10 Moo Ind App 563 (P C). (Plaintiff recovering a less amount than what he claimed is entitled only to proportionate costs.)

(1900) 1900 Pun Re No. 9, p. 31 (33). (Defendant's second appeal rejected summarily—Costs of the plaintiff to be calculated as per the decree of the Court of first appeal.)

('35) AIR 1935 Mad 904 (907). (Where vakalatnama filed for a party after judgment is accepted, the decree will be drafted on the footing that the party was represented at the time of the argument.)

('35) AIR 1935 Mad 874 (875). (Suit decided on preliminary point—Suit not heard on merits—Ad valorem pleader's fees not to be awarded.)

('30) AIR 1930 Mad 479 (483). (Maintenance suit—Plaintiff was granted a little less than the amount claimed—Defendant may not be awarded costs on part disallowed.)

('25) AIR 1925 Mad 1235 (1236). (Mad. Civ. Rules of Practice, R. 278 (b).)

('92) 15 Mad 405 (410). (Company employing standing solicitors at fixed salary—Costs must be paid at that rate.)

('25) AIR 1925 Oudh 432 (433) : 28 Oudh Cas 217. (Pleader's fee allowed only on amount decreed.)

('36) AIR 1936 Pesh 196 (197). (A person, who although otherwise qualified, is not enrolled as a lawyer, cannot be treated as a lawyer for purpose of awarding costs, and the person whom he represents as an agent in a suit cannot be given pleader's fee according to the rules.)

('25) AIR 1925 Sind 275 (280). (Where suit is overvalued, costs will be taxed only on the proper valuation.)

Note 27

1. ('67) 12 Moo Ind App 157 (202) (P C).

('32) AIR 1932 P C 13 (21) : 59 Ind App 1 (P C).

('87) 9 All 205 (210).

('72) 17 Suth W R 188 (188).

('69) 11 Suth W R 270 (271).

('66) 6 Suth W R 108 (109).

(1865) 2 Suth W R 60 (61). (Members of the same family living in the same place, when sued together on a common cause of action.)

(1864) 1 Suth W R 139 (139).

('25) AIR 1925 Mad 1235 (1236).

('33) AIR 1933 Oudh 242 (246).

Marsh 95 : 1 Hay 162.

('39) AIR 1939 Rang 108 (111) : 1938 Rang L R 252. (Defendants impleaded in administration suit relating to trust as trustees and having identical interest are entitled to one set of costs only.)

('34) AIR 1934 Rang 259 (260).

[But see ('32) AIR 1932 All 337 (340) : 54 All 490.]

2. (1859) S D N W P 349.

3. ('16) AIR 1916 Mad 575 (577, 578) : 1915 Mad W N 1021 (1023).

('33) AIR 1933 All 466 (468).

('87) 9 All 655 (659).

(1900) 27 Cal 860 (891). (When separate salvage actions are consolidated separate costs are payable.)

('69) 11 Suth W R 19 (19) : 2 Beng L R A C 168.

('69) 11 Suth W R 36 (38). (The defences of a zamindar and patnidar are separate and they are entitled to separate costs.)

('66) 6 Suth W R 324 (324). (When several defendants are charged with an act of joint misappropriation each can, if successful, claim separate pleader's fee.)

('29) AIR 1929 Oudh 536 (538).

(1859) S D N W P 1.

4. ('39) AIR 1939 Rang 108 (111) : 1938 Rang L R 252.

[See ('71) 8 Bom H O R A C 241 (244).]

Note 28

1. ('78) 2 Bom 360 (362).

35 amount,² a subsequent suit to recover the costs incurred *but not awarded* will be barred
 29 on the principle of *res judicata*. There is a conflict of opinion as to whether, when the Court in the prior proceeding had *no jurisdiction* to order costs, a subsequent suit will lie for its recovery. In *Mahram Das v. Ajudhia*,³ Mahmood, J., expressed the opinion that an independent suit will lie. In *Ram Das v. Mahammad Faqir*,⁴ a later case, Mears, C. J., held that no such suit will lie, as it is not one for malicious prosecution, and as, treating it as a suit for damages, the damages are in law too remote to furnish any cause of action.

Where costs are awarded by an *executable* decree or order, no suit will lie to recover the costs so *awarded* as the same will be barred by the provisions of Section 47.⁵ But where costs are awarded by a decree or order which is *not executable*, an independent suit upon the judgment to recover the amount will lie.⁶

The rules set forth above apply, however, only to the recovery of costs as between *party and party*. They do not interfere with the right of enforcing by suit a contract between a pleader and his client as to the fees payable,⁷ or the right of a commissioner appointed by Court at the request of the plaintiff, to sue the plaintiff for his fees,⁸ or the recovery by suit of sums advanced by the plaintiff to the *guardian ad litem* of a minor to conduct his defence.⁹

A suit for costs against a third person on the ground that he was the mover of, and had an interest in the suit, does not, however, lie in the absence of malice and want of probable cause.¹⁰

29. Appeal and second appeal against order as to costs. — The question of appealability of a direction as to costs may be discussed under three heads —

- (1) where the direction is contained in a *non-appealable order*,
- (2) where the direction is contained in an *appealable order*, and
- (3) where the direction is contained in a *decree*.

(1) *Where the direction is contained in a non-appealable order.* — The order itself not being appealable, the direction as to costs contained therein will not also be appealable.¹ Thus no appeal will lie from a direction as to costs made in an order granting an adjournment of a case.²

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| <p>(‘08) 1908 All W N 18 (19). (Execution of decree—Objection to attachment successful, but costs not allowed—Costs of objection not recoverable in separate suit.)</p> <p>(‘87) 9 All 474 (476).</p> <p>(‘07) 11 Cal W N cclxiii.</p> <p>(1864) 1864 Suth W R Gap 247 (247). (Costs of receiver appointed in execution.)</p> <p>(‘67) Referred Case No. 5 of 1867 : 3 Mad H C R 341 (342).</p> <p>2. (1807) 1 Camp 151 (152), Hathaway v. Barrow. (1827) 4 Bing 160 (162), Jenkins v. Biddulph. (‘86) 8 All 452 (461).</p> <p>(‘76) 1 Bom 467 (468).</p> <p>(‘32) AIR 1932 Lah 257 (258) : 13 Lah 551. (1844) 13 M & W 47 (51), Doe v. Filliter. (1836) 2 Bing N C 534 (537), Grace v. Morgan.</p> <p>3. (‘86) 8 All 452 (461).</p> <p>(‘70) 6 Mad H C R 192 (193, 194) (F B). [See also (‘06) 28 All 475 (476).]</p> <p>4. (‘22) AIR 1922 All 143 (144). [See also (‘90) 14 Bom 100 (101). (Costs incurred in defending criminal proceedings.)</p> | <p>(‘02) 15 O P L R 129 (130). (Do).]</p> <p>5. (‘32) AIR 1932 Lah 257 (257, 258) : 13 Lah 551. (‘25) AIR 1925 Mad 279 (280) : 48 Mad 482. (‘02) 24 All 288 (291).</p> <p>6. (‘25) AIR 1925 Mad 279 (280, 281) : 48 Mad 482. (‘06) 33 Cal 560 (564). (Suit on order for costs awarded by Insolvency Court is maintainable)</p> <p>7. (‘94) 21 Cal 85 (91, 92).</p> <p>8. (‘82) 4 Mad 399 (401).</p> <p>9. (‘99) 22 Mad 314 (316).</p> <p>10. (‘78) 2 Cal 233 (260) : 4 Ind App 23 (P C).</p> <p style="text-align: center;">Note 29</p> <p>1. (‘18) AIR 1918 Upp Bur 14 (14) : 3 Upp Bur 61 (62). (Order as to costs in an order under S. 24, C. P. Code.)</p> <p>(‘32) AIR 1932 Mad 714 (715).</p> <p>(‘98) 21 Mad 421 (422). (Direction for costs in order permitting plaintiff to withdraw suit under the Religious Endowments Act.)</p> <p>[But see (‘73) 20 Suth W R 123 (125).]</p> <p>2. (‘82) 8 Cal 91 (94).</p> <p>(‘15) AIR 1915 Mad 1222 (1223) : 2 Mad L W 519 (520).</p> |
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(2) *Where the direction is contained in an appealable order.*—The direction as to costs in this case will be appealable on the grounds mentioned below under the third heading.³ But no *second* appeal will lie inasmuch as the appealable order in which the direction is contained is itself not open to second appeal.⁴

(3) *Where the direction is contained in a decree.*—It has been seen that the award of costs is entirely within the *judicial discretion* of the Court. An appeal from a direction as to costs will, therefore, lie only —

(a) where the Court has *not exercised* any real discretion in making the direction,⁵ or

(b) where the exercise of discretion is not *judicial*, that is, based on sound and well established legal principles; in other words, where the direction as to costs *involves a matter of principle*.⁶

[See ('06) 2 Nag L R 49 (49). (The same will be the case with a direction for costs in a non-appealable decree such as a compromise decree.)]

3. ('22) AIR 1922 All 90 (90) : 44 All 209.

('92) 16 Bom 241 (242).

('84) 8 Bom 368 (370).

('86) 12 Cal 271 (272).

('82) 8 Cal 91 (94, 95).

('07) 31 Mad 328 (329). (Appeal as to costs in an award under Land Acquisition Act.)

4. See Section 104.

5. (1903) 2 K B 756 (765), *Civil Service, etc. v. G. S. Navigation Co.*

('71) 8 Bom H C R A C 100 (102). (Where the direction is exercised with care, no appeal will lie.)

('25) AIR 1925 Cal 1085 (1086). (Do.)

('18) AIR 1918 Cal 180 (182).

('14) AIR 1914 Oudh 231 (232).

6. ('20) AIR 1920 Pat 622 (625) : 5 Pat L Jour 472 (480, 489).

('33) AIR 1933 All 299 (301).

('81) AIR 1931 All 126 (128).

('24) AIR 1924 All 794 (795).

('19) AIR 1919 All 453 (455) : 40 All 558 (562). (Reasons could be examined by appellate Court.)

('05) 1905 All W N 75 (76).

('91) 13 All 290 (294, 295).

('29) AIR 1929 Bom 63 (65) : 53 Bom 178.

('23) AIR 1923 Bom 37 (39). (Where reasons are given and principle adopted is not wrong no interference.)

('25) AIR 1925 Bom 432 (432). (Taxation of costs—Mode of—No appeal lies.)

('11) 13 Bom L R 1061 (1095).

('10) 12 Bom L R 621 (631). (A defendant cannot be asked to bear the costs of an unsuccessful co-defendant or of a co-defendant who does not contest.)

('09) 11 Bom L R 1187 (1192). (If reasons are not recorded for varying the general rule.)

(1900) 2 Bom L R 254 (255).

('98) 22 Bom 164 (167, 168).

('84) 8 Bom 368 (370).

('21) AIR 1921 Cal 156 (156).

('20) AIR 1920 Cal 1009 (1013) : 24 Cal W N 352 (365).

('20) AIR 1920 Cal 423 (424) : 47 Cal 67 (70).

('18) AIR 1918 Cal 526 (527) : 22 Cal W N 372 (373).

('18) AIR 1918 Cal 307 (311) : 27 Cal L Jour 78 (83). (A party succeeding on a particular issue must always get his costs on that issue.)

('16) AIR 1916 Cal 126 (135) : 20 Cal W N 929 (943).

('07) 34 Cal 878 (880).

('05) 9 Cal W N 584 (590).

('03) 7 Cal W N 647 (649).

('01) 28 Cal 567 (570).

('86) 12 Cal 179 (181).

('85) 11 Cal 359 (361).

('76) 1 Cal 385 (388). (Discretion duly exercised—No appeal.)

('67) 7 Suth W R 208 (208).

('66) 6 Suth W R 187 (188, 189) (F B).

(1865) 2 Suth W R 33 (34). (Discretion duly exercised—No appeal.)

(1864) 1864 Suth W R 146 (147). (Court must be satisfied that there has been a miscarriage of justice.)

('33) AIR 1933 Lah 585 (587). (Discretion exercised—Reasons given—No interference in appeal.)

('22) AIR 1922 Lah 229 (230). (No interference where reasons for varying the rule were sound.)

('15) AIR 1915 Lah 166 (166) : 1915 Pun L R No. 65, p. 185. (If there are no sufficient reasons to vary the rule.)

('12) 1912 Pun L R No. 118, p. 354 (355).

('66) 1866 Pun Re No. 4, p. 4 (7).

('69) 1869 Pun Re No. 31.

('37) AIR 1937 Mad 810 (810).

('35) AIR 1935 Mad 874 (875). (Question of principle involved—Ad valorem pleaders' fees allowed though suit not tried on merits.)

('33) AIR 1933 Mad 224 (224).

('16) AIR 1916 Mad 575 (577) : 1915 Mad W N 1021 (1022).

('14) AIR 1914 Mad 418 (420) : 26 Mad L Jour 356 (358, 360, 361).

('12) 15 Ind Gas 202 (202) (Mad). (Where reasons given to vary the rule unsatisfactory.)

(1862) 1 Mad H C R 74 (74).

(c) Where the direction as to costs is based on a *misapprehension of fact or law*.⁷

No appeal will lie in respect of an order as to costs in other cases.^{7a}

As a general rule it will be assumed that the Court has exercised its discretion properly.⁸

Where an appeal is preferred both against the substantive portion of the decree and the direction as to costs, but the appeal against the substantive portion is subsequently abandoned, the appeal against direction for costs can nevertheless be heard.⁹

A *second* appeal will lie in respect of a direction as to costs where a second appeal will lie from the decree itself, that is, where it is contrary to law or opposed to well established principles.¹⁰ See also Section 100. But the Court in second appeal

- (‘33) AIR 1933 Nag 49 (49) : 27 Nag L R 307.
 (‘26) 95 Ind Cas 446 (447) (Nag). (Discretion exercised properly—No appeal.)
 (‘18) AIR 1918 Nag 185 (185). (Mortgage suit—Costs may be ordered against mortgagor personally where the mortgage bond provides for it.)
 (‘15) AIR 1915 Nag 65 (66) : 11 Nag L R 189 (191). (If there are no sufficient reasons to vary the rule.)
 (‘34) AIR 1934 Oudh 259 (260). (Exercise of discretion by trial Court in judicial manner should not be interfered with by Appellate Court. If it so interferes High Court can interfere in second appeal.)
 (‘33) AIR 1933 Oudh 455 (457) : 9 Luck 22.
 (‘26) AIR 1926 Oudh 35 (35).
 (‘25) AIR 1925 Oudh 699 (699, 700).
 (‘24) AIR 1924 Oudh 110 (110).
 (‘05) 8 Oudh Cas 251 (252, 253).
 (‘36) AIR 1936 Pat 151 (151). (On a question of cost only an appeal will lie where a question of principle is involved or where a wrong principle has been followed.)
 (‘34) AIR 1934 Pat 397 (398).
 (‘19) AIR 1919 Pat 257 (258).
 (‘21) AIR 1921 Upp Bur 20 (21) : 4 Upp Bur 8.
 (‘13) 19 Ind Cas 611 (611) (Sind).
 (‘12) 6 Sind L R 226 (227).
 (1907) 24 T L R 25, Edmund v. Martell. (If order is based on grounds not open.)
 (1879) 4 Q B D 611 (613), Harris v. Petherick.
7. (‘92) 16 Bom 676 (682).
 (‘17) AIR 1917 Bom 18 (19) : 42 Bom 327 (332). (To disallow costs to plaintiff who has succeeded and when there is no misconduct.)
 (‘20) AIR 1920 Cal 1009 (1013) : 24 Cal W N 352 (357, 359).
 (‘30) AIR 1930 Lah 234 (234).
 (‘35) AIR 1935 Mad 342 (344).
 (‘34) AIR 1934 Mad 73 (74). (Where it overlooks plain provision of law it can be interfered with.)
 (‘37) AIR 1937 Oudh 282 (283) : 13 Luck 171. (Discretion exercised based on an erroneous view of the law.)
 (‘25) AIR 1925 Oudh 699 (699, 700).
 Note :—(A direction based on a misapprehension is really not an exercise of discretion at all. It is really not necessary in such a case that the Court should have also acted contrary to principles. The interpretation of 16 Bom 676 and 22 Bom 164 as being in conflict with the Calcutta decision in AIR 1920 Cal 423 does not appear to be correct.)
 (1885) 28 Ch D 549 (551), In re Gilbert.
 (1879) 4 QBD 611 (613), Harris v. Petherick.
- 7a. (‘37) AIR 1937 Mad 40 (44) : I L R (1937) Mad 479. (Question is not what Appellate Court considers right but whether there are grounds justifying interference with lower Court’s discretion.)
 (‘36) AIR 1936 Pat 68 (70).
 (‘36) AIR 1936 Pat 513 (520) : 15 Pat 510.
 [See (‘37) AIR 1937 Sind 159 (160). (Trial Court not awarding costs, as plaintiff unable to establish his case—Appellate Court though not interfering with decision on other points awarding costs—Order of Appellate Court, *held*, could not stand as it had no jurisdiction to interfere with the discretion exercised by the trial Court.)]
8. (‘14) AIR 1914 Mad 418 (420) : 26 Mad L Jour 356 (361).
 (1900) 2 Bom L R 254 (260).
 (1899) 2 Ch 467 (472), Bew v. Bew.
9. (‘92) 16 Bom 241 (242).
 (‘30) AIR 1930 Bom 445 (447). (But, not when it is impossible to grant relief without challenging the main order.)
10. (‘26) 27 Pun L R 391 (393).
 (‘19) AIR 1919 Cal 947 (947).
 (‘26) AIR 1926 All 419 (420).
 (‘19) AIR 1919 All 214 (216) : 41 All 254 (257, 258).
 (‘93) 15 All 333 (333, 334).
 (‘71) 8 Bom H C R A C 100 (102).
 (‘67) 4 Bom H C R A C 41 (42). (Improper exercise of discretion alone is not a good ground.)
 (‘21) AIR 1921 Cal 604 (605).
 (‘03) 30 Cal 536 (538). (No reasons were given for awarding full costs to plaintiff when a portion of the amount claimed was alone decreed.)
 (‘03) 7 Cal W N 647 (648). (Where a successful defendant had been deprived of his costs.)

will not examine the reasons or review the discretion exercised.¹¹

30. Review of direction as to, or the taxation of costs. — A Court can, in proper cases, review a direction as to costs, but unless a strong case is made out it will be reluctant to do so.¹ As to the taxation of the costs, it is in the discretion of the Taxing Master and the Courts will not interfere with it on review unless the taxation has proceeded on an erroneous principle.²

31. Revision. — A mistake committed by a Court on the point of costs is hardly a ground for revision.¹ Nor will a bare failure to exercise a judicial discretion as to costs justify an interference in revision.² The High Court will not interfere in revision unless it is satisfied that the discretion has been exercised arbitrarily.³

32. Letters Patent Appeal. — An order of a single Judge, merely as to costs, is not a "judgment" within the meaning of Clause 15 of the Letters Patent so as to give a right of appeal to the Division Bench of the High Court,¹ but when such order is incidental to a "judgment," an appeal will lie.²

33. Privy Council appeal as to costs. — The Privy Council is not a taxation tribunal, and will only deal with such matters as the taxation of costs, by way

('66) 1866 Suth WR 187 (188, 189).

(1864) 1864 Suth WR 215 (216). (Question how costs have been awarded is not a matter for special appeal.)

('80) AIR 1930 Lah 229 (230).

('20) AIR 1920 Lah 164 (164).

('20) 2 Lah L Jour 310 (311, 312). (When findings and issues are in favour of defendant, she must have costs.)

('19) AIR 1919 Lah 418 (418).

('18) AIR 1918 Lah 247 (247). (Arbitrary exercise—Second appeal lies.)

('12) 17 Ind Cas 418 (418) : 1913 Pun Re No. 47. (Second appeal lies where costs are assessed on erroneous principle.)

('83) 1883 Pun Re No. 21, p. 43 (49).

('80) 1880 Pun Re No. 23, p. 51. (Costs awarded on an amount not decreed.)

('17) AIR 1917 Mad 876 (877). (Exercise of discretion sound—No second appeal lies.)

('03) 13 Mad L Jour 210 (210). (Costs awarded on an amount not decreed.)

('31) AIR 1931 Oudh 9 (10) : 6 Luck 378.

('29) AIR 1929 Oudh 406 (412) : 6 Luck 497 (F B).

('23) AIR 1923 Oudh 155 (155, 156) : 25 O.C. 385.

('23) AIR 1923 Oudh 114 (117) : 27 Oudh Cas 64. (Where Sub-Judge in interfering with Munsif's discretion gave no reason.)

('03) 6 Oudh Cas 52 (55, 57). (An order of an Appellate Court as to costs is "contrary to law," within the meaning of S. 100, C. P. Code, not only when the Court's discretion has been exercised contrary to law, in the ordinary sense, but also when that discretion has been exercised in such circumstances as would justify the correction of the order by the Appellate Court had it been passed by a Court of original jurisdiction.)

('03) 6 Oudh Cas 39 (39, 40). (Grounds must show substantially the error of law or procedure.)

('36) AIR 1936 Pat 151 (151). (Where pro forma defendants were ordered to pay costs.)

('20) AIR 1920 Pat 622 (624) : 5 Pat L Jour 472 (480, 489) (F B).

('19) AIR 1919 Pat 257 (258).

11. ('12) 15 Ind Cas 429 (429, 430) (F B).

('03) 13 Mad L Jour 210 (210).

('12) 13 Ind Cas 201 (203) (Cal).

('76) 25 Suth W R 22 (22). (No interference with discretion in second appeal.)

('15) AIR 1915 Lah 378 (379) : 1915 Pun Re No. 62. (A second appeal cannot be allowed merely because the lower Appellate Court has directed the plaintiff to pay the defendant's costs.)

Note 30

1. ('22) AIR 1922 Pat 1 (1, 2) : 6 Pat L Jour 284.

('26) AIR 1926 Bom 367 (367). (District Court can order as to method of taxation of costs after disposal of the case on appeal.)

2. ('07) 9 Bom L R 1014 (1016, 1017).

('96) 20 Bom 301 (303, 304.)

('26) AIR 1926 Bom 18 (22, 23) : 50 Bom 69. (Principle wrong—Taxing Master's opinion was reviewed.)

('21) AIR 1921 Bom 87 (87) : 45 Bom 1234.

('08) 32 Bom 262 (267).

[See ('30) AIR 1930 Bom 536 (537). (Bombay High Court (original side) Rules — Application for review of taxation under R. 531 cannot be entertained unless objection was already taken under R. 529.)]

Note 31

1. ('28) AIR 1928 Lah 800 (802).

('30) AIR 1930 Mad 72 (74).

[But see ('23) AIR 1923 All 119 (120).]

2. ('16) AIR 1916 Mad 384 (385).

3. ('33) AIR 1933 All 311 (311, 312).

Note 32

1. ('07) 17 Mad L Jour 569 (569) (F B).

2. ('14) AIR 1914 Mad 418 (419).

of appeal from the judgment of the Registrar upon items to which objections were taken before him. Where objections as to the taxation of costs were not raised before the Registrar of the High Court, they will not be considered by the Board.¹ It is very rarely that the Privy Council interferes with the discretion of the Appellate Courts in India in a matter merely of costs.²

34. Right of contribution for costs payable under joint decree. — Where *A* and *B* join and sue *C* and the suit is dismissed with costs and such costs are paid by *A* alone, he will be *prima facie* entitled to claim contribution from *B* for his share of the costs on the ground that since they have joined together of their own will to institute the suit, there is an implied contract that both should contribute towards the expenses.¹ This rule will however apply only to a *bona fide litigation*.² Where *A* and *B* join together and bring a suit against *C* which is false to their own knowledge, and the suit is dismissed with costs, *A* and *B* are in the position of joint tortfeasors and there is no right of contribution between them.³

Where, on the other hand, *C* sues *A* and *B* and the suit is decreed with costs, and *A*, after paying the whole costs sues *B* for contribution, the principles applicable are somewhat different. *A* and *B* do not join of their own accord but are pushed into the same boat as co-defendants by *C*. No implied contract to contribute can be presumed, and therefore there is no right of contribution between *A* and *B* unless there is an express contract or some *equity* between them, which gives a right of contribution.⁴ Where the parties stand on an equal footing,⁵ as for instance, the defendants in a partition suit,⁶ the fact that one judgment-debtor has been compelled to pay the entire amount due, in itself may constitute such an equity. But where the defences of *A* and *B* are separate and antagonistic,⁷ or where, though the defences are joint, they have colluded or conspired together and raised false defences, there is no right of contribution between them.⁸

A plaintiff sued two persons, *A* and *B*. *A* admitted the claim of the plaintiff. *B* contested the suit and after contest the suit was decreed with costs against both. *B* paid the total amount of the costs and sued *A* for contribution of his proportionate

Note 33

1. ('28) AIR 1928 P C 238 (238, 239) (P C).
- (32) AIR 1932 P C 13 (21) : 6 Luck 556 : 59 Ind App 1 (P C).
2. ('32) AIR 1932 P C 13 (21) : 6 Luck 556 : 59 Ind App 1 (P C).

Note 34

1. ('28) AIR 1923 All 67 (70, 71) : 45 All 99.
- (24) AIR 1924 Oudh 48 (49) : 26 Oudh Cas 196.
- (21) AIR 1921 All 372 (373, 374) : 43 All 77.
- (11) 9 Ind Cas 1023 (1023) (Mad).
2. ('20) AIR 1920 Pat 815 (816).
- (10) 7 Ind Cas 268 (269) (Mad).
- (10) 7 Mad L Tim 194 (195).
3. ('23) AIR 1923 All 67 (70, 71) : 45 All 99.
- (20) AIR 1920 Pat 185 (186).
4. ('23) AIR 1923 All 60 (70, 71) : 45 All 99.
- (12) 22 Mad L Jour 406 (409). (Even if there is a contract plaintiff cannot claim a charge on the defendant's property for the amount to be contributed.)
- (10) 32 All 585 (588).
- (32) AIR 1932 Mad 146 (147).
5. ('21) AIR 1921 Oudh 123 (123) : 24 Oudh Cas

148. (Overruling 10 Oudh Cas 103).
- (67) 7 Suth W R 300 (301).
- (34) AIR 1934 Cal 709 (710) : 61 Cal 861.
- (Parties equally interested in defending suit by third party and having common defence should equally bear the costs decreed against them.)
- [See ('32) AIR 1932 All 383 (384).]
6. ('03) 26 Mad 373 (375).
- (24) AIR 1924 Bom 318 (320) : 49 Bom 351.
- (19) AIR 1919 All 17 (17).
- (30) AIR 1930 Bom 505 (507) : 55 Bom 91.
- (Where plaintiff pays decretal amount in execution of decree for co against him and other defendants, he is entitled to contribution from other defendant.)
7. ('23) AIR 1923 All 67 (70, 71) : 45 All 99.
- (18) AIR 1918 All 323 (329) : 40 All 672 (673, 674).
- (37) 19 All 462 (464).
8. ('37) 24 Cal 330 (334).
- [See ('30) AIR 1920 Lah 159 (159). In this case, contribution was decreed with effect that was alleged that the defence in the first suit was false.]

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- (67) 7 Suth W R 300 (301).
- (34) AIR 1934 Cal 709 (710) : 61 Cal 864. (Parties equally interested in defending suit by third party and having common defence should equally bear the costs decreed against them.)
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- (24) AIR 1924 Bom 318 (320) : 48 Bom 351.
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- (97) 19 All 462 (464).
8. ('97) 24 Cal 330 (334).
- [See ('30) AIR 1930 Lah 49 (50). (In this case, contribution was decreed although it was alleged that the defence in the prior suit was false.)]

as to the costs of the appeal, it was held that the order of the Appellate Court was not to absolve the defendant from his liability for costs under the decree of the first Court.⁹ See also the undermentioned decisions bearing on the construction of decrees as to costs.^{9a} If a judgment includes costs, it implies costs allowed by the rules. If costs which are not permissible under the rules are included in the decree, the decree is not in accordance with the judgment and it is the duty of the Court to correct the decree so as to make it in conformity with the judgment.¹⁰

35 A. (1) If in any suit or other proceeding, not being an appeal, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less:

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, and not being a Court constituted under that Act, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees:

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

9. ('12) 16 Ind Cas 381 (382) (Cal).

('23) AIR 1923 Bom 206 (206, 207): 47 Bom 559 (562). (When suit was withdrawn.)

9a. ('30) AIR 1930 Oudh 167 (168): 5 Luck 595. (Foreclosure decree—Order for costs does not import personal liability.)

[See ('37) 1937 Mad W N 292 (293). (Personal liability—Order giving right to party to recover costs from another party and making costs a first charge on sale proceeds of particular property — Personal liability not taken away.)

10. ('35) AIR 1935 Cal 619 (620): 63 Cal 181.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.

Synopsis

1. Legislative changes.
2. Scope and object of the Section.
- 2a. Applicability of Section to proceedings under Provincial Insolvency Act.
3. Appeal.
4. Revision.

1. Legislative changes. — This Section was added by Section 2 of Act 9 of 1922, and by the provisions of that Act, this Section will only come into operation where the Local Government of the particular province has duly notified to that effect. It has been brought into force in Bombay, Bengal, the United Provinces, Bihar, Orissa, Central Provinces, Assam, Punjab and Sind.

2. Scope and object of the Section. — This Section is an exception to the general principle on which Section 35 is based, namely, that the award of costs to a litigant is to secure to him the expenses *incurred* by him in the litigation and not to enable him to get smart money by way of *penalty* or *punishment* on the opposite party; see Notes 1 and 26 to Section 35. In order that this Section may apply, the following conditions must exist¹ —

- (1) The claim or defence must be *false* or *vexatious*.^{1a}
- (2) It must be false or vexatious to the knowledge of the party raising it.
- (3) Such claim or defence must have been *disallowed* or *withdrawn* or *abandoned* in whole or in part.²
- (4) Objection must have been taken at the *earliest possible* opportunity.³

The awarding of compensatory costs under this Section is not obligatory in every case where a false claim or defence is put forward and objection is taken at an early opportunity. The Court may refuse to grant compensatory costs if in the circumstances of a case it considers it not proper to grant such costs.⁴

The words "not being an appeal" show that the provisions of the Section are applicable only to *suits* and *proceedings* but not to *appeals*. It has been held by the Calcutta High Court that the Section seems to apply only to the *original* hearing of

Section 35 A — Note 2

1. ('31) AIR 1931 Lah 509 (510).
- 1a. ('36) AIR 1936 Oudh 67 (72); 11 Luck 486.
('37) AIR 1937 Pat 477 (479). (Suit against Secy. of State and others filed in Civil Court by witness in criminal case for recovery of additional expenses—Suit neither false nor vexatious but only misconceived—S. 35A has no application.)
2. ('31) AIR 1931 Lah 509 (510). (Dismissal of suit for default after warnings, and on

account of reprehensible conduct on part of plaintiff amounts to abandonment.)

- ('30) AIR 1930 Nag 133 (134). (Judge trying suit has same powers as Small Cause Court from which Court suit was transferred.)
3. ('26) AIR 1926 Lah 472 (472).
4. ('38) AIR 1938 All 266 (271); I L R (1938) All 370. (Valuation of suit Rs. 1300. Counsel's fee of Rs. 2275 allowed to successful plaintiff —Held, allowing of compensatory costs was not proper.)

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

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suits and other proceedings and that it does not also apply to revision proceedings before the High Court, so that the High Court has no power to award compensatory costs in respect of such proceedings.⁵

2a. Applicability of Section to proceedings under Provincial Insolvency Act. — This Section applies to proceedings under the Provincial Insolvency Act.¹ It is immaterial that the Section was not in existence at the time of the passing of the Provincial Insolvency Act (V of 1920).²

3. Appeal. — An order for compensation under this Section is appealable under Section 104 clause (*ff*). But where the original Court has refused or omitted to award compensatory costs, the Appellate Court cannot, in view of the provisions of O. 41 R. 33, award such costs. An order for compensatory costs under this Section passed by a Small Cause Court is appealable to the District Judge under Section 24 of the Provincial Small Cause Courts Act,¹ though such an order will not be appealable under the Code.²

4. Revision. — An order for compensatory costs in a case to which this Section does not apply is one without jurisdiction and can be set aside by the High Court in revision.¹

5. ('39) 42 Cal W N 658 (659).

Note 2a

1. ('85) AIR 1935 Nag 207 (208): 31 Nag L R 365. (S. 76, Prov. Insolvency Act, does not prohibit Court from acting under this section.)

2. ('85) AIR 1935 Nag 207 (208): 31 Nag L R 365.

Note 3

1. ('26) AIR 1926 All 554 (555).

2. See ('19) AIR 1919 Mad 23 (23).

Note 4

1. ('37) AIR 1937 Pat 477 (479).

PART II.

EXECUTION

GENERAL

36. The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

Application to orders.

[Compare 1882, S. 649, para. 1.]

Synopsis

1. Legislative changes.
2. Principle and scope of the Section.
3. "Execution," meaning of.
4. "Orders."
5. What decrees may be executed. See Section 38.
6. Who may apply for execution. See O. 21 R. 11.
7. Against whom execution may be had. See O. 21 R. 11.

Other Topics

Amended decrees and forms. See S. 38.

Executability of orders like decrees does not make the former decrees. See Note 2 Pt. (2).

Execution of order. See Note 4.

Mesne profits, decree or order for. See S. 38.

Mode of execution. See Note 3.

1. Legislative changes. — Under the last paragraph of Section 220 of the old Code an order for costs not forming part of a decree, could be executed as if it were a decree for money. The provisions of Chapter XIX dealing with execution of decrees were applied to the execution of other orders also, by reason of the fact that a 'decree-holder' was defined in Section 2 of the Code as including a person in whose favour an order was passed, and a 'judgment-debtor' as including a person against whom an order capable of execution was passed. This Section now makes it quite clear that the provisions relating to decrees shall, so far as they are applicable, be deemed to apply to the execution of orders. It is based upon the last para. of Section 220 and Section 649 of the old Code¹ but is of very much wider application.²

2. Principle and scope of the Section. — The principle underlying the provisions of this Section is that every Court has an inherent power to have its orders *carried out*, as otherwise the orders would be a mere farce.¹

Section 36 — Note 1

1. Section 649 of the old Code was as follows :
"The rules contained in Chapter XIX shall apply to the execution of any judicial process for the arrest of a person or the sale of property or payment of money, which may be desired or ordered by a Civil Court in any civil proceeding."

2. ('25) AIR 1925 Cal 57 (58, 59); 52 Cal 269.
(Order directing payment of remuneration to Commissioner is executable as a decree.)

Note 2

1. ('07) 34 Cal 860 (862).
('21) AIR 1921 Pat 152 (154); 6 Pat L Jour 304.
('10) 6 Ind Cas 386 (387) (Cal).

The fact that the provisions applicable for the execution of decrees apply to the execution of orders, does not make such orders "decrees" for all purposes. Thus, where a non-appealable order such as an order for costs is sought to be executed and on objection being raised thereto the matter is decided under Section 47 (which will apply by reason of Section 36), such decision will not be appealable as a "decree." The reason is, that the order for costs being itself not appealable, an order passed in execution of that order cannot also be appealable.²

The High Court of Madras has, in the undermentioned case,³ held that such an order would not be one under Section 47 at all. It is submitted that this view is not correct in view of the clear wording of the Section 36 to the effect that *the provisions of the Code relating to the execution of decrees* shall apply to the execution of orders.⁴ The High Court of Calcutta has, on the other hand, held⁵ that Section 47 would apply to such a case, but has proceeded on the assumption that because the objection to the execution of the order was dealt with under Section 47, an appeal necessarily lies from the order. This view also, it is submitted, is not correct for the reason set forth above.

The provisions of the Code relating to the execution of decrees apply to the execution of orders only in *so far as such provisions are applicable to such orders*. Thus, it is provided by O. 16 R. 4 that in default of payment of the expenses of a witness, the Court may order the same to be levied by attachment and sale of the *moveable property* of the debtor. Such an order cannot, by reference to this Section, be executed as if it were a decree, by attachment and sale of the *immovable property* of the debtor.⁶

3. "Execution," meaning of. — Execution is the enforcement of decrees and orders by process of Court, so as to enable the judgment-creditor to recover the fruits of the judgments.¹ The modes in which the Courts can execute their decrees and orders are set forth in this Part and elaborated in Order 21, *infra*. The functions of an executing Court are judicial and not merely ministerial.²

4. "Orders." — This Section is applicable to all orders which can be included in the definition of the term "order" in Section 2 clause 14 *ante*,¹ and is not limited

2. ('19) AIR 1919 Mad 23 (23).

3. ('15) AIR 1915 Mad 1222 (1223).

4. ('25) AIR 1925 Cal 57 (58, 59): 52 Cal 269.

5. ('25) AIR 1925 Cal 57 (58, 59): 52 Cal 269.

6. ('21) AIR 1921 Cal 430 (431).

Note 3

1. ('82) 9 Cal 773 (776, 777).

2. ('70) 7 Bom H C R A C 37 (41).

Note 4

1. ('89) 12 Mad 120 (122). (Order for costs of the day.)

('15) AIR 1915 Mad 1222 (1223). (Orders granting day costs.)

('34) AIR 1934 Bom 452 (457): 59 Bom 10.

('93) 17 Bom 514 (517). (Order obtained by attorney against his client for payment of costs.)

('84) 8 Bom 511 (524). (Judgment entered up under S. 86 of the Indian Insolvent Act.)

('25) AIR 1925 Cal 57 (58, 59): 52 Cal 269. (Dissenting from 10 Cal W N 234 and holding that an order made after the dismissal of a partition suit directing the plaintiff to deposit in Court a certain sum of money as remuneration for work done by the commissioners of partition is an order within the meaning of S. 2 cl. 14 and that it may be executed as a decree.)

('10) 6 Ind Cas 386 (387) (Cal.) (Order for recovery of amount drawn by Court Commissioner in excess of his dues.)

('36) AIR 1936 Lah 696 (698). (Order passed in execution proceedings.)

('19) AIR 1919 Mad 894 (895). (Court sale subsequently set aside—Order for refund of money to purchaser.)

('25) AIR 1925 Rang 189 (191): 2 Rang 673. (Order under O. 20 R. 11 (2) can be executed as if it were a decree.)

('26) AIR 1926 Sind 119 (120): 20 Sind L R 216. (Order under O. 21 R. 6.)

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to orders made under the Code.^{1a} Thus, an order under the Guardians and Wards Act, for the restoration of the ward's property in the possession of such guardian, is executable as a decree against the guardian.² But, an order under Section 34 clause (e) of the Guardians and Wards Act directing the guardian of a minor to pay a certain sum out of the minor's estate for the marriage expenses of a dependant of the minor is not executable as a decree.³ The reason is that such an order is only in the nature of a direction to the guardian over whom the Court has control, to pay a certain sum of money out of the funds of the minor in discharge of the liability of the minor's estate. There is no *adjudication* by the Court in such a case on the relative claims of parties, and hence, such an order cannot be said to be a 'decision' within the meaning of Section 2 clause 14.

5. What decrees may be executed. — See Section 38.

6. Who may apply for execution. — See O. 21 R. 11.

7. Against whom execution may be had. — See O. 21 R. 11.

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37. [S. 649, para. 2.] The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include, —

- (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and
- (b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

[1877, S. 649; 1859, S. 296.]

Synopsis

1. Legislative changes.
2. Scope and object of the Section.
3. Where the decree has been passed in the exercise of appellate jurisdiction.
4. Where the Court of first instance has ceased to exist.
5. Where the Court of first instance has ceased to have jurisdiction to execute the decree.

(²¹) AIR 1921 Sind 13 (15) : 15 Sind L R 11.
(Order for costs subsequent to decree.)

1a. (³⁴) AIR 1934 Bom 452 (457) : 59 Bom 10.
(Section applies to order on a notice of motion

passed by a chartered High Court.)

2. (²⁵) AIR 1925 All 457 (457).

3. (¹⁸) AIR 1918 Mad 389 (391) : 41 Mad 241.

Other Topics

Court of Wards. See Note 5 F-N (1).

"Court which passed a decree." See Note 2.

Decree for money. See Note 5 F-N (1).

"Deemed to include." See Note 2.

Distribution of business by District Judge. See Note 5 Pt. (4).

Transfer of area in which the judgment-debtor lives. See Note 5 Pt. (3).

Special class of persons—Jurisdiction over. See Note 5 Pt. (5).

1. Legislative changes.

1. The words "In relation to the execution of decrees" are new.
2. In clause (a) the words "has been passed in the exercise of appellate jurisdiction" have been substituted for the words "is passed in appeal."
3. In clause (a) the words "the Court of first instance" have been substituted for the words "the Court which passed the decree against which the appeal was preferred."

2. Scope and object of the Section. — Under Section 38 of the Code a decree

may be executed either —

1. by the Court which passed the decree, or

2. by the Court to which it is sent for execution. This Section defines the expression "Court which passed the decree" *as including* the Courts mentioned in clauses (a) and (b). The object of the Section is to avoid the cumbrous procedure which would result, if the Court which *actually* passed the decree be held to be the only Court which could execute it.¹ The word "include" shows that the definition is only in extension of the literal meaning of the expression and that it does not exclude the Court which *actually* passed the decree.² The following Courts thus fall under the definition :

- (1) The Court of first instance which *actually* passed the decrees.
- (2) The Court of first instance in the case of *appellate* decrees.
- (3) Where the Court of first instance has *ceased to exist*, the Court which would have jurisdiction to try the suit at the time of execution.
- (4) Where the Court of first instance has *ceased to have jurisdiction to execute* the decree, the Court which, at the time of execution, would have had jurisdiction to try the suit.

3. Where the decree has been passed in the exercise of appellate jurisdiction. — Under Section 649 para. 2 of the old Code, where a decree was passed in the exercise of *appellate* jurisdiction, the Court that could execute the decree was *the Court which passed the decree against which the appeal was preferred*. Thus, where a decree was passed in *second* appeal, the *first* Appellate Court was the Court to execute the decree. Under the present Section it is the Court of *first instance* that is to execute the decree. Even an appellate decree of the Privy Council should be executed only by the Court of first instance and not by the High Court to which the decree is transmitted by the Privy Council.¹

See also the undermentioned case.²

Section 37—Note 2

1. ('08) 35 Cal 974 (978).
2. ('20) AIR 1920 Mad 427 (433):42 Mad 821 (FB).
('32) AIR 1932 Mad 260 (262).
('01) 28 Cal 238 (241).
('88) 15 Cal 667 (669).

('81) 6 Cal 513 (518).

Note 3

1. ('14) AIR 1914 Mad 222 (224) : 38 Mad 832.
2. ('36) AIR 1936 Oudh 5 (6) : 11 Luck 511.
(Application under Ss. 5 and 30 of the United Provinces Agriculturists Relief Act 27 of 1934
—Application must be made to Court of first

4. Where the Court of first instance has ceased to exist. — A Court ceases to exist —

(1) if it is *abolished*.¹ But it can be revived² and on such revival becomes again the same Court which passed the decree, and cannot be taken to have ceased to exist.³

(2) if a special jurisdiction vested in it has been withdrawn after decree.^{3a}

Thus, a Court vested with the powers of a Court of Small Causes ceases to exist as a Court of Small Causes when those powers are withdrawn.⁴

A Court does not cease to exist for the purposes of this Section —

(1) by ceasing to have *local* jurisdiction after decree,⁵

(2) by the *pecuniary* limits of its jurisdiction being altered,⁶

(3) by getting a different *designation* though with the same local and pecuniary jurisdiction,⁷

(4) by a *different officer* presiding over it,⁸

(5) by a removal of its *headquarters* to another place within the same jurisdiction.⁹

5. Where the Court of first instance has ceased to have jurisdiction to execute the decree.—It is a general principle of law that when once a Court gets jurisdiction to entertain a suit it does not ordinarily lose such jurisdiction by reason of subsequent events.¹ Thus, it does not cease to have jurisdiction by reason of the following facts :

(1) The transfer to a different Court by the local Government of the property in respect of which the decree was passed² or the area in which the judgment-debtor lives,³ or

(2) the transfer by the District Judge of the business of the Court to another Court.⁴

instance and the words 'Court which passed the decree' must be interpreted in the same way as in this Section.)

Note 4

1. ('81) 6 Cal 513 (518).

('67) 7 Suth W R 124 (125).

2. ('26) AIR 1926 Pat 209 (210): 4 Pat 688.

3. ('26) AIR 1926 Pat 209 (210): 4 Pat 688.

3a. See ('19) AIR 1919 Pat 237 (238). (Court invested with the power of a "Court" under the Land Acquisition Act.)

4. ('96) 19 Mad 445 (447, 448).

5. ('81) 6 Cal 513 (515).

('01) 28 Cal 238 (240, 241).

6. ('16) AIR 1916 Pat 3 (3) : 2 Pat L Jour 113.

7. ('15) AIR 1915 Oudh 170 (170). (Munsif's Court substituted for Sub-Judge's Court.)

8. ('26) AIR 1926 Pat 209 (210) : 4 Pat 688.

9. ('81) 6 Cal 513 (515, 519). (Though it may thereby have ceased to have jurisdiction to execute the decree.)

Note 5

1. ('86) 10 Bom 200 (202). (Decree for money—Amount due under decree increased by accumulation of interest, beyond the pecuniary limits of the jurisdiction of the Court—It does not cease to have jurisdiction.) (1800) 6 Bom 582 (583). (Do.)

('14) AIR 1914 Bom 180 (181) : 38 Bom 662. (It was argued that Court which passed a decree "ceases to have jurisdiction to execute it" because after the passing of the decree a party (e. g., Court of Wards) is added in execution who had been a party when the suit, wherein the decree was passed, was instituted would have deprived the Court of its jurisdiction—*Held* that notwithstanding the fact the Court could proceed with execution.) ('33) AIR 1933 Cal 684 (687).

('33) AIR 1933 Lah 687 (687) : 14 Lah 457. (Mortgage decree for sale in respect of properties both within and without jurisdiction—Court has jurisdiction to sell in execution properties outside jurisdiction.)

('16) AIR 1916 Pat 3 (3) : 2 Pat L Jour 113. (Specially empowered Munsif of Court A passing decree for over Rs. 1000—Succeeding Munsif having jurisdiction up to Rs. 1000 does not lose jurisdiction to execute the decree passed by his predecessor.)

See also Note 8 to Section 17.

2. ('07) 30 Mad 537 (539).

See also the cases in Footnote (7) below.

3. See the cases in Footnote (7) below.

4. ('98) 25 Cal 315 (316, 319).

(1900) 27 Cal 272 (274, 275).

('25) AIR 1925 Cal 679 (680).

But where the Political Agent at Kolhapur who had jurisdiction only over *Sirdars* passed a decree against a *Sirdar* and the latter thereafter died leaving heirs who were *not Sirdars*, it was held that the Political Agent's Court "ceased to have jurisdiction to execute" the decree.⁵ In the undermentioned case^{5a} it was held by the Madras High Court, on a consideration of the Government notifications relating to the question, that on the Court of the Subordinate Judge of Berhampore becoming a Court within the jurisdiction of the newly constituted Province of Orissa, it ceased to have jurisdiction to execute a decree passed by it while it had been in the Presidency of Madras but that the Court did not cease to *exist*. In *Latchman Pundeh v. Maddan Mohan Shye*⁶ it was held that the expression "ceased to have jurisdiction to execute" was intended to "meet such a case as the following : for example, where an Additional or Subordinate Judge attached to more than one district, having passed a decree in one district, leaves this district and sits in another district under the provisions of Section 15 of the Bengal Civil Courts Act, such Additional or Subordinate Judge is a Court. Where such a Court is sitting in a district other than that in which the decree was passed, it has not ceased to *exist*, but it has *ceased to have jurisdiction to execute* that particular decree."

It is now settled by a consensus of judicial opinion that where a decree is passed in respect of a certain property and subsequent thereto the area within which such property is situate is transferred to the jurisdiction of another Court, the Court *which actually passed the decree* nevertheless does not cease to have jurisdiction to execute it and can therefore *entertain an application* for execution thereof.⁷ But there is a difference of opinion as to whether it could *sell the property* which is situate outside the local limits of its jurisdiction.⁸

(95) 22 Cal 871 (874, 875).

(21) AIR 1921 Pat 152 (154): 6 Pat L Jour 304.

5. ('93) 17 Bom 162 (164).

5a. ('39) AIR 1939 Mad 463 (464).

6. ('81) 6 Cal 513 (519).

7. ('25) AIR 1925 Bom 414 (414). (AIR 1920 Mad 427 (FB), approved.)

('34) AIR 1934 Pat 192 (194): 13 Pat 21.

('31) AIR 1931 Cal 312 (316, 317, 318): 58 Cal 832.

('08) 35 Cal 974 (978).

('01) 28 Cal 238 (240, 241).

('96) 20 Cal 105 (106).

('81) 6 Cal 513 (515, 519).

('35) AIR 1935 Mad 935 (935).

('20) AIR 1920 Mad 427 (433): 42 Mad 821 (FB). (This must be deemed to have overruled the decisions in AIR 1914 Mad 162; AIR 1915 Mad 602; AIR 1918 Mad 401; AIR 1917 Mad 257 in so far as they held that the original Court cannot even entertain an application for execution.)

('19) AIR 1919 Mad 192 (193): 42 Mad 461. (This was a case in which a mortgage decree was passed by a Court which had no territorial jurisdiction but which was established in aid of other Courts.)

('28) 107 Ind Cas 195 (197) (Nag).

('06) 9 Oudh Cas 281 (283).

8. ('08) 35 Cal 974 (978). (No. It should transfer

it to the proper Court.)

('93) 20 Cal 105 (106). (No. It should transfer the decree to the Court having jurisdiction.)

('90) 17 Cal 699 (703, 704) (FB). (No. In this case the facts show that the suit itself was instituted in a Court having no territorial jurisdiction.)

('88) 15 Cal 667 (669, 671). (Yes. In the case of mortgage decree the Court which actually passed the decree alone must execute it by sale of the properties.)

('81) 6 Cal 513 (515, 519). (No. Should not order sale but transfer it to Court having territorial jurisdiction.)

('27) AIR 1927 Mad 627 (629): 50 Mad 882. (No jurisdiction to sell—Case of a mortgage suit.)

('26) AIR 1926 Mad 421 (424): 49 Mad 746. (Yes. In the case of mortgage decrees, the Court which passed the decree can sell properties though transferred out of its jurisdiction.)

('24) AIR 1924 Mad 457 (457). (No. Transfer under S. 39 is obligatory.)

('20) AIR 1920 Mad 505 (506, 508): 43 Mad 135. (No. Transferee Court losing territorial jurisdiction.)

('17) AIR 1917 Mad 272 (273). (Suit for partition—It cannot execute the decree, but should transfer it to the Court having territorial jurisdiction.)

There is also a conflict of opinion as to whether, in the circumstances set forth above, *the Court to which the local area is transferred can also entertain an application to execute the decree*. The High Court of Calcutta⁹ has held that it can.

In *Seeni Nadan v. Muthusami*, A.I.R. 1920 Madras 427 (F. B.), Wallis, C. J., expressed an opinion (though it was *obiter*) that Section 150 of the Code conferred upon the Court of transfer jurisdiction to entertain an application for execution. This view has been adopted in the undermentioned decisions of the Madras High Court,^{9a} by the Oudh Judicial Commissioner's Court^{9b} and by the Bombay High Court also.¹⁰ On the other hand, it was held in later decisions of the Madras High Court¹¹ that the Court of the transferred area has no jurisdiction to entertain the application for execution. The difference of opinion is due to the different interpretations of Section 150, *infra*. See Notes to Section 150. It is respectfully submitted that this last view is correct. Under Section 37 (b) a "Court which passed a decree" will include a Court other than that which actually passed it, only where the latter ceases to exist or ceases to have jurisdiction to execute the decree. If the jurisdiction of the Court which actually passed the decree *does not cease* by reason of the property dealt with by it being transferred to the jurisdiction of another Court, the Court of the transferred area is not a "Court which passed the decree." Under Section 38 of the Code, a decree may be executed either by the "Court which passed the decree" or by the Court to which it is sent for execution. It follows, therefore, that the Court of the transferred area cannot entertain an application for execution of the decree. The mere fact that a temporary Court is established for a certain period and is thereafter continued cannot deprive that Court of its character of the Court which passed the decree. Hence, such Court has jurisdiction to entertain an application for the execution of the decree.^{11a}

Where the Court is one and the same but is presided over by several Judges, the decree passed by one can be executed by the other. Section 37 (b) does not apply to such a case.¹²

COURTS BY WHICH DECREES MAY BE EXECUTED

38. [S. 223, para. 1.] A decree⁵ may be executed² either by the Court which passed it,³ or by the Court to which it is sent for execution.⁴

Court by which decree
may be executed.

[1877, S. 223, para. 1; 1859, Parts of Ss. 285 and 286.]

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| ('30) AIR 1930 Oudh 305 (308, 309). (No.) | after transmission of decree.) |
| 9. ('81) 6 Cal 513 (515, 519.) | ('28) AIR 1928 Mad 746 (751). (Dissenting from A I R 1927 Mad 627; approved in A I R 1932 Mad 418 (SB).) |
| ('01) 28 Cal 238 (240, 241). (Distinguishing 25 Cal 315.) | ('35) AIR 1935 Mad 935 (935). |
| 9a. ('24) AIR 1924 Mad 32 (32). | [See also ('19) AIR 1919 Mad 192 (193) : 42 Mad 461.] |
| 9b. ('06) 9 Oudh Cas 281 (283). | 11a. ('35) AIR 1935 Mad 849 (849): 58 Mad 1009 |
| 10. ('25) AIR 1925 Bom 414 (414). | 12. ('19) AIR 1919 Pat 367 (369). |
| 11. ('32) AIR 1932 Mad 418 (419) : 55 Mad 801 (SB). (The transferee Court can execute only | |

Synopsis

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| <ol style="list-style-type: none"> 1. Scope and object of the Section. 2. "May be executed." See Note 3 to Section 36. 3. Court which passed the decree. See Section 37. 4. Powers of Court to which decree is sent for execution. See Sections 41 and 42 and Order 21 Rule 16. 4a. Powers of transferor Court after transfer of decree. See Notes to Section 42. 5. What decrees may be executed. 6. Territorial jurisdiction. 7. Pecuniary jurisdiction. 8. Executing Court, if can go behind decree. | <ol style="list-style-type: none"> 9. Executing Court may construe decree. 9a. Executing Court may declare decree to be incapable of execution. 9b. Power of executing Court to fix order in which mortgaged properties are to be sold. 9c. Power of executing Court under rent decree. 9d. Power of executing Court to enforce agreements between parties in course of execution proceedings. See Section 47 Note 41. 10. Simultaneous executions. 11. Execution proceedings and <i>res judicata</i>. |
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Other Topics

Inconsistent decisions in execution. See S. 11 Note 100 Pt. (3).
 Interest or mesne profits when added exceeding jurisdiction. See Note e7.
 Step-in-aid. See S. 48 Note 8 F-N (2).

1. Scope and object of the Section. — Under this Section a decree may be executed¹—

(a) by the "Court which passed the decree"^{1a} which is defined in Section 37, *ante*, or

(b) by the Court to which it is sent for execution — See Section 39.

A Court which is neither the Court which passed the decree nor the Court to which the decree is transferred for execution cannot, as a general rule, execute the decree.^{1aa} There are, however, some exceptions. A decree may be executed also by the Court to which the execution proceedings may be transferred under the provisions of Section 24.² Again, it has been held by the Patna High Court in the undermentioned case³ that where there are two independent Courts within the same territorial limits having *concurrent jurisdiction*, it is open to either of the Courts to execute the decree of the other. Under Section 63, where a property is attached in execution of decrees of more Courts than one, the Court of the highest grade is the Court by which the property should be sold. (See Section 63, Note 5.) Under O. 21 R. 16 an application for execution by the transferee of a decree can be made only to the Court which passed the decree. (See O. 21 R. 16, Note 12.)

Where a Court has, at the time of the presentation of an execution petition, no jurisdiction over it or could only exercise its jurisdiction irregularly, the Court is not bound to dismiss the execution petition if it afterwards obtains jurisdiction.⁴

Sections 38, 39, 41, 42, 45 and 46 of the Code apply to the Arakan Hills. See the Arakan Hills District Laws Regulation I of 1916, Schedule I.

Section 38 — Note 1

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| <ol style="list-style-type: none"> 1. ('12) 35 Mad 588 (590).
('22) AIR 1922 Nag 189 (191). 1a. ('35) AIR 1935 Mad 849 (850); 58 Mad 1009.
(Temporary Court established for one year and continued thereafter — Its character as Court passing the decree is not lost and it can execute the decrees passed by it in the previous year.) 1aa. ('36) AIR 1936 Pat 615 (616) : 15 Pat 439. 2. ('25) AIR 1925 All 276 (277); 47 All 57. | <ol style="list-style-type: none"> ('95) 22 Cal 871 (874). (Jurisdiction conferred on a Court by an order of transfer under Sec. 24, C. P. Code, transferring the suit for trial to it does not necessarily terminate as soon as the decree is passed.)
[See ('81) 5 Bom 680 (681). (Held that District Judge has power to withdraw an application for execution of a decree.)] 3. ('19) AIR 1919 Pat 367 (369).
[See also ('09) 4 Ind Cas 510 (511) (Cal). ('35) AIR 1935 Pat 468 (469).] 4. ('34) AIR 1934 Mad 283 (286) : 57 Mad 795. |
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2. "May be executed."—See Note 3 to Section 36.

3. Court which passed the decree.—See Section 37.

4. Powers of Court to which decree is sent for execution. — See Sections 41 and 42 and O. 21 R. 16.

4a. Powers of transferor Court after transfer of decree. — See Notes to Section 42.

5. What decrees may be executed. — Where a decree is *reversed* or *modified* or *affirmed* on appeal, the only decree capable of execution is the appellate decree.¹ In exceptional cases, however, where the appellate judgment does not even affirm the decree of the lower Court, but *simply dismisses* the appeal, the general rule that the appellate decree alone is the one to be executed does not apply and the Courts should allow execution of the decree of the original Court.²

Where the appellate decree affirms the lower Court's decree with all its specifications, it would be competent to the executing Court to look at the latter decree for information as to its contents.³ But it is always desirable that the appellate decree should embody so much of the lower Court's decree as it is intended to affirm, as this avoids the necessity for reference to the superseded decree.⁴⁻⁶

A purely declaratory decree is not capable of execution and a decree originally capable of execution may also subsequently become incapable of execution.⁷ The question whether a decree is executable has to be settled primarily upon the form or the

Note 5

1. ('33) AIR 1933 Lah 859 (859). (Preliminary and final decree obtained.—Final decrees sought to be executed.—Preliminary decree modified in appeal by a compromise — Original final decree is not executable and a fresh final decree must be obtained.)
(72) 14 Moo Ind App 465 (491) (P O).
(01) 23 All 152 (158): 27 Ind App 209 (P O). (Appeal to Privy Council.—Decree to be executed is that of the Privy Council.)
(98) 20 All 493 (495).
(91) 13 All 394 (395).
(89) 11 All 346 (347).
(89) 11 All 314 (318) (FB).
(89) 11 All 267 (274) (FB).
(82) 4 All 376 (379) (FB).
(30) AIR 1930 Bom 225 (227). (Cases turning on limitation cited.)
(14) AIR 1914 Bom 132 (134) : 39 Bom 175.
(98) 22 Bom 500 (506).
(95) 19 Bom 258 (260).
(30) AIR 1930 Cal 308 (310).
(17) AIR 1917 Cal 417 (419). (Dismissal under O. 41 R. 11.)
(18) AIR 1918 Cal 133 (134).
(98) 25 Cal 311 (313). (But where appellate decree simply dismisses lower Court's decree, time for redemption fixed by latter not extended.—Obiter.)
(95) 22 Cal 467 (472).
(93) 20 Cal 551 (556). (Appeal to Privy Council — Decree to be executed as that of the Privy Council.)
(82) 8 Cal 218 (224) (FB).
(75) 23 Suth W R 57 (58).

- (71) 7 Beng L R 704 (714) (F B).
(06) 1906 Pun Re No. 48, p. 172 (179, 184).
(92) 15 Mad 170 (171).
(31) AIR 1931 Pat 27 (29) : 9 Pat 829. (Application to execute trial Court's decree mentioning affirmance on appeal — Sufficient compliance.)
(18) AIR 1918 Pat 260 (261) : 3 Pat L Jour 116. (Appeal to Privy Council.—Decree to be executed as that of the Privy Council.)
[See ('33) AIR 1933 P C 68 (70): 60 Cal 662: 60 Ind App 83 (P O).
(12) 14 Ind Cas 299 (300) : 39 Cal 925.]
2. ('21) AIR 1921 Low Bur 37 (42): 11 Low Bur Rul 163.
(14) AIR 1914 P C 65 (66) : 36 All 284 : 41 Ind App 104 (P O). (Dismissal for default of prosecution.)
(14) AIR 1914 PC 66 (67): 36 All 350 (PC). (Do.)
(91) 15 Bom 370 (373). (Appeal withdrawn — Original decree alone can be executed.)
(24) AIR 1924 Cal 830 (832) : 51 Cal 715. (Dismissal for default of prosecution.)
(17) AIR 1917 Cal 728 (730): 44 Cal 954. (Do.)
(69) 4 Mad H C R 32 (39). (Do.)
3. ('84) 6 All 48 (49).
(82) 4 All 376 (378) (F B).
(85) 7 All 366 (368, 369).
(83) 5 All 589 (590). (Costs of lower Court awarded although not specified in appellate decree.)
- 4-6. ('73) 10 Beng L R 101 (114): 14 Moo Ind App 465 (P O).
7. ('13) 19 Ind Cas 375 (376) (All). (Where a decree gives a life estate to A and he dies before execution is taken out, it becomes incapable of execution.)

language of the decree itself. The test to ascertain whether a decree is executable is whether there is a direct and definite order to a definite person to do or to refrain from doing a definite thing.^{7a}

Every decree to be executed must, as a rule, be a *subsisting* decree.⁸

6. Territorial jurisdiction. — As a general rule territorial jurisdiction is a condition precedent to a Court executing a decree,^{1a} and neither the Court which passed the decree¹ nor the Court to which it is sent for execution² can execute it in respect of property lying outside its territorial jurisdiction. To this rule, however, there are certain exceptions :

1. Where the suit is instituted, under Section 17 of the Code, in Court *A* in respect of properties situated within the jurisdiction of Courts *A* and *B*, the decree passed in the suit can be executed by Court *A* even in respect of properties situated within the jurisdiction of Court *B*. The reason is that where a Court has *acquired* jurisdiction in a suit, such jurisdiction will *continue* in execution proceedings also.³ Court *A* can also send the decree for execution to the Court *B* and the latter Court can then execute the decree against such property.⁴

2. Where subsequent to the passing of a decree by Court *A* in respect of certain properties, the territory within which such properties are situate is transferred to the jurisdiction of Court *B*, Court *A*, nevertheless, does not cease to have jurisdiction to execute the decree and can *entertain an application* for execution.⁵ There is a conflict of opinion whether it could *sell* the property or order its delivery to the decree-holder.⁶

('34) AIR 1934 Cal 402 (404) : 61 Cal 148.

('95) 19 Bom 546 (549). (Decree superseded by agreement—No execution.)

('95) 22 Cal 903 (908). (Decree creating charge—Remedy by way of suit.)

('95) 22 Cal 859 (863, 864). (Do.)

('98) 2 Cal W N 33 (33). (Do.)

('21) AIR 1921 Lah 376 (377).

('82) 4 Mad 219 (220). (Decree incapable of execution.)

('07) 2 Mad L Tim 94 (95). (Declaratory decree incapable of execution.)

('26) AIR 1926 Nag 158 (160) : 21 Nag L R 148. (Part capable of execution if independent, is executable.)

('34) AIR 1934 Pesh 3 (4). (The insertion of a clause that decree may be executed cannot change its nature.)

[See also ('80) 5 Cal L Rep 176 (178).]

7a. ('34) AIR 1934 Mad 680 (680, 681).

8. ('03) 30 Cal 718 (721).

('06) 29 Mad 175 (176). (Attachment when ex parte decree had been set aside—Void.)

('33) AIR 1933 Lah 859 (859). (Preliminary decree and final decree—Appeal from preliminary decree and compromise modifying such decree—Final decree as such cannot be executed unless fresh final decree is obtained.)

Note 6

1a. ('29) AIR 1929 Lah 645 (646).

1. ('29) AIR 1929 Cal 818 (818) : 57 Cal 67.

('81) 7 Cal 410 (412).

('30) AIR 1930 Cal 502 (503) : 57 Cal 964. (Rule has primary reference to execution as defined in S. 51 (b) and not applicable to sales by receivers.)

('11) 11 Ind Cas 417 (418) : 39 Cal 104.

('91) 18 Cal 526 (530).

('90) 17 Cal 699 (703) (F B).

(1862) 1 Hyde 136 (139).

('32) AIR 1932 Pat 148 (149) : 11 Pat 473.

2. ('20) AIR 1920 Mad 505 (506) : 43 Mad 135.

('18) AIR 1918 Mad 17 (17).

[But see ('38) AIR 1938 Pat 237 (238).]

3. ('87) 14 Cal 661 (668). (Suit on mortgage.)

('92) 19 Cal 13 (15). (Do.)

('39) AIR 1939 Cal 403 (409). (Mortgagedecree for sale—S. 39 does not compel transfer of decree.)

('94) 21 Cal 639 (641). (Suit on mortgage.)

('16) AIR 1916 Mad 632 (632).

('28) 107 Ind Cas 195 (197) (Nag). (Where business of Court transferred under S. 150.)

('25) AIR 1925 Pat 139 (139, 140). (Suit on mortgage.)

[See also ('02) 1902 Pun Re No. 8, p. 30 (35).]

4. ('18) AIR 1918 Lah 63 (64) : 1918 Pun Re No. 43.

5. See Note 5 to S. 37, particularly cases in footnote (7).

[See also ('35) AIR 1935 Mad 935 (935).]

6. See note 5 to S. 37, particularly cases in footnote (8).

3. Where a single revenue-paying estate is situate within the jurisdiction of Court A and of Court B, Court A can execute a decree for money passed by it by attachment and sale of the whole property.⁷

4. The salary of a public officer or of a servant of a Railway Company or of a local body may be attached by a Court although the disbursing officer is outside the limits of its local jurisdiction.⁸

7. Pecuniary jurisdiction. — It has been observed in Section 6 *ante* that where a Court has jurisdiction at the time of the institution of a suit, it does not lose it by any change in the value of the subject-matter after the institution, and that it can pass a decree in such a suit for an amount even exceeding its pecuniary jurisdiction. It follows that the Court can execute the decree even when the decretal amount *plus* the interest or mesne profits exceeds the limits of its pecuniary jurisdiction.¹

But, can a Court to which a decree is sent for execution execute the decree if its value exceeds the limits of its pecuniary jurisdiction? No, according to Bombay,² Calcutta,³ Lahore,⁴ Patna,⁵ and Rangoon.⁶ Yes, according to Madras.⁷ The ground on which the Madras decisions proceed is that in the classes of cases mentioned in Section 223 of the old Code (now Section 39), a *special and extraordinary* jurisdiction is created in the Court to which the decree is sent for execution and this is inferred mainly from the fact that sub-section (2) mentions that when a Court of its *own motion* sends a decree for execution to another Court, the latter must be a Court of *competent* jurisdiction whereas sub-section (1) does not say so.

8. Executing Court, if can go behind decree. — An executing Court cannot go behind the decree.¹ In other words, the jurisdiction of the Court executing a decree must be determined with reference to and is circumscribed by the directions contained

7. See O. 21 R. 3.

(1886) 12 Cal 307 (312).

(188) 12 Cal L Rep 404 (406).

(182) 8 Cal 703 (705).

[See also (178) 2 Cal L Rep 334 (336). (The sale of part of single taluq in two districts is void.)]

8. See O. 21 R. 48. (The decision in 1895 Pun Re No. 40, p. 165 decided under the old Code must be regarded as obsolete under the new Code.)

Note 7

1. (186) 10 Bom 200 (202).

(188) AIR 1933 Sind 128 (128). (Such a decree can be transferred for execution to another Court with like powers.)

(112) 15 Ind Cas 252 (254) : 40 Cal 56.

(194) 21 Cal 550 (554).

(139) AIR 1939 Rang 115 (117) : 1939 Rang L R 134.

2. (188) 12 Bom 155 (157).

3. (110) 37 Cal 574 (577).

(120) AIR 1920 Cal 275 (276).

(189) 16 Cal 465 (467).

(189) 16 Cal 457 (464).

4. (101) 1901 Pun Re No. 9, page 35 (39) (F B). (Overruling 1887 Pun Re No. 31.)

5. (122) AIR 1922 Pat 188 (189) : 1 Pat 651.

[See also (136) AIR 1936 Pat 177 (178). (The execution of a decree passed in a suit can only be carried out by a Court which is

competent to entertain the suit of the particular value.)]

6. (11) 12 Ind Cas 27 (28) (Rang).

7. (194) 17 Mad 309 (311, 312, 313).

(192) 15 Mad 345 (347).

(114) AIR 1914 Mad 206 (206).

(110) 5 Ind Cas 155 (155) (Mad).

(184) 7 Mad 397 (399).

Note 8

1. (112) 14 Ind Cas 506 (507) : 34 All 321.

(132) AIR 1932 Bom 483 (483). (Decree against father and sons without any restriction. Sons cannot in execution plead that execution against them must be restricted to their interest in the family property.)

(138) AIR 1938 P C 99 (100) : 32 Sind L R 401 (P C). (In execution proceedings, the question as to whether the view of the Court which passed the decree is right or wrong is no longer open.)

(135) AIR 1935 All 269 (271).

(133) AIR 1933 All 113 (114).

(131) AIR 1931 All 38 (40). (Decree on mortgage—Question as to legality of mortgage cannot be gone into in execution.)

(120) AIR 1920 All 129 (131) : 42 All 544. (But it can recognize a discharge subsequent to decree.)

(118) AIR 1918 All 96 (96) : 40 All 659.

(114) AIR 1914 All 230 (231).

(198) 1898 All W N 17 (17).

in the decree. It has no power to go behind it or question its legality or correctness.² This is based on the principle that a proceeding to enforce a judgment is *collateral*

- (32) AIR 1932 Bom 462 (463).
 ('22) AIR 1922 Bom 195 (196) : 46 Bom 243. (Objection that a defendant was not impleaded in appeal and as such decree could not be executed adversely to him does not lie.)
 ('03) 5 Bom L R 1036 (1040).
 ('87) 11 Bom 537 (539). (Decree against property—Personal execution cannot be taken.)
 ('26) AIR 1926 Cal 109 (110).
 ('15) AIR 1915 Cal 122 (123).
 ('12) 15 Ind Cas 735 (738) (Cal). (A term of compromise not embodied in decree—Execution only as decree stands.)
 ('08) 8 Cal L Jour 20 (25). (Objection that property in a mortgage decree for sale does not belong to the judgment-debtor—Invalid.)
 ('04) 31 Cal 179 (182). (Pre-decree agreement cannot be set up in answer to execution.)
 ('36) AIR 1936 Lah 704 (704) : 17 Lah 187. (Decree against all defendants—Objection by one of the defendants that he is not personally liable cannot be entertained by the executing Court.)
 ('35) AIR 1935 Lah 549 (550). (Mortgaged decree regarding certain property against father—Sons cannot object that the property was their personal property and not liable under the mortgage by the father.)
 ('31) AIR 1931 Lah 545 (545). (Same point as in AIR 1932 Lah 529).
 ('32) AIR 1932 Lah 529 (530). (Decree ordering sale of property—Plea in execution that land being that of agriculturist cannot be sold by virtue of the provisions of Punjab Alienation of Land Act cannot be taken, but see however AIR 1933 Lah 397 (399).)
 ('26) 99 Ind Cas 999 (1000) (Lah).
 ('88) AIR 1938 Mad 809 (809). (Decree not showing minor as not properly served—Decree must be executed as it stands.)
 ('37) AIR 1937 Mad 134 (136) : I L R (1937) Mad 329. (Decree for sale of mortgaged property—Judgment-debtor alleging that property is not liable to sale being inalienable—Executing Court is not entitled to enquire into plea—AIR 1935 Mad 647, Reversed.)
 ('38) AIR 1938 Mad 175 (176). (Personal decree against one member of a Hindu family—No decree against others—Decree-holder cannot prove in execution that the decree was against the defendant as manager.)
 ('32) AIR 1932 Mad 557 (558). (Terms of compromise in compromise decree beyond scope of suit—Plea of non-executability cannot be raised in execution—Appeal against decree is remedy.)
 ('25) AIR 1925 Mad 270 (271).
 ('20) AIR 1920 Mad 183 (187) : 43 Mad 786.
 ('06) 29 Mad 314 (317).
 ('02) 25 Mad 537 (539).
 ('01) 24 Mad 665 (669).
 ('93) 3 Mad L Jour 220 (221).
 ('25) AIR 1925 Nag 361 (362).
 ('32) AIR 1932 Pat 184 (185). (Decree giving personal relief against defendant—He cannot plead in execution that there is no personal liability.)
 2. ('28) 1928 Mad W N 227 (227). (e. g. on the ground of want of proper representation of minor.)
 ('32) AIR 1932 Cal 517 (520). (Decree ordering sale—Saleability of the properties cannot be questioned in execution—Remedy is appeal against decree.)
 ('38) AIR 1938 P C 93 (100) : 32 Sind L R 401 (P C).
 ('37) AIR 1937 All 518 (514).
 ('39) AIR 1933 All 649 (652) : 55 All 775. (Part of compromise not relating to suit but Court holding that it relates to suit and passing decree thereon—Decree is not a nullity and cannot be questioned in execution.)
 ('31) AIR 1931 All 746 (747). (Executing Court cannot refuse to execute on ground of some irregularity committed in the suit before the decree was passed.)
 ('15) AIR 1915 All 57 (58) : 37 All 278.
 ('98) 20 All 337 (338, 339).
 ('70) 6 N W P H C R 98 (98, 99). (It cannot be seen whether a minor was or was not properly represented.)
 ('07) 1907 All W N 286 (286).
 ('35) AIR 1935 Bom 95 (96). (Decree against property—Contention that it cannot be sold in execution cannot be raised.)
 ('33) AIR 1933 Bom 298 (301, 302). (Party not making objection to recording of a compromise cannot in execution question the legality of the compromise.)
 ('21) AIR 1921 Bom 228 (228) : 45 Bom 503.
 ('35) AIR 1935 Cal 631 (634) : 63 Cal 92.
 ('33) AIR 1933 Cal 496 (497, 498). (Executing Court cannot consider whether the decree as it stands is defective or faulty.)
 ('33) AIR 1933 Cal 85 (89) : 60 Cal 191. (Decree against person under disability without proper representation cannot be challenged on that ground in execution.)
 ('25) AIR 1925 Cal 203 (203). (Objection that the decree sought to be executed was passed against a wrong person.)
 ('20) AIR 1920 Cal 103 (104).
 ('17) AIR 1917 Cal 844 (845) : 44 Cal 627. (e. g. an objection, that it was passed against a lunatic or minor not properly represented.)
 ('15) AIR 1915 Cal 122 (123).
 ('10) 8 Ind Cas 26 (28) (Cal). (Objection that a decree was passed against an infant represented by his mother as his guardian ad litem in contravention of O. 32 R. 4.)
 ('02) 6 Cal W N 796 (798).
 ('34) AIR 1934 Lah 438 (439) : 15 Lah 772.
 ('33) AIR 1933 Lah 46 (46). (Award made rule of Court—Decree not a nullity on the face of it—Executing Court cannot go behind decree.)

to the judgment, and, therefore, no enquiry into its regularity or validity can be permitted in such a proceeding.³ It follows that the executing Court must execute the decree as it stands and according to its terms.⁴ It cannot enter into a criticism of the

- ('32) AIR 1932 Lah 534 (534) : 14 Lah 6.
 ('32) AIR 1932 Lah 529 (530). (Plea that property being of an agriculturist cannot be sold, cannot be raised for first time in executing Court when decree orders sale of that property.)
 ('26) 99 Ind Cas 535 (536) : 27 Pun L R 750 (751). (Execution of award — Validity of award, if can be gone into.)
 ('24) AIR 1924 Lah 448 (448) : 5 Lah 54. (A minor not properly represented.)
 ('20) AIR 1920 Lah 79 (80). (But executing Court must decide about executability of decree.)
 ('13) 1913 Pun Re No. 68, page 254 (256).
 ('38) AIR 1938 Mad 144 (144). (Final decree providing for sale of a particular item to discharge prior mortgage debt—Executing Court cannot question such direction.)
 ('35) AIR 1935 Mad 598 (599).
 ('34) AIR 1934 Mad 40 (44) : 57 Mad 426. (Executing Court cannot refuse to execute award under the Co-operative Societies Act unless it is apparent on the face of it that it is passed without jurisdiction.)
 ('33) AIR 1933 Mad 197 (198).
 ('16) AIR 1916 Mad 20 (22) : 39 Mad 570.
 ('82) 4 Mad 324 (325). (Objection that suit was not sustainable cannot be taken.)
 ('37) 20 Nag L Jour 6 (7). (Court executing award cannot question correctness of award.)
 ('18) AIR 1918 Oudh 105 (108).
 ('36) AIR 1936 Pat 93 (95) : 15 Pat 51. (Court executing final decree cannot investigate whether application for final decree was time barred.)
 ('34) AIR 1934 Pat 426 (427).
 ('34) AIR 1934 Pat 203 (204) : 13 Pat 17. (Compromise decree—Objection as to one of the terms being outside the scope of the suit cannot be entertained by executing Court—Remedy is by way of review or appeal.)
 ('33) AIR 1933 Pat 161 (163) : 12 Pat 77. (Where Court passing mortgage decree definitely lays down order in which properties are to be sold, executing Court cannot ignore this order and change it.)
 ('32) AIR 1932 Pat 237 (238).
 ('32) AIR 1932 Pat 184 (185).
 ('29) 118 Ind Cas 143 (144) (Pat).
 ('25) AIR 1925 Pat 516 (517). (Objection that suit was not sustainable cannot be taken.)
 ('17) AIR 1917 Pat 140 (141). (e. g. an objection that it was passed against a lunatic or minor not properly represented—Lunatic.)
 ('16) AIR 1916 Low Bur 36 (36).
 ('33) AIR 1933 Sind 130 (131).
 ('11) 11 Ind Cas 192 (195) : 5 Sind L R 71. Cf. foot-note (19) *infra*.
 ('17) AIR 1917 Cal 844 (847) : 44 Cal 627.
 ('98) 20 All 397. (399).
 ('84) 7 All 194 (196). (Cannot execute before the period fixed in the decree.)
 ('35) AIR 1935 All 359 (360). (Decree against minor plaintiffs—Guardian of the minor not shown in decree as party—Decree cannot be executed against the guardian.)
 ('34) AIR 1934 All 793 (794). (Suit between trustee and stranger—Decree granting costs against trustee—No direction how to be executed—Trustee personally liable.)
 ('33) AIR 1933 All 743 (744). (Execution Court cannot consider language of preliminary decree if it is at variance with final decree, and cannot order sale of entire mortgaged property when decree directs sale of only half of the mortgaged property.)
 ('22) 67 Ind Cas 753 (753, 754) (All).
 ('15) AIR 1915 All 57 (58) : 37 All 278.
 ('70) 2 N W P H C R 59 (60). (Allowing payment in instalments.)
 ('83) 5 All 53 (54). (Whether the decree contained a direction for mesne profits or whether the payments made right or wrong could not be considered.)
 ('32) AIR 1932 Bom 462 (463). (Decree against defendants 1 and 2 only—Executing Court must execute it against defendants 1 and 2 and not against defendant 3.)
 ('87) 11 Bom 537 (539). (As where it directed the recovery of the money from the property mortgaged.)
 ('82) 1882 Bom P J 284 (284). (Objection that property in a mortgage decree for sale cannot be sold does not lie in execution.)
 ('70) 13 Suth W R 123 (124).
 ('34) AIR 1934 Lah 438 (439). (Decree directing sale of mortgaged property—Executing Court cannot refuse to sell.)
 ('34) AIR 1934 Lah 115 (116) : 15 Lah 326. (Decree for payment of money—Judgment-debtor cannot in execution prove that he was sued only as member of joint family and was minor when debt was contracted.)
 ('22) 67 Ind Cas 740 (740) (Lah).
 ('26) AIR 1926 Mad 1144 (1144). (Question of marshalling decided in judgment cannot be re-opened in execution.)
 ('26) AIR 1926 Mad 113 (113). (Objection that execution cannot proceed against certain assets liable under decree does not lie.)
 ('21) AIR 1921 Mad 85 (86).
 ('16) AIR 1916 Mad 795 (798).
 ('14) AIR 1914 Mad 170 (170). (Cannot refuse execution against person when decree directs.)
 ('87) 10 Mad 283 (288).
 ('86) 9 Mad 80 (82).
 ('15) AIR 1915 Oudh 142 (143). (Can entertain an objection impugning the right of the decree-holder to proceed against any property other than that charged in the decree.)

decree,⁵ or give relief against its rigour,⁶ or add to or alter the decree⁷ even in the light of subsequent events,^{7a} or correct errors,⁸ or grant a relief not contemplated by the decree,⁹ such as allowing costs or interest or mesne profits,¹⁰ or question the right

- (‘37) AIR 1937 Pat 618 (619).
 (‘25) AIR 1925 Sind 318 (319). (Partition cannot be ordered in execution where decree granted only declaration.)
 (‘10) 10 Ind Cas 975 (976, 977): 4 Sind LR 244.
 [See also (‘36) AIR 1936 Lah 448 (449).]
5. (‘87) 11 Bom 528 (532).
 (‘24) AIR 1924 Nag 378 (381).
6. (‘01) 28 Cal 353 (361): 28 Ind App 57 (P C).
 (‘32) AIR 1932 Pat 237 (238). (Decree granting interest — Executing Court cannot refuse interest.)
 (‘93-1900) 1893-1900 Low Bur Rul 375.
 (‘35) AIR 1935 Sind 140 (141). (Decree allowing instalments made rule of Court—Execution Court cannot grant relief by allowing further instalments.)
7. (‘74) 24 Suth W R 193 (195): 2 Ind App 219 (P C).
 (‘33) AIR 1933 Pat 161 (163): 12 Pat 77. (Mortgage decree laying down order in which properties are to be sold—Executing Court cannot sell the properties in a different order.)
 (‘22) AIR 1922 All 27 (28): 44 All 350.
 (‘19) AIR 1919 All 193 (194): 41 All 517.
 (‘15) AIR 1915 All 238 (234). (Even if the decree is ambiguous.)
 (‘69) 1 N W P H C R 193 (199).
 (‘09) 2 Ind Cas 296 (297) (Bom). (Adding to.)
 (‘05) 29 Bom 79 (81). (Cannot order court-fee not required in decree.)
 (‘02) 26 Bom 707 (710).
 (‘91) 15 Bom 644 (646). (Enlarging time for payment by allowing further time under preliminary decree.)
 (‘83) 13 Bom 106 (109). (Extension of period of redemption.)
 (1864) 2 Bom H C R A C 101 (103).
 (‘35) AIR 1935 Cal 619 (620): 63 Cal 181. (Where the executing Court and the Court which passed the decree are one and the same, the Court can amend the decree in the course of the execution.)
 (‘35) AIR 1935 Cal 245 (246).
 (‘34) AIR 1934 Cal 793 (794).
 (‘26) 97 Ind Cas 576 (576) (Cal). (Agreement contemporaneous with decree not to execute decree cannot be pleaded in execution.)
 (‘22) AIR 1922 Cal 311 (313).
 (‘17) AIR 1917 Cal 288 (289). (Or amend.)
 (‘12) 15 Ind Cas 719 (720) (Cal).
 (‘01) 28 Cal 353 (361): 28 Ind App 57 (P C).
 (‘82) 8 Cal 332 (336): 9 Ind App 1 (P C).
 (‘78) 3 Cal 161 (170, 171): 4 Ind App 137 (P C).
 (‘71) 16 Suth W R 275 (275). (Even by consent of parties.)
 (‘68) 9 Suth W R 387 (388). (Alteration in amount of the decree.)
 2 Hay 113: Marsh 244. (Alter amount.)
 (‘27) AIR 1927 Lah 894 (895). (Execution against person cannot be denied contrary to decree.)
- (‘13) 18 Ind Cas 48 (49): 1913 Pun Re No. 68. (Fixing period for redemption not fixed in decree.)
 (‘37) AIR 1937 Mad 109 (109): 1936 Mad WN 1375 (1376). (Decree silent about interest—Agreement to pay interest in execution — Executing Court cannot enquire into such agreement and modify the decree.)
 (‘35) AIR 1935 Mad 429 (430).
 (‘34) AIR 1934 Mad 40 (42, 44): 57 Mad 426. (Registrar of Co-operative Societies is a Court — Executing Court cannot refuse to execute the award nor could it amend it in any way.)
 (‘87) 10 Mad 288 (288). (Cannot extend scope of decree.)
 (‘37) AIR 1937 Nag 120 (121): I L R (1937) Nag 344.
 (‘24) AIR 1924 Oudh 434 (435): 21 Oudh Cas 218. (Or amend by directing a set-off.)
 (‘16) AIR 1916 Oudh 338 (339). (Cannot add premia paid by decree-holder after decree to a Fire Insurance Co. to save the property.)
 (‘26) AIR 1926 Pat 411 (412).
 (‘24) AIR 1924 Pat 263 (264): 3 Pat 221. (Decree for sale—Executing Court cannot require surrender of possession before ordering execution.)
 (‘09) 3 Sind LR 197 (139): 4 Ind Cas 479 (480).
 [See (‘97) 19 All 480 (481).]
 (‘33) AIR 1933 Cal 627 (629): 60 Cal 753. (Executing Court and Court passing decree same—Amendment made by Court not objectionable.)
 (‘24) AIR 1924 Nag 419 (421): 22 Nag L R 121.]
- 7a. (‘16) AIR 1916 Cal 923 (923).
 (‘68) 10 Suth W R 95 (96).
8. (‘69) 1 N W P H C R 168 (170).
 (‘70) 2 N W P H C R 164 (165).
 (‘86) 8 All 377 (380). (No power to amend.)
 (‘22) AIR 1922 Mad 186 (186). (No power even to amend obvious error in the decree.)
 (‘35) AIR 1935 Oudh 57 (58): 10 Luck 503.
9. See cases in foot-note (10) below.
 (‘26) 94 Ind Cas 212 (212) (Lah).
 (‘35) AIR 1935 All 186 (187). (The Court has no jurisdiction to make any inquiry in execution as to the amount of prospective damages after the case has been decreed. The fact that the decree directs that the matter would be taken up in execution proceedings cannot invest the execution Court with jurisdiction which is not given to it by the Code or by any other law and therefore the execution Court is barred from adopting that procedure.)
10. (‘22) AIR 1922 All 27 (28): 44 All 350. (Award of costs not in decree.)
 (‘77) 3 Cal 161 (171): 4 Ind App 137 (P C). (Costs.)
 (‘81) 8 Cal 332 (335, 336): 9 Ind App 1 (P C). (Interest on mesne profits.)

of the person whose name is on the record to execute the decree.¹¹ Nor can it go into the question whether the decree was a valid one¹² or was obtained by fraud.¹³

But, can an executing Court question the *jurisdiction* of the Court which passed the decree? The question depends again upon another question, whether the executing Court is the *very Court* which passed the decree, or one to which the decree has been *transferred* for execution. Under Section 225 of the old Code corresponding to O. 21 R. 7, it was held in some cases that *the Court to which a decree was sent for execution* was not precluded from entertaining any objection as to the jurisdiction of the Court which passed the decree.¹⁴ The words "or of the jurisdiction of the Court which passed it" which occurred in Section 225 have now been omitted in O. 21 R. 7. It has now been held that the result of this omission is that the *transferee* Court cannot question the jurisdiction of the transferor Court which passed the decree.^{14a}

But where the execution Court is the very Court which passed the decree, the answer must depend upon general principles of law as modified by legislative enactments, if any. It is a general principle of law that where a Court has no jurisdiction over a litigation, its judgments and orders, however precisely certain and technically correct, are merely nullities and can be declared to be void by *every Court* in which they may be presented.¹⁵ As seen in Note 1 to Section 21, there are two legislative exceptions to this rule, the first, with reference to the *pecuniary* jurisdiction,¹⁶ and the

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- (75) 24 Suth W R 193 (195) : 2 Ind App 219 (PC). (Interest not awarded in decree.)
 ('71) 16 Suth W R 802 (303). (Interest on costs when not mentioned in the decree.)
 ('70) 13 Suth W R 11 (13).
 ('17) AIR 1917 Mad 212 (213). (Ascertaining the amount due to a puisne mortgagee who did not defend the suit.)
 ('83) 5 All 53 (54). (Mesne profits.)
 ('25) AIR 1925 Pat 807 (809, 810) : 4 Pat 440. (Future interest.)
11. See O. 21, R. 16.
 (1900) 27 Cal 488 (491).
 ('74) 21 Suth W R 219 (219, 220).
 ('74) 21 Suth W R 141 (142).
 ('71) 6 Beng L R App 66 (66).
 ('14) AIR 1914 Mad 222 (224) : 38 Mad 832. (Where the High Court transmits a decree of the Privy Council to the District Court the decree of which was appealed against, the District Court could recognize a transfer of the decree by permitting the transferee to execute it as the position of the District Court in the circumstances cannot be compared to that of Court executing transferred decrees.)
12. ('93) 15 All 334 (335).
 ('01) 23 All 181 (190) : 28 Ind App 35 (P O).
 ('37) AIR 1937 All 567 (568) : ILR (1937) All 761.
 ('31) AIR 1931 All 38 (40).
 ('24) AIR 1924 All 689 (689) : 46 All 571.
 ('87) 10 All 130 (132, 133).
 ('21) AIR 1921 Bom 301 (302). (Decree on award — Validity of award cannot be questioned.)
 ('96) 22 Bom 475 (479).
 ('87) 11 Bom 528 (532).
 ('66) 2 Bom H C R 103 (105). (It cannot see whether award of interest after decree is legal or not.)
 ('11) 10 Ind Cas 532 (534) (Cal).
 ('10) 8 Ind Cas 26 (28) (Cal).
- (06) 4 Cal L Jour 475 (475).
 ('04) 31 Cal 922 (927).
 ('02) 6 Cal W N 796 (798).
 ('79) 4 Cal L Rep 97 (98, 99).
 ('70) 13 Suth W R 312 (313).
 ('36) AIR 1936 Mad 618 (622, 623) : 59 Mad 642. (Validity of decree cannot be questioned in execution proceedings on the ground of guardian's interest being adverse to that of minor.)
 ('35) AIR 1935 Mad 236 (238) : 58 Mad 752.
 ('32) AIR 1932 Mad 7 (8). (Not to enquire if judgment-debtor was a lunatic not properly represented.)
 ('09) 32 Mad 429 (439).
 ('07) 30 Mad 402 (405).
 ('04) 28 Mad 26 (27, 28). (Validity of personal decree cannot be questioned.)
 ('96) 19 Mad 249 (253) : 23 Ind App 32 (P O).
 ('89) 12 Mad 503 (504). (It cannot see whether the compromise by minor was by leave of Court or not.)
 ('25) AIR 1925 Nag 377 (378).
 ('38) AIR 1938 Pat 594 (596).
 [See also ('36) AIR 1936 Lah 442 (442, 443). (Court executing award under Co-operative Societies Act cannot question validity of award.)]
13. ('91) 15 Bom 307 (308).
 ('86) 9 Mad 80 (82, 83).
 ('31) AIR 1931 All 92 (94) : 53 All 125. (Collusion.)
 ('06) 30 Bom 101 (107, 108).
 See however O. 21 R. 7.
14. For cases, see O. 21 R. 7, Note 4.
 14a. For cases, see O. 21 R. 7, Note 4.
 15. See Notes 3 to 5 of S. 9. Also Note 1 to S. 21.
 16. See S. 11 of the Suits Valuation Act, 1887.

second, with reference to the *territorial* jurisdiction of Courts.¹⁷ It has, accordingly, been generally held that a question of *territorial* or *pecuniary* jurisdiction of the Court which passed the decree cannot be allowed to be raised in execution proceedings before it,¹⁵ but that a question as to the jurisdiction of the Court in other matters rendering the decree a nullity can be entertained even by the executing Court.¹⁰ The Calcutta High Court has, however, held broadly that an executing Court can question the

17. See S. 21 of the Code.

18. ('20) AIR 1920 Mad 1019 (1023, 1024) : 43 Mad 675 (F B).

('31) AIR 1931 Rang 252 (257) : 9 Rang 480 (FB).

('27) AIR 1927 Bom 83 (84) : 50 Bom 839.

('37) AIR 1937 Cal 430 (431).

('32) AIR 1932 Cal 380 (381). (Objection as to the territorial jurisdiction of the Court passing the decree.)

('75) 24 Suth VR 363 (364). (Objection to jurisdiction was taken in the transferee Court.)

('84) AIR 1934 Lah 804 (805). (Objection as to undervaluation or overvaluation of suit.)

('32) AIR 1932 Lah 269 (290) : 13 Lah 25.

('04) 27 Mad 118 (119, 120).

('37) AIR 1937 Oudh 379 (381) : 13 Luck 340.

('35) AIR 1935 Oudh 358 (360) : 11 Luck 187 (FB).

('34) AIR 1934 Pat 240 (242) : 13 Pat 290.

('38) AIR 1938 Pesh 77 (78).

('35) AIR 1935 Pesh 142 (143).

19. ('33) AIR 1933 All 163 (165). (Decree in a suit of a nature not cognizable by Civil Court — Decree ultra vires and not executable.)

('33) AIR 1933 All 751 (752).

('18) AIR 1918 All 226 (227) : 40 All 423. (Decree against dead person.)

('86) 8 All 377 (380). (Decree in accordance with judgment amended without notice — Objection as to non-executability of decree can be taken in execution.)

('95) 17 All 478 (482). (Decree against dead person.)

('31) AIR 1931 Bom 295 (296). (Executing Court can question the decree on patent want of jurisdiction.)

('29) AIR 1929 Nag 357 (357, 358) : 26 Nag L R 60. (Do.)

('09) 4 Ind Cas 137 (137, 138) (Bom). (Case adjourned for argument—In the meanwhile plaintiff died—Decree in favour of plaintiff is a nullity.)

('39) 43 Cal W N 271 (272).

('32) AIR 1932 Cal 9 (10, 11) : 58 Cal 1018. (Award under Arbitration Act—No decree can be passed thereon—If passed, it is a nullity.)

('30) AIR 1930 Cal 327 (328) : 57 Cal 931. (Decree against dead person.)

('13) 20 Ind Cas 506 (506) (Cal). (Do.)

('10) 5 Ind Cas 523 (524) (Cal). (Do.)

('79) 3 Cal L Rep 192 (193). (Do.)

('38) AIR 1938 Lah 515 (519).

('38) AIR 1938 Lah 129 (133).

('34) AIR 1934 Lah 623 (624). (Absence of inherent jurisdiction—Decree nullity—Executing Court can refuse to execute.)

('35) AIR 1935 Mad 417 (418).

('33) AIR 1933 Mad 362 (363). (Want of juris-

diction not apparent on the face of decree—Executing Court cannot go into a disputed question of fact regarding want of jurisdiction.)

('26) AIR 1926 Mad 429 (430). (Decree against minor not represented in suit is a nullity and can be questioned in execution.)

('16) AIR 1916 Mad 656 (656) : 38 Mad 682. (Decree against dead person.)

('03) 26 Mad 31 (33). (Objection to execution on ground of compromise decree being opposed to public policy, i. e. decree for sale of an office—See O. 23 R. 3.)

('36) AIR 1936 Nag 1 (3) : 31 Nag L R Sup 57 (F B).

('35) AIR 1935 Nag 235 (236) : 31 Nag L R 403. (Decree against minor not represented by guardian ad litem is nullity—Its validity can be questioned in execution proceedings.)

('33) AIR 1933 Nag 211 (212, 213). (Want of jurisdiction must be patent on the face of the decree.)

('33) AIR 1933 Oudh 213 (214).

('35) AIR 1935 Oudh 358 (360) : 11 Luck 187 (FB).

('35) AIR 1935 Oudh 57 (58) : 10 Luck 508.

('34) AIR 1934 Oudh 75 (84, 85) : 9 Luck 435 (F B). (Want of inherent jurisdiction.)

('37) AIR 1937 Pat 618 (619).

('36) AIR 1936 Pat 303 (305). (If a Court gives personal decree against a puisne mortgagee behind his back and when there is no prayer for the personal decree, the puisne mortgagee is entitled to object in execution proceedings that the decree is not capable of execution.)

('34) AIR 1934 Pat 145 (146). (Registrar's decision under the Co-operative Societies Act being a nullity—Execution Court can refuse to execute the same.)

('19) AIR 1919 Pat 430 (431) : 4 Pat L Jour 240. (Decree against dead person.)

('33) AIR 1933 Rang 124 (127) : 11 Rang 125. (Burma Co-operative Societies Act, Ss. 47 and 49—Application for execution of order of liquidator in Civil Court — Civil Court is entitled to see the legality of the order.)

('12) 15 Ind Cas 832 (833) : 5 Sind L R 260. (Decree against dead person.)

[But see ('23) AIR 1923 All 141 (144) : 45 All 198. (Where it was held that where a final decree is objected to on the ground that preliminary decree was passed against a dead person, the Court cannot treat the decree as a nullity.)

('30) AIR 1930 Bom 141 (144) : 54 Bom 96. (Death of guardian ad litem — No fresh guardian—Decree not a nullity—Only an irregularity.)

0 registered, the executing Court can declare that the decree is not capable of execution. In doing so, it cannot be said to go behind the decree.¹

9b. Power of executing Court to fix order in which mortgaged properties are to be sold. — Where a mortgage decree itself fixes the order in which the mortgaged properties are to be sold, the executing Court cannot go behind the decree and sell the properties in a different order.¹ But where the mortgage decree does not fix any order in which the mortgaged properties are to be sold, the executing Court has the power to prescribe such order.²

9c. Power of executing Court under rent decree. — A Court executing a rent decree has no jurisdiction to refuse execution of the decree against the property of the judgment-debtor other than the tenure in arrears or to direct that the decree-holder must proceed in the first instance against the tenure in arrears.¹

9d. Power of executing Court to enforce agreements between parties in course of execution proceedings. — See Section 47 Note 41.

10. Simultaneous executions. — There is nothing in law to prevent the simultaneous execution of decrees in more than one Court,¹ although it is a matter for the discretion of the Court to permit or refuse concurrent execution² and in practice concurrent execution is not generally carried out.³ But a decree cannot be executed against the *same property* in more than one Court.^{3a}

Where the Court at *A* sends it for execution to the Court at *B* within whose jurisdiction the property to be proceeded against is situate, and an application for *sale* of such property is made to Court *A*, it has been held by the Privy Council in the undermentioned case⁴ that it was not made to a "proper Court" within the meaning of Article 182 of the Limitation Act. The reason is that Court *A* cannot, as has been seen in Section 37, *sell* immovable property situate outside its territorial jurisdiction and an application to that Court for sale of such properties cannot be deemed to be an application made to a "proper Court." The decision does not touch the question

Note 9a

1. ('37) AIR 1937 All 282 (284).

Note 9b

1. ('33) AIR 1933 Pat 161 (163) : 12 Pat 77.
2. ('31) AIR 1931 All 657 (658, 659). (Final decree silent about the order in which the mortgaged properties may be sold—Executing Court may and ought to prescribe the order.)

Note 9c

1. ('35) AIR 1935 Cal 544 (544).

Note 10

1. ('17) AIR 1917 All 129 (130).
('72) 14 Moo Ind App 529 (540) (PC).
('36) AIR 1936 All 655 (656) : (AIR 1917 All 129 followed.)
('29) AIR 1929 Bom 418 (419) : 53 Bom 844. (Dissenting from A I R 1922 Bom 359.)
('35) AIR 1935 Cal 268 (270). (Court has jurisdiction to execute its decree and at the same time send it to another Court for simultaneous execution.)
('05) 1 Cal L Jour 315 (318).
('82) 8 Cal 687 (690).
('30) AIR 1930 Lah 199 (201). (Transfer of decree—Transferor Court can execute decree.)

('87) 1887 Pun Re No. 83, p. 174 (175).

('28) AIR 1928 Mad 1154 (1156). (Different properties.)

('17) AIR 1917 Mad 591 (591).

('37) AIR 1937 Nag 305 (307) : I L R (1937) Nag 440.

('27) AIR 1927 Nag 367 (367) : 23 Nag L R 126. (Transfer of decree to Court A—Application to Court which passed the decree could be made to transfer the same decree to Court B.)

('27) AIR 1927 Rang 258 (261) : 5 Rang 397.

2. ('21) AIR 1921 Low Bur 25 (26) : 11 Low Bur Rul 15.

('69) 1869 Pun Re No. 49.

[See also ('29) AIR 1929 Cal 529 (530) : 56 Cal 1176. (In ordering simultaneous execution, oppression should be avoided by prescribing proper safeguards.)]

3. ('23) AIR 1923 Pat 224 (224) : 2 Pat 328.

('82) 8 Cal 687 (690). (Power should be sparingly exercised.)

('34) AIR 1934 Rang 231 (232).

3a. ('09) 3 Ind Cas 105 (108) (Cal).

4. ('16) AIR 1916 P C 16 (18) : 39 Mad 640 : 43 Ind App 238 (PC).

of the maintainability of simultaneous execution applications. On the strength of the said decision, it was, however, held in the undermentioned cases⁵ that simultaneous executions are not permissible in two Courts. It is submitted that the latter view is not correct. Their Lordships' observations in the Privy Council case, during the course of the argument, that the tendency of the Code is against concurrent executions, appear to have influenced the decisions of the High Courts. But the observations must be taken to refer to concurrent executions against the *same property*.

See for further Notes O. 21 R. 21; See also Section 42 Note 3.

11. Execution proceedings and res judicata.—Where an executing Court decides upon the construction of a decree in a particular manner, the decision is binding between the parties in subsequent execution proceedings though not as *res judicata* yet on general principles as an interlocutory judgment in the suit.¹ See also Notes to Section 11.

39. [S. 223, paras. 2 & 3.] (1) The Court which passed a decree³ may, on the application of the decree-holder, send it for execution to another Court,⁵—

- Transfer of decree.**
- (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain,⁶ within the local limits of the jurisdiction of such other Court, or
 - (b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court,⁷ or
 - (c) if the decree directs the sale or delivery of immoveable property⁸ situate outside the local limits of the jurisdiction of the Court which passed it, or
 - (d) if the Court which passed the decree considers⁹ for any other reason, which it shall record in writing, that the decree should be executed by such other Court:

5. ('23) AIR 1923 Pat 384 (384) : 2 Pat 247.

('25) AIR 1925 All 276 (277) : 47 All 57.

('22) AIR 1922 Bom 359 (360) : 47 Bom 56.
(Dissented from, in A I R 1929 Bom 418.)

('36) AIR 1936 Oudh 64 (65). (Property to be sold, situated in two districts—Decree transferred for sale of property outside jurisdiction — During pendency of such application, another application to Court which passed

the decree for sale of property situated within jurisdiction—Not competent.)

('25) AIR 1925 Oudh 428 (428) : 29 Oudh Cas 84.

('39) AIR 1939 Pat 289 (290). (Section 38 is disjunctive.)

[But see ('23) AIR 1923 Pat 224 (224, 225) : 2 Pat 328.]

Note 11

1. ('84) 6 All 269 (274) : 11 Ind App 37 (PO). 3

('38) AIR 1938 Pesh 77 (78).

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

[1877, S. 223, paras. 2 and 3; 1859, Parts of Ss. 285 and 286. See Section 20, O. 21 Rr. 35, 36, 82 to 103 and Order 34.]

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and applicability of the Section. 3. "Court which passed a decree." 4. "Decree-holder." See Section 2 (3) Note 2. 5. When and to what Court a decree may be sent for execution. 6. Residence outside jurisdiction—Clause(a). 7. Having property outside jurisdiction — Clause (b). 8. Decree for sale or possession of property outside jurisdiction — Clause (c). 9. Court considering that execution should be in another Court — Clause (d). | <ol style="list-style-type: none"> 10. Transfer of small cause decree for execution. 11. Jurisdiction of transferring Court after transfer. See Section 42 Notes 1 and 3. 12. Step-in-aid of execution. 13. Jurisdiction of transferee Court. See Notes 6 and 7 to Section 38 and Notes 1 and 3 to Section 42. 14. Madras Village Courts Act (I of 1889). 15. Simultaneous execution. See Note 10 to Section 38. 16. Appeals from orders under this Section. 17. Notice of transmission. 18. Form of application under the Section. |
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Other Topics

"Another Court." See Note 5.
 Award. See Note 3 Pt. (2).
 Court to which decree is sent for execution. See Note 13.
 Execution Court—Going behind decree. See Section 38 Note 8.
 Transferee Court—Jurisdiction of—When ceases. See Note 13.
 Jurisdiction of executing Court. See Notes 6, 7 and 8.
 Limitation—Questions of. See Note 12.
 "May." See Note 2 Pt. (1).
 Power of transferring Court. See Notes 5 and 11.

1. Legislative changes. — The words "*or delivery*" in clause (c) of sub-section (1) and "*of competent jurisdiction*" in sub-section (2) are new.

2. Scope and applicability of the Section. — Section 38 provides that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. This Section lays down the conditions under which a decree can be so sent. The use of the word "*may*" shows that the Section is directory and not mandatory¹ and gives the Court a *discretion* either to execute the decree itself or to send it to another Court for execution.² (See also Note 7, *infra*.)

The test of the applicability of the Section is to see whether the Code regulates the procedure of both the transferor and the transferee Courts.³ Where there is no

Section 39 — Note 2

1. ('92) 19 Cal 13 (15, 16).
 ('39) AIR 1939 Cal 403 (409). (The fact that a portion of the mortgaged property is outside its territorial jurisdiction does not oust the jurisdiction of the Court to sell it and a transfer need not necessarily be made.)
 ('37) AIR 1937 Cal 570 (572).
2. ('88) 15 Cal 667 (670).
 [See ('68) 9 Suth W R 346 (347). (Under the

- Code of 1859 it was held that it was only where a decree could not be executed by the Court which passed it that it could be sent to another Court for execution.)]
3. ('07) 34 Cal 576 (581, 582). (Decree passed by a Court established under the Benares Family Domains Regulation VII of 1828.)
 ('37) AIR 1937 Cal 557 (558) : I L R (1937) 2 Cal 734. (Not necessary that the whole of the Civil Procedure Code should be applicable to the transferee Court.)

power to make a transfer at all, the proceedings of the transferee Court will be void *ab initio*.⁴

A transfer under this Section must be of the *whole* decree and not only a part thereof.⁵ Nor can the transfer be for a *limited purpose only*.⁶ Clauses (a), (b) and (c) of sub-section (1) only define the circumstances under which a decree may be transferred for execution to another Court and do not in any way restrict or limit the powers of the Court to which a decree is transferred. Hence, the mere fact that a decree has been transferred to another Court on the ground of the judgment-debtor having immovable property within the jurisdiction of such Court does not preclude such Court from *arresting* the judgment-debtor.^{6a}

Where a decree of a trial Court has become merged in that of the Appellate Court, the latter decree is the only decree which can be transferred under this Section.⁷

An award filed in Court under Section 11 of the Arbitration Act is enforceable under Section 15 of that Act as if it were a decree of the Court and therefore it could be transferred under this Section for execution as a decree.⁸

This Section has been applied to Arakan Hills. See Arakan Hills District Laws Regulation, 1916 (I of 1916), Schedule I.

3. "Court which passed a decree."—See Section 37. An award passed under rules framed under Section 43 of the Bombay Co-operative Societies Act is enforceable, on application to any Civil Court having jurisdiction, as a *decree* of such Court. Such Court therefore has power to transfer it for execution to another Court.¹ The same principles hold good as regards awards filed under Section 11 of the Indian Arbitration Act, 1899.²

4. "Decree-holder."—See Section 2 (3) Note 2.

5. When and to what Court a decree may be sent for execution.—Section 38 read with this Section shows that the Court which passed the decree is primarily the Court to execute the decree, but that such Court may send the decree for execution to another Court either on the *application* of the decree-holder or of its *own motion* if certain conditions are satisfied. Where the transfer is made on an *application* by the decree-holder, one of the conditions in clauses (a) to (d) of sub-section (1) must be satisfied.^{1a} Where it is made on the Court's *own motion* the conditions in sub-section (2) must be satisfied, namely, that it must be made to a *subordinate* Court of *competent jurisdiction*.¹ It has been held by the Allahabad High Court that the competency of the Court under sub-section 2 of this Section must be determined by reference to its competence to try a suit of similar valuation to the

4. ('06) 33 Cal 451 (456). (Transfer of a certificate under Public Demands Recovery Act (Bengal Act I of 1895)—No power. In so far as the decision holds that the transfer is unauthorised under the circumstances mentioned therein, it is submitted that it is not correct. The High Court of Madras in an analogous case has held a contrary view: see (1898) 8 Mad L Jour 1 (3).)

5. ('17) AIR 1917 Pat 70 (71). (Transfer of the share of only one of the decree-holders is irregular.) ('35) AIR 1935 Cal 118 (119).

6. ('17) AIR 1917 Pat 221 (222). (Transfer only to enable the decree-holder to share in rateable distribution.)

6a. ('38) AIR 1938 Mad 27 (28).

7. ('33) AIR 1933 Mad 872 (873).

8. ('31) AIR 1931 Nag 170 (171): 27 Nag L R 386. [See also ('34) A I R 1934 Pesh 107 (109). (Award cannot be transferred for execution to any Court except the Court of a District Judge.)]

Note 3

1. ('22) AIR 1922 Bom 377 (377, 378): 46 Bom 128.

2. ('21) AIR 1921 All 199 (201): 43 All 394.

('31) AIR 1931 Nag 170 (171): 27 Nag L R 386. (The Arbitration Act need not be in force in the local area of the transferee Court.)

Note 5

1a. ('39) 41 Pun L R 186 (187).

1. ('27) AIR 1927 Pat 38 (40): 5 Pat 714.

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suit in which the decree was passed.^{1b} But the Lahore High Court has held that the words "competent jurisdiction" refer to competence to deal with the *decree* and not to competence to try the *suit* in which the decree was passed.^{1c}

A decree cannot be sent, under this Section, for execution to a Court not in British India² except in the cases mentioned in Section 45, *infra*.³ But it is not necessary that the transferee Court should be of the same *kind* as the transferor Court.⁴ Thus, a Civil Court may transfer its decree to a Revenue Court and *vice versa*.⁵

As to whether a decree can be sent for execution to a Court which has no pecuniary jurisdiction over the suit, see Section 38 Note 7, *ante*.

As to the procedure to be followed by the transferor Court in sending a decree for execution to another Court, see O. 21 R. 6 and as to the procedure that is to be followed by the transferee Court, see O. 21 R. 7. See also Note 1 to Section 42.

6. Residence outside jurisdiction — Clause (a). — Under clause (a) it is sufficient if it is shown that the judgment-debtor resides within the jurisdiction of the Court to which the transfer is sought. The decree-holder is not bound to state the *mode* in which the decree is sought to be executed, *i. e.*, whether against the person or property of the judgment-debtor.¹ Where a prohibitory order is to be served on the garnishee of the judgment-debtor, the decree may be transferred to the Court within whose jurisdiction the garnishee resides.²

7. Having property outside jurisdiction — Clause (b). — The jurisdiction of a Court is circumscribed by and is co-extensive with its territorial limits. Where property sought to be attached is *bona fide* outside the jurisdiction of the Court which passed the decree, that Court cannot attach it but must transfer the case to the Court within whose local jurisdiction the property is situated.¹ Similarly, the decree of a temporary Court, which has no local jurisdiction, must be transferred for execution to the Court which has local jurisdiction over suits in respect of such property.² The word 'may' used in this Section does not mean that, in such a case it is in the

('07) 17 Mad L Jour 616 (617). (Transfer may be ordered on an application for execution. No separate application for transmission necessary.)

('98) 8 Mad L Jour 1 (3). (Misrepresentation of facts required under sub-s. (1) (b) discovered after transfer—Transfer not invalid.)

1b. ('39) AIR 1939 All 57 (59); I L R (1939) All 97.

1c. ('39) AIR 1939 Lah 258 (258). (Award filed under Arbitration Act can be sent to Court in place to which the Arbitration Act does not apply.)

2. ('88) 12 Bom 230 (231).

('02) 29 Cal 400 (402).

('18) AIR 1918 Mad 605 (605).

('18) AIR 1918 Mad 580 (584); 40 Mad 1069 (FB). See Section 45.

3. See Section 45.

4. ('92) 15 Mad 345 (347). (A decree passed in the exercise of ordinary jurisdiction of one Court sent to another Court exercising small cause jurisdiction.)

('39) I L R (1939) 1 Cal 233 (235). (Decree in a suit excepted from cognisance of Small Cause Court can be transferred to a Small Cause Court for execution.)

5. ('83) 9 Cal 295 (303); 9 Ind App 174 (PC).

('11) 10 Ind Cas 538 (539) (Cal).

('09) 1 Ind Cas 933 (934); 36 Cal 252.

('10) 6 Ind Cas 994 (995); 13 Oudh Cas 119.

[See also ('72) 17 Suth W R 471 (472).]

[But see ('94) 16 All 496 (497, 498).]

Note 6

1. ('29) AIR 1929 Cal 529 (529, 530); 56 Cal 1176.

2. ('11) 11 Ind Cas 417 (419); 39 Cal 104.

Note 7

1. ('18) AIR 1918 Pat 126 (127); 4 Pat L Jour 141.

('32) AIR 1932 Cal 213 (214); 59 Cal 199.

(Person and property of judgment-debtor outside jurisdiction.)

('29) AIR 1929 Cal 818 (818); 57 Cal 67. (Properties outside jurisdiction cannot be sold though attached before judgment.)

('73) 19 Suth W R 434 (436). (Though the original Court ought to have sold the properties within its jurisdiction before ordering a transfer, a transfer without doing so, is not without jurisdiction.)

('73) 19 Suth W R 307 (305). (Decree may be transferred where it cannot be completely executed by sale of the property within jurisdiction.)

2. ('17) AIR 1917 Mad 272 (273).

discretion of the Court which passed the decree either to execute the decree itself or transfer it to another Court; it should send the decree to the Court having territorial jurisdiction.^{2a}

Where it is alleged by the decree-holder applying for transfer that the properties within the jurisdiction of the Court are not sufficient to satisfy the decree, it is enough if the allegations are supported by an affidavit or some other evidence on which the Court can reasonably rely. It is not necessary that the Court should go through the process of sale in order to find out whether in fact the proceeds will be sufficient to satisfy the decree.^{2b}

When a decree is transmitted for execution to another Court, the presumption is that the decree was intended to be executed against properties within the jurisdiction of the latter Court and not against properties situated within the jurisdiction of the transmitting Court.³ Similarly, it has been held that where a decree is transferred for execution to another Court on the ground that one of the judgment-debtors has no property within the local limits of the Court which passed the decree and has property within the local limits of the jurisdiction of the other Court, the decree cannot be executed against another judgment-debtor who does not fulfil that condition.⁴ But, it has been held by the Madras High Court in the undermentioned case⁵ that the fact that a decree has been transferred to another Court under clause (b) of this Section on the ground of the judgment-debtor having property within the jurisdiction of such Court, does not preclude such Court from arresting the judgment-debtor.

8. Decree for sale or possession of property outside jurisdiction — Clause (c). — See also Note 6 to Section 38. Clause (c) includes also cases where the Court passing the decree has subsequently lost territorial jurisdiction.¹

Where properties mortgaged are within the jurisdiction of more than one Court and one of such Courts has passed a decree for sale, the Court which has passed the decree is entitled to sell the properties outside its jurisdiction also and it is not bound to transfer the decree to the Court having territorial jurisdiction over such property.² The reason is that as observed in Note 2 *ante*, the Section is only directory and not mandatory.

In the undermentioned case,³ a decree was passed by the Bombay High Court for the sale of property in Karachi and the property was also sold by the Bombay High Court and purchased by the decree-holder himself. The decree-holder was obstructed in obtaining possession of the property. Thereupon the Bombay High Court transferred the decree to the Karachi Court for removal of the obstruction. On a contention being raised that removal of obstruction was not, properly speaking, *execution* of the decree and that therefore the decree could not be transferred to the Karachi Court, it was held that the decree being one for sale of property within the jurisdiction of another Court, the case came within clause (c) of Section 39 and that as the auction-purchaser was the decree-holder himself the proceeding for the removal of obstruction was a proceeding in execution (within Section 47) and hence the decree could be properly transferred for 'execution' under clause (c) of Section 39.

9. Court considering that execution should be in another Court — Clause (d). — The jurisdiction of a Court transferring a decree for execution to

2a. ('32) AIR 1932 Cal 213 (214, 215): 53 Cal 199.

2b. ('35) AIR 1935 Cal 268 (270).

3. ('24) AIR 1924 Mad 144 (144).

4. ('36) AIR 1936 Cal 521 (523): 63 Cal 1210.

5. ('38) AIR 1938 Mad 27 (29).

Note 8

1. ('81) 6 Cal 513 (519, 520).

2. ('39) AIR 1939 Cal 403 (409).

3. ('36) AIR 1936 Sind 11 (13): 30 Sind L.R. 290.

41. [S. 223, para. 4.] The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

[1859, S. 294; 1877, S. 223 (4).]

Synopsis

1. Scope and object of the Section.

2. "Shall certify."

3. Jurisdiction of transferee Court, how long continues. See Note 3 to Section 42.

1. Scope and object of the Section. — The Court to which a decree is sent for execution must, on the determination of the proceedings in that Court, certify to the Court which passed the decree the result of those proceedings.¹ This certification is a very important act as its effect is to determine the jurisdiction of the transferee Court.² This Section has been applied to Arakan Hills. See Arakan Hills District Laws Regulation, 1916 (I of 1916), Schedule I.

2. "Shall certify." — In *Shivlingappa v. Shidmallappa*,¹ Macleod, C. J., held that there must be a formal certification by the transferee Court to the transferor Court and that the fact of certification should not be left open to inferences to be drawn from entries in the register of suits of the transferor Court showing the result of the proceedings in the transferee Court. In an earlier case,² where a decree on the small cause side had been transferred to the original side of the same Court for execution and the result of the proceedings in execution was entered in the small cause suit register, the same learned Chief Justice however held that the requirements of Section 41 were "clearly" satisfied. It is submitted with respect that the view taken in the later case is the correct one.

An order by the transferee Court that the result of part satisfaction of the decree may be communicated to the transferor Court^{2a} or a report by the former Court to the latter of the facts relating to an arrangement come to between the decree-holder and the judgment-debtor,^{2b} is not such a certificate as is contemplated by the Section and does not determine the jurisdiction of the transferee Court. But when the transferee Court dismissed the execution case and directed that the transferor Court should be informed of it and a copy of this order was actually filed in the latter Court with the application of the decree-holder asking for a transfer to another Court, it was held that this was sufficient compliance with the requirements of the Section.^{2c}

Where the transferee Court dismisses the execution case on the ground that an objection as to limitation is a valid one, and sends back the case to the transferor Court with the requisite certificate, but the objection as to limitation is disallowed on appeal, the transferee Court can get back the records and proceed with the execution. The position is the same as if no certificate of the manner of execution had been sent under this Section to the transferor Court.³

Section 41 — Note 1

1. ('09) 9 Cal L Jour 239 (243).

2. ('24) AIR 1924 Bom 359 (359, 360).

Note 2

1. ('24) AIR 1924 Bom 359 (359).

2. ('23) AIR 1923 Bom 371 (371).

2a. ('38) AIR 1938 All 412 (413).

2b. ('37) AIR 1937 All 766 (768).

2c. ('37) AIR 1937 Cal 557 (559) : I L R (1937) 2 Cal 734.

3. ('20) AIR 1920 Pat 128 (129).

The Section does not authorise the transfer by a cess collector, of a certificate under the Public Demands Recovery Act (Bengal Act I of 1895) to another Court for execution.⁴

3. Jurisdiction of transferee Court, how long continues. — See Note 3 to Section 42.

42. [S. 228.] The Court executing a decree sent to it shall

Powers of Court in executing transferred decree.

have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

[1887, S. 228 ; 1859, S. 294 ; see O. 21 R. 9 and Sch. III, C. P. C.]

Synopsis

1. Powers of Court executing transferred decree.
2. Pecuniary limits of the jurisdiction of the transferee Court. See Section 38 Note 7.
3. Jurisdiction of transferee Court, how long continues.
4. Law of limitation applicable to transferred decree. See Section 40 Note 1.
5. "Shall be subject to the same rules in respect of appeal."

1. Powers of Court executing transferred decree. — A decree transferred to a Court for execution is to be regarded as a decree of that Court for the purposes of execution and the transferee Court has the same powers as it would have, if the decree had been passed by itself.¹ But it will not execute the decree until a regular

4. ('06) 33 Cal 451 (456).

Section 42 — Note 1

1. ('72) 3 N W P H C R 168 (170).

('24) AIR 1924 All 700 (700) ; 46 All 560. (Transferee Court can entertain objections preferred to it.)

('38) AIR 1938 All 654 (655). (Court to which decree is transferred under S. 39 for execution can execute it for larger amount than that specified in the certificate of transfer — It is the decree which is the guide and not the certificate.)

('21) AIR 1921 All 199 (201) ; 43 All 394. (Is competent to determine the question whether *S* was a member of the firm in an application under O. 21 R. 50 (2).)

('06) 31 Bom 5 (8, 9).

('82) 6 Bom 582 (583). (Can enquire into the validity of a mortgage lien on property which has been attached by its order on a transferred decree.)

('74) 11 Bom H C R A C 19 (21). (Can issue notice under O. 21 R. 22.)

('25) AIR 1925 Cal 213 (216). (Court transmitting the decree is not the Court to decide objections on the part of the judgment-debtor, such as that the decree is incapable of execution or that execution is barred by limitation — The Court of execution must determine such objections.)

('11) 10 Ind Cas 538 (539) (Cal).

('80) 5 Cal 448 (449, 450).

('69) 11 Suth. W R 557 (558). (Can determine claims of third parties.)

('38) AIR 1938 Lah 593 (593) ; I L R (1938) Lah 624. (Can execute the decree against the surety.)

('34) AIR 1934 Lah 117 (118).

('31) AIR 1931 Lah 507 (508). (Is competent to determine the question whether *S* was a member of the firm in an application under O. 21 R. 50 (2).)

('29) AIR 1929 Lah 228 (230). (Do.)

('26) 98 Ind Cas 855 (856) (Lah). (Do.)

('12) 17 Ind Cas 323 (328, 329) (Mad). (Can exercise powers under O. 21 R. 53, Cl. 1 (b).)

application is made to it under O. 21 R. 11,² except where the decree-holder has already made an application for execution to the Court which has passed the decree.^{2a} The expression "powers in executing such decree" means "powers in carrying out the purpose of executing the decree."^{2b} The transferee Court cannot question the legality or propriety of the order of the transferor Court directing execution.³ Thus, it cannot entertain an objection that the execution of the decree was barred by limitation when the order for execution was passed,⁴ though, where the decree is simply transferred without any order for execution having been passed,⁵ or where the transferor Court has expressed an opinion on the question of limitation but without hearing the judgment-debtor on the point,^{5a} it has power to decide whether the execution is barred by limitation. It cannot transfer the decree to another Court for execution^{5b} or stay execution of the decree except under the provisions of O. 21 R. 26 so as to enable the parties to get the objections decided by the transferor Court.⁶ Nor can it decide the liability of a third person under O. 21 R. 50, sub-rule 2 as a partner of a firm.^{6a}

Just as the transferor Court cannot, as an executing Court, go behind the decree, the transferee Court also cannot go behind the decree or add to or vary its terms,⁷

- ('31) AIR 1931 Nag 170 (171) : 27 Nag L R 386. (The executability by transferee Court of the decree on an award is not affected by the Arbitration Act not being in force in the place where it is sought to be executed.)
- ('27) AIR 1927 Oudh 112 (112) : 1 Luck 46. (Can attach salary of public officer under O. 21 R. 48.)
- ('25) AIR 1925 Sind 293 (294) : 19 Sind L R 1. (Is competent to determine the question whether S was a member of the firm in an application under O. 21 R. 50 (2).)
- ('18) 20 Ind Cas 540 (541) : 7 Sind L R 19. (Can order restitution under S. 144.)
- [See also ('38) AIR 1938 Mad 27 (28).]
- ('18) AIR 1918 Mad 645 (647). (As to power of transferee Court to decide application under O. 21 R. 50, see Notes to O. 21 R. 50, *infra*.)
- ('36) AIR 1936 Sind 11 (13) : 30 Sind L R 290.]
2. ('24) AIR 1924 Nag 413 (414).
- ('10) 35 Bom 103 (109). (An order for transmission of the decree for execution to another Court is not an order for execution of the decree nor is an application for transmission, an application for execution.)
- 2a. ('24) AIR 1924 Pat 120 (121) : 2 Pat 909.
- ('31) AIR 1931 Cal 312 (316) : 58 Cal 832.
- 2b. ('36) AIR 1936 Rang 184 (187).
3. ('30) AIR 1930 Lah 143 (144). (Execution cannot be refused because part of the decree alone was transferred.)
- ('34) AIR 1934 Mad 266 (266).
- ('85) 7 All 330 (333).
- ('97) 21 Bom 456 (458).
- ('80) 5 Cal 736 (737).
- ('75) 23 Suth W R 154 (155).
- ('32) AIR 1932 Pat 168 (169) : 11 Pat 94 (97). (Transferee's name brought on record and decree transferred—Transferee Court cannot question transferee's right to execution.)
- ('37) AIR 1937 Rang 477 (480) : 1937 Rang L R 287.
- ('36) AIR 1936 Rang 271 (273) : 14 Rang 550.
4. ('90) 15 Bom 28 (29, 30).
- ('30) AIR 1930 Lah 118 (119).
- ('75) 24 Suth W R 151 (152).
- ('74) 21 Suth W R 330 (331).
- ('29) AIR 1929 Mad 199 (199, 200). (AIR 1924 Mad 673; AIR 1926 Mad 411; 1928 Mad WN 152, relied on.)
- ('27) AIR 1927 Nag 31 (32).
5. ('75) 7 N W P H O R 115 (117).
- ('94) 16 All 390 (393).
- ('30) AIR 1930 All 699 (700) : 52 All 1024. (Court having application to execute made to it is bound to decide questions of limitation suo motu.)
- ('07) 1907 All WN 65(66) : 4 All L Jour 142(143).
- ('11) 11 Ind Cas 216 (217) (Cal.)
- ('96) 23 Cal 39 (43). (Dissenting from 13 Beng L R App 30.)
- ('86) 13 Cal 257 (262).
- ('82) 8 Cal 916 (917).
- ('80) 5 Cal 897 (901).
- ('74) 21 Suth W R 292 (293).
- ('68) 10 Suth W R 10 (12) (F B).
- ('67) 7 Suth W R 19 (19).
- ('66) 5 Suth W R Misc 14 (14).
- 5a. ('35) AIR 1935 Nag 131(132) : 31 Nag L R 333.
- 5b. ('38) AIR 1938 Mad 113 (114) : 1 L R (1938) Mad 326.
6. ('36) AIR 1936 Rang 184 (187).
- [See ('86) 13 Cal 257 (261).]
- 6a. ('37) AIR 1937 Pesh 96 (97).
7. ('31) AIR 1931 Rang 252 (256) : 9 Rang 480.
- ('34) AIR 1934 Rang 165 (166) : 12 Rang 320. (Transferee Court has no power to pass instalment order under O. 20 R. 11 (2).)
- ('31) AIR 1931 All 92 (94) : 53 All 125. (Decree if collusively obtained.)
- ('87) 11 Bom 528 (532). (Cannot refuse execution because too much has been left for the executing Court to do.)
- ('70) 13 Suth W R 330(330). (Cannot correct.)

but must execute the decree as it stands.⁸ Where the decree-holder dies after the date of transfer, his legal representative must apply to the Court which passed the decree for substitution of his name on the record. See Notes to O. 21 R. 16, *infra*. Similarly, where a judgment-debtor dies after the date of transfer, the application to implead his legal representatives must be made to the Court which passed the decree.⁹ There was a conflict of decisions as to whether the transferee Court also could entertain and dispose of the application. All the High Courts except the High Courts of Calcutta and Lahore held that the proper Court to apply is only the Court which passed the decree.¹⁰ The Calcutta¹¹ and Lahore¹² High Courts, on the other hand, held that the application can be made even to the transferee Court. They further held that even if it be assumed that the application should be made only to the transferor Court, the making of an application to the transferee Court, even if objected to by the judgment-debtor, is only an irregularity in procedure curable by Section 99.¹³ The High Court of Madras was, however, of opinion that the non-compliance with the rule that the application should be made to the Court which passed the decree, *if objected to at the proper time* is not a mere irregularity though if not so objected to, is an irregularity curable under Section 99.¹⁴ The Privy Council has now reconciled the apparent conflict by holding that while an application for substitution of legal representatives should be made to the Court which passed the decree, the non-compliance with the rule is only an irregularity in procedure which, if acquiesced in by a party, cannot be challenged by him later on.¹⁵

The transferee Court cannot question the jurisdiction of the Court which passed the decree.^{15a} Under the old Section 225 corresponding to O. 21 R. 7, the words 'or of the jurisdiction of the Court which passed it' occurred. This gave rise to a conflict of opinion as to whether the transferee Court can go into the question of jurisdiction of the Court which passed it. The said words have now been removed thus setting the conflict at rest.¹⁶⁻¹⁷

Where it is brought to the notice of the transferee Court that the decree sought to be executed has, subsequent to the transfer, *ceased to exist*¹⁸ or is satisfied out of Court,¹⁹ the Court is bound to go into the question and if the allegation is correct, should refuse to proceed with the execution.

Where a decree has been transferred to another Court and that Court certifies its failure to execute the same, it is only the Court which passed the decree and not

8. See the cases in foot-note 7.

[See also ('78) 3 Cal 512 (513, 514).]

9. See Section 50, *infra*.

('30) AIR 1930 Cal 614 (615, 616) : 57 Cal 1137. (Death of decree-holder.)

('30) AIR 1930 Sind 16 (17). (Until disposal of that petition, proceedings in transferee Court will be suspended.)

[See also ('25) AIR 1925 Cal 213 (216).]

10. ('95) 17 All 431 (432).

('94) 18 Bom 224 (226).

('26) AIR 1926 Mad 411 (412).

('05) 28 Mad 466 (471).

('23) AIR 1923 Nag 195 (197). (Such application can be made to the Court which is actually executing decree.)

('20) AIR 1920 Nag 174 (175).

11. ('95) 22 Cal 558 (561).

('09) 1 Ind. Cas 57 (58, 59) (Cal).

12. ('26) AIR 1926 Lah 34 (35).

('97) 1897 Pun Re No. 70, page 317 (321, 324).

13. See the cases in foot-notes 11 and 12 above.

14. ('05) 28 Mad 466 (472).

('07) 17 Mad L Jour 300 (301). (Objection not pressed.)

('16) AIR 1916 Mad 33 (34, 36) : 38 Mad 1076.

('02) 12 Mad L Jour 24 (32, 33).

15. ('28) AIR 1928 P C 162 (164) : 55 Ind App 227 : 3 Luck 314 (P C). (Confirming A I R 1925 Oudh 448.)

('31) AIR 1931 All 320 (322). (Following A I R 1928 P C 162.)

15a. See O. 21 R. 7, Note 4.

16-17. See Notes to O. 21 R. 7 and Note 4, *Infra*.

18. ('27) AIR 1927 Rang 104 (105) : 4 Rang 562.

19. ('80) 5 Cal 448 (449, 450).

[But see ('70) 1870 Pun Re No. 51.]

the latter that is competent to grant a certificate of non-satisfaction to the decree-holder in order to enable him to execute the decree in another Court.²⁰

2. **Pecuniary limits of the jurisdiction of the transferee Court.** — See Section 38 Note 7.

3. **Jurisdiction of transferee Court, how long continues.** — The transferee Court retains its jurisdiction over the execution proceedings until it certifies to the Court which passed the decree in the manner set forth in Section 41¹ or until the execution has been withdrawn from it.² Where, therefore, a decree has been executed by it partly, an application for further execution can be made to it without obtaining a fresh certificate under O. 21 R. 6 from the transferor Court.³ It is not bound to send the certificate as soon as one application for execution fails. The failure should be *complete* and not partial.⁴ The mere fact that the execution petition is struck off for some informality does not determine its jurisdiction in the matter⁵ and it can review its order striking off the petition⁶ or review the execution proceedings.⁷

After the issue of the certificate under this Section the transferee Court ceases to have jurisdiction to receive execution petitions or to do anything further in the matter⁸ except to decide objections in respect of anything done in the course of the execution proceedings which were pending before it.⁹ The Nagpur Judicial Commissioner's Court has, however, held that its jurisdiction does not cease even after a certificate is sent under this Section and that it can therefore entertain a fresh application for execution without another transfer under O. 21 R. 6 from the transferor Court.¹⁰

But the fact that execution has been transferred to another Court does not deprive the transferor Court of all control over the execution proceedings.¹¹ Thus, it

20. ('34) AIR 1934 Lah 390 (331).

Note 3.

1. ('98) 20 All 129 (181, 132).
(92) AIR 1932 Pat 286 (287) : 11 Pat 513.
(24) AIR 1924 Bom 359 (359, 360).
(23) AIR 1923 Bom 396 (396).
(09) 13 Cal W N 533 (540).
(14) AIR 1914 Mad 435 (435, 436) : 15 Ind Cas 738 (741) : 37 Mad 291.
(29) AIR 1929 Oudh 76 (77) : 4 Luck 209.
(Jurisdiction to issue fresh process for execution ceases after issue of certificate. But jurisdiction to decide questions arising in respect of any thing done in the course of execution proceeding remains.)
2. ('26) AIR 1926 Bom 271 (272) : 50 Bom 439.
(The Court which transfers its decree for execution to another Court has also the power to call back the decree.)
3. ('83) 1883 All W N 247 (248).
(09) 1 Ind Cas 57 (61) (Cal). (It has jurisdiction to entertain successive applications for execution.)
(75) 23 Suth W R 225 (226).
(01) 4 Oudh Cas 333 (338).
(31) AIR 1931 Pat 27 (30) : 9 Pat 829.
4. ('23) AIR 1923 Bom 396 (396).
5. ('09) 1 Ind Cas 57 (61) (Cal). (6 Suth W R Misc 47 must have been impliedly overruled by 10 Suth W R 46.)
(97) 1897 Pun Re No. 70, page 317.
(98) 20 All 129 (132).

('26) AIR 1926 Pat 274 (275) : 5 Pat 398.

[See also ('66) 1866 Suth W R Misc 47 (48).

(Jurisdiction of transferee Court ceases on case being struck off for default.)]

6. ('68) 10 Suth W R 46 (50) (F B).
7. ('68) 10 Suth W R 46 (50) (F B).
(09) 9 Cal L Jour 239 (243). (Attachment effected by transferee Court and thereafter certificate sent to Court which passed the decree—Re-transfer again to that Court under O. 21 R. 6—Attachment is revived.)
8. ('25) AIR 1925 All 179 (179).
(33) AIR 1933 Lah 149 (150).
(39) 43 Cal W N 412 (415).
(99) 3 Cal W N cxi.
- (30) AIR 1930 Lah 508 (511).
- (26) AIR 1926 Mad 1209 (1209).
- (26) AIR 1926 Pat 274 (275) : 5 Pat 398.
- (37) AIR 1937 Rang 406 (407).
9. ('29) AIR 1929 Oudh 76 (79) : 4 Luck 209.
10. ('22) AIR 1922 Nag 210 (212) : 18 Nag L R 178.
11. ('05) 1 Cal L Jour 315 (318).
(1900) 13 O P L R 169 (170).
(85) 7 All 73 (76). (Per Mahmood, J.)
(29) AIR 1929 Bom 418 (419) : 53 Bom 844.
(Concurrent execution can be had before receipt of certificate from transferee Court, only a formality.)
(36) AIR 1936 Cal 267 (269).
(34) AIR 1934 Lah 728 (729) : 16 Lah 80.
(38) AIR 1938 Mad 113 (114) : 1 L R (1938) Mad 326.

decree had been passed by itself, such order would be appealable. Thus, where a small cause suit is transferred to the original side for execution and an appealable order is passed in execution by the Court of transfer, such order would be appealable notwithstanding that the *decree transferred* is itself not appealable.¹ But the transfer of the decree cannot alter the *nature of the suit*² and the provisions of Section 102 will control this Section with the result that in the case of suits of a small cause nature, no *second* appeal will lie.³

43. [S. 229.] Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of *the Central Government or the Crown Representative*^a in the territories of any foreign Prince or State, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India.

[1877, S. 229; 1859, S. 284.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Governor-General in Council."

Synopsis

1. Legislative changes.
2. Scope of the Section.
3. Courts established or continued by authority of the Central Government or the Crown Representative in the territories of any foreign Prince or State.
4. Limitation applicable to foreign decrees. See Section 44.

1. Legislative changes. — The words "any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend" are new. See Note 2.

2. Scope of the Section. — Under the old Code only the decrees of British Courts in *foreign territory* could, under this Section, be executed within the jurisdiction of any Court in British India. A decree of a Court in a scheduled district in British India, to which the Code was not made applicable, could not be executed by

Note 5

1. ('90) 12 All 581 (586, 587).
('09) 31 All 1 (2).
('16) AIR 1916 All 293 (294).
('28) AIR 1928 Bom 534 (537): 53 Bom 46.
('21) AIR 1921 Cal 242 (243).
('15) AIR 1915 Cal 237 (237). (Order directing arrest of surety in execution of small cause decree.)
('73) 19 Suth W R 131 (132).
('05) 1905 Pun L R No. 3.
('25) AIR 1925 Mad 1179 (1180). (S. 42 in an amended form is made applicable to the Madras Small Cause Courts Act and does not

- govern transfers by the City Small Cause Court to the Moffussil Munsif's Court — The latter will be governed by S. 42, C. P. Code.)
('19) AIR 1919 Mad 264 (265).
('88) 11 Mad 130 (132).
2. ('90) 12 All 579 (580).
 3. ('18) AIR 1918 Mad 1368 (1368).
('11) 12 Ind Cas 959 (960) (Mad).
('27) AIR 1927 All 740 (740).
('26) AIR 1926 All 161 (162).
('07) 11 Cal W N 861 (862).
('98) 25 Cal 872 (874).
[See also ('18) AIR 1918 Mad 921 (921).]

another British Indian Court.¹ The addition of the words 'any decree passed. . . . extend' in the present Section makes it clear that the Section applies to Courts in areas in British India to which the Code does not apply.

3. Courts established or continued by authority of the Central Government or the Crown Representative in the territories of any foreign Prince or State. — The words "the Central Government or the Crown representative" have been substituted for the words "the Governor-General in Council" by the Adaptation of Indian Laws Order, 1937. The Court of the Political Agent at Sikkim is situated in a foreign territory and was held to be a Court "established or continued by the authority of the Governor-General in Council" within the meaning of this Section, and a decree of that Court was held executable by a British Indian Court.¹ The Court of the Dewan Ahilkar of Cooch Behar is situated in a foreign territory but was not established or continued by the authority of the Governor-General in Council.² The Court of the Native Commissioners of Kondh situated within the family domains of the Maharajah of Benares was held to be a Court established by the authority of the Governor-General, though *not* situated in foreign territory as the family domains of the Maharajah of Benares are in British India. This Section does not therefore apply to the execution of the decrees of such Court.³

4. Limitation applicable to foreign decrees. — See Section 44.

44. *The Provincial Government may by notification in the Official Gazette declare that the decrees of any Civil or Revenue Courts in any Indian State, not being Courts established or continued by the authority of the Central Government or of the Crown Representative; or any class of such decrees, may be executed in the Province as if they had been passed by Courts of British India.^a*

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original Section.

Synopsis

1. Legislative changes.
2. Scope of the Section.
3. Notifications.
4. British Indian Courts, if and when can refuse to execute foreign decrees.
- 4a. Burma Courts, if can execute decrees of Courts in Indian States.
5. Foreign judgments. See Section 13.
6. Limitation and procedure.

1. Legislative changes. — The Section was substituted by the Government of India (Adaptation of Indian Laws) Order, 1937. The previous Section¹ gave the power

Section 43 — Note 2

1. ('88) 15 Cal 365 (370).

Note 3

1. ('11) 38 Cal 859 (861).
2. ('70) 13 Suth W R 154 (155).

3. ('07) 34 Cal 576 (582, 583).

Section 44 — Note 1

1. For Notification issued by the Governor-General in Council under this Section, as stood before 1st April 1937, see Gen. R. and O., Supplement, Vol. 1, pp. 775 to 781.

of notification under this Section to the Governor-General in Council whereas under the new Section the power is given to the Provincial Government. Again, the previous Section applied to Courts situated in the territories of any Native Prince or State in alliance with His Majesty whereas the new Section refers to Courts situated in any "Indian State."

2. Scope of the Section. — This Section applies to a *particular* class of foreign Courts, namely those situated within the territories of any "Native Prince or State" while Section 43 applies to British Courts situated in the territories of "*any* foreign Prince or State."

3. Notifications. — See General Statutory Rules and Orders, Vol. I, pages 622-625, Vol. III, p. 475 (Edition 3),¹ Vol. IV, pp. 682, 683 and 685 and Sup. Vol. I, pp. 775-781.² See also Notification No. 170—I of Government of India, dated 23rd March, 1927.

4. British Indian Courts, if and when can refuse to execute foreign decrees. — A decree of a Native State notified under this Section does not thereby cease to be a foreign decree.¹ The Section merely alters the *procedure* for enforcing the foreign judgment of a Native State.² It does not bar any objections being raised in execution which are open in suits on foreign judgments.³ Thus the judgment-debtor is not precluded from questioning the jurisdiction of the Court passing the decree⁴ or from objecting that the decree was obtained by fraud.⁵

A British Indian Court is not bound under this Section to order execution of the decree in all cases.^{5a} It can refuse to execute the decree not only on the grounds specified in Sections 13 and 14^{5b} but also on the other valid grounds as well.⁶

When foreign decrees are sought to be executed in British Indian Courts, as an invariable rule notice ought to be issued to show cause against execution.⁷

As to whether *suits* are maintainable on judgments of Native States notified under this Section, see the undermentioned case.⁸

4a. Burma Courts, if can execute decrees of Courts in Indian States. — Before the separation of Burma from India there were notifications under the Section,

Note 3

1. See ('38) AIR 1938 Cal 511 (517): 63 Cal 1033.
2. See Unrepealed Central Acts, Vol. V, p. 23.

Note 4

1. ('91) 15 Bom 216 (219, 221). (Objection on ground of fraud—For right of suit, see Notes under Section 13.)
2. ('38) AIR 1938 Cal 511 (517): 63 Cal 1033.
3. ('25) AIR 1925 Mad 788 (789).
4. ('15) AIR 1915 Mad 486 (488): 39 Mad 24 (47) (F B).
5. ('38) AIR 1938 Cal 511 (517): 63 Cal 1033.
6. ('17) AIR 1917 Mad 780 (782): 39 Mad 733 (F B).
7. ('31) AIR 1931 All 689 (691): 53 All 747.
8. ('35) AIR 1935 Lah 551 (551). (Words "as if they had been passed by Court in British India" do not control operation of S. 13 (a).)
9. ('15) AIR 1915 Mad 486 (487): 39 Mad 24 (30) (F B). (But if he voluntarily submits to jurisdiction he cannot question it in execution.)
10. ('25) AIR 1925 Cal 955 (956).

11. ('16) AIR 1916 Bom 307 (308): 40 Bom 551. (Decree in absentum).
12. 5. ('91) 15 Bom 216 (219, 220).
13. 5a. ('15) AIR 1915 Mad 486 (486, 487): 39 Mad 24 (30) (F B). (Objection to jurisdiction.)
14. 5b. ('17) AIR 1917 Mad 780 (782): 39 Mad 733. ('38) AIR 1938 Mad 112 (113). (Ex parte foreign decree in personam against British subject not residing there at date of action will not be executed by British Courts.)
15. ('37) AIR 1937 Mad 97 (99).
16. ('34) AIR 1934 Mad 434 (434): 57 Mad 824. (Decree of foreign Court against resident in British India — Decree can be executed in British India only if defendant submits to jurisdiction of foreign Court before judgment.)
17. 6. ('25) AIR 1925 Mad 788 (790).
18. ('87) 14 Cal 546 (550). (Executing Court can refuse to execute unless the record of the Native Court is properly certified.)
19. 7. ('25) AIR 1925 Mad 788 (789).
20. 8. ('15) AIR 1915 Mad 486 (488): 39 Mad 24 (F B). (Per Seshagiri Iyer J.)

by which the decrees of Indian States could be executed in Burma.¹ By para. 9 of the Burma Laws Adaptation Order, 1937 and Sections 148 and 149 of the Government of Burma Act, the said notifications will be in force even after the separation of Burma on 1st April 1937, unless altered or repealed by the Legislature or other competent authority. Consequently it was held in the undermentioned case² that the decree of a Court in the Pudukkottah State, in respect of which a notification under this Section had been issued, could be executed by the Courts in Burma.

5. Foreign judgments. — See Section 13.

6. Limitation and procedure. — The rules as to limitation and procedure applicable to the execution of a decree of a foreign Court, are those prescribed by the law of British India and not those prescribed by that of the foreign State.¹ See also the Authors' Commentaries on the Limitation Act, Section 11 Note 2 and Article 182, Note 95.

44 A. ^a(1) *Where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in British India as if it had been passed by the District Court.*

(2) *Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.*

(3) *The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.*

Explanation 1. — “Superior Courts,” with reference to the United Kingdom, means the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham.

Note 4a

1. See Notification 4395 — 1/A dated 8-12-04 p. 625 of Vol. I of General Statutory Rules and Orders 1907.
2. ('38) AIR 1938 Rang 352 (353) : 1938 Rang L R 463.

Note 6

1. ('87) 14 Cal 570 (571): (Limitation—Art. 182 of the Indian Limitation Act). ('16) AIR 1916 Bom 200(201):40 Bom 504. (Do.) ('78) 2 Mad 337(338). (Civil Procedure—A judgment against the legal representative of the debtor—Execution confined to assets in hand.)

Explanation 2.—“Reciprocating territory” means any country, or territory, situated in any part of His Majesty’s Dominions ^{b* * *} which the “[Central Government] may, from time to time, by notification in the “[Official Gazette], declare to be reciprocating territory for the purposes of this section; and “superior Courts”, with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 3.—“Decree”, with reference to a superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, and—

- (a) with reference to superior Courts in the United Kingdom, includes judgments given and decrees made in any Court in appeals against such decrees or judgments, but
- (b) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment.

a. This Section was inserted by the Code of Civil Procedure (Amendment) Act, 1937 (VIII of 1937), Section 2.

b. The words “or in India” repealed by the Government of India (Adaptation of Indian Laws) Order, 1937.

c. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for “Governor-General in Council.”

d. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for “Gazette of India.”

Synopsis

1. Scope and object of the Section. | 2. Explanation 3.

1. Scope and object of the Section.—Under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, provision is made for the extension of Part I of the Act by Order in Council to His Majesty’s Dominions outside the United Kingdom and also for the specification by such Order in Council of the Courts which shall be deemed to be “superior Courts” within the meaning of the Act. On the Act being extended to British India, the decrees of the Courts in British India which may be deemed to be “superior Courts” for the purpose of the Act may be executed in the United Kingdom. This Section is intended to reciprocate the policy contained in the above Act and to be part of a reciprocal arrangement under which on the one part decrees of British Indian Courts should be executable in the United Kingdom and on the other, decrees of Courts in the United Kingdom and other notified areas should be executable in British India.¹

2. Explanation 3.—This Explanation has been added to the Section with two objects in view, viz., to include a Court of Appeal in the United Kingdom among “superior Courts” and to define decrees so as to assimilate the meaning of the term

Section 44 A—Note 1

1. *Vide* Statement of Objects and Reasons, Gazette of India Part V p. 24, dated 16th February 1935.

to that applicable to the corresponding British statute (Section 10, Foreign Judgments (Reciprocal Enforcement) Act, 1933).¹

45. *So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in any Province to send a decree for execution to any Court established or continued by the authority of the Central Government or of the Crown Representative in the territories of any foreign Prince or State to which the Provincial Government has by notification in the Official Gazette declared this section to apply.*

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 for the original Section 45.

Synopsis

1. Execution of decrees of British Indian Courts in foreign territory.
2. Notifications.
3. "Any foreign Prince or State."
4. Step-in-aid of execution.

1. Execution of decrees of British Indian Courts in foreign territory. —

This Section deals with cases converse to those dealt with by Sections 43 and 44. It deals with the execution of decrees of *British Indian Courts* in foreign territory. But in order to send a decree of a British Indian Court for execution in foreign territory it is necessary that the transferee Court should be one —

1. which is established or continued by the Governor-General in Council in such foreign territory, *and*

2. to which the Governor-General in Council has, by notification, declared this Section to apply.¹

In the absence of either of these conditions a British Indian Court has no jurisdiction to send its decrees for execution to a Court not situate in British India.² The reason why the Code is silent as to the execution of decrees of British Indian Courts by the Courts of Native States is that the Indian Legislature has no power to legislate for foreign Courts.³ But by treaty arrangements decrees of British Indian Courts may be executed in Courts of Native States.⁴

2. Notifications.—See General Statutory Rules and Orders, Vol. I, pp. 618 to 621. This Section applies to Arakan Hills. See Arakan Hills District Laws Regulation, 1916 (I of 1916), Schedule I.

Note 2

1. *Vide* Report of the Select Committee.

Section 45 — Note 1

1. ('18) AIR 1918 Mad 580 (583) : 40 Mad 1069 (1077) (FB).

('29) AIR 1929 Sind 45 (46) : 23 Sind L R 205.

('11) 11 Ind Cas 442 (442) : 38 Cal 859, (Court of Political Agent at Sikkim—Established by authority of the Governor-General in Council.)

2. ('18) AIR 1918 Mad 605 (605) : 32 Mad L Jour 487 (488).

('02) 29 Cal 400 (402).

('88) 12 Bom 230 (231).

('19) AIR 1919 Low Bur 4 (4).

3. ('18) AIR 1918 Bom 236 (239) : 42 Bom 420 (429).

('29) AIR 1929 Sind 45 (46) : 23 Sind L R 205.

(Attachment before judgment—Property in Dutch territory—Mandate issued to British Consul there cannot be maintained.)

4. ('18) AIR 1918 Mad 580 (584) : 40 Mad 1069 (1077) (FB).

3. "Any foreign Prince or State."—The Courts contemplated by this Section are Courts in the Native Indian States in alliance with the British Government.¹

4. **Step-in-aid of execution.** — As to whether an application to a British Indian Court to send its decree to the Court of a Native State between which and the British Courts reciprocity prevails, is an application to take a step-in-aid of execution, see the Authors' Commentaries on the Limitation Act, Article 182, Note 107.

46. (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

Precepts.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree:

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

Synopsis

1. Attachment by precept.
2. Powers of Court to which precept is sent.
3. Application under the Section is not one for execution.

Other Topics

Object of the Section. See Note 1.

Precept can be issued even after decree is transferred. See Note 1 Pt. (4).

"Unless the period of attachment is extended." See Note 1 Pt. (2).

Validity of precept if can be challenged by Court to which it is sent. See Note 2.

1. **Attachment by precept.** — The Section is new and its object is to attach the property of the judgment-debtor in another Court in order to prevent the judgment-debtor from alienating or otherwise dealing with it to the detriment of the decree-holder till proper proceedings for the sale of the property in pursuance of an application can be taken.¹ It is for this reason that the effect of the attachment in

Note 3

1. ('29) AIR 1929 Sind 45 (46) : 23 Sind L R 205.

Section 46 — Note 1

1. ('36) AIR 1936 Lah 486 (487, 488).
 ('27) AIR 1927 Cal 581 (588).
 ('31) AIR 1931 Rang 279 (280) : 9 Rang 561.
 ('11) 10 Ind Cas 794 (795) (Low Bur).

QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE

47. [S. 244.] (1) All questions⁴ arising⁶ between the parties⁷ to the suit in which the decree was passed, or their representatives,¹⁷ and relating to the execution, discharge or satisfaction of the decree,²⁸ shall be determined⁷³ by the Court executing the decree⁷⁴ and not by a separate suit.⁷²

Questions to be determined by the Court executing decree.

(2) The Court may, subject to any objection as to limitation⁸³ or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding⁸² and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.²⁷

Explanation. — For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed,⁸ are parties to the suit.

[1877, S. 244; 1861, S. 11; 1859, S. 283, See S. 2, cl. (2); Ss. 50, 52, 144, 145.]

Synopsis

1. Legislative changes.

2. Scope, object and applicability of the Section.

3. Applicability to proceedings under other Acts.

4. Question must be one arising 'between the parties' to the suit in which the decree is passed or their representatives.

5. Parties arrayed on the same side.

6. "Arising," meaning of.

7. "Parties to the suit," meaning of.

8. Plaintiff whose suit is dismissed and defendant against whom suit is dismissed — Explanation.

8a. Person against whom suit abates.

9. Surety under Section 145.

10. Government in proceedings under Order 33.

11. Custodian of attached property.

12. Unnecessary party. See Note 8.

13. Intervenor.

14. Trespassers.

15. Party sued in a representative capacity.

16. Question as to who is a party can be decided by the executing Court.

17. "Representative," who is.

18. Decree-holder becoming auction-purchaser.—See Note 19.

19. Auction-purchaser, position of.

20. Transferee from auction-purchaser.

21. Transferee from a party.

22. Purchaser from party to suit in which injunction has been granted affecting such property.

23. Official Assignee or Official Receiver.

23a. Liquidator of company.

24. Transferee of decree.

25. Attaching creditor.

25a. Judgment-debtor under attached decree.

26. Surety for the performance of a decree.

27. Question as to who is the representative must be determined by the Court — Clause (3).

28. Question must relate to execution, discharge or satisfaction of the decree.

29. Question as to validity of the decree.

30. Question as to the existence of the decree.

31. Pre-decree matters.

32. Matters subsequent to the decree.—See Notes 33 to 71.

33. Decree incapable of execution.
34. Questions arising between the preliminary and final decrees.
35. Question as to excess or deficient execution.
36. Question of damages for acts done under cover of execution.
37. Question as to seizure of wrong property.
38. Question of mesne profits.
39. Question of restitution of property taken in execution, when the decree is amended, varied or reversed.—See Notes 3 to 6 and 30 to Section 144.
40. Question of adjustment of decree.
41. Agreement against execution of decree.
42. Contribution among judgment-debtors.
43. Mal-administration of estate of deceased judgment-debtor.
44. Stay of execution.
45. Question of liability of certain property to attachment and sale.
46. Question if property attached belongs to judgment-debtor.
47. Question if debts were contracted without legal necessity or tainted with immorality or that the attached property is self-acquired or ancestral.
48. Question as to the transferability of the property proceeded against.
49. Question between decree-holder and judgment-debtor in which auction-purchaser is interested.
50. Question between the execution-purchaser and a party or his representative.
51. Setting aside sales in execution.
52. Decree obtained by fraud.
53. Fraud in execution proceedings.
54. Fraud anterior to sale.—See Note 53.
55. Fraud in publishing and conducting the sale.
56. Other grounds for setting aside sale.—See Notes 57 to 71.
57. Property not saleable.—See Note 45.
58. Reversal of decree.
59. Amendment of decree after sale.—See Notes 39 and 58 above and Notes 54, 13, 30 and 33 to Section 144.
60. Ex parte decree set aside after sale.
61. Want of notice under O. 21 Rr. 16, 22 and 66.
62. Purchase by decree-holder without permission.
63. Setting aside sale on deposit.
64. Judgment-debtor having no saleable interest.
65. Sale in contravention of the Transfer of Property Act.
66. Sale in contravention of stay order.
67. Sale in contravention of injunction order.
68. Sale not warranted by decree.
69. Sale under time-barred decree.
70. Sale without jurisdiction.
71. Other grounds for setting aside sale.
- 71a. Miscellaneous.
72. "Shall be determined by the Court executing the decree and not by a separate suit."
73. "Determined," meaning of.
74. "Court executing the decree," meaning of.
75. Powers of the executing Court.—See Notes to Section 38 generally.
76. Power to construe decree.
77. Rules of construction of decree.
78. Power to go behind decree.—See Note 8 to Section 38, and Note 29.
79. Power to grant relief against forfeiture and penalty.
80. Costs.
81. Interest.
82. Court may treat a proceeding as a suit or vice versa—Sub-section (2).
83. Objections as to limitation, when to be considered.
84. Appeal.
85. Forum of appeal.
86. Interlocutory orders in execution proceedings.
- 86a. Parties to proceedings under Section.
87. Revision.
88. Limitation.

Other Topics

- Accession to hypotheca to be decided in execution. See Note 71a Pt. 20 and F-N 20 also.
- Attached property. See Note 21 Pt. 2.
- Claim by auction-purchaser for refund of purchase-money. See Note 71a F-N 12.
- Conditional decree for possession in a pre-emption suit—Conditions satisfied—Possession claimable in execution—Separate suit—Barred. See Note 71a F-N 9.
- Damages for breach of agreement as to execution or satisfaction—Suit when lies. See Note 40 Pts. 8 to 10.
- Defaulting purchaser at execution sale. See Note 7 Pt. 16; also Note 50 and Note 71 Pt. 5; also O. 21 R. 71.
- Dispossession subsequent to private possession under a previous decree. See Note 35 Pt. 3; See also Section 11.

2. Scope, object and applicability of the Section.— This Section, like Section 11, has been enacted for the purpose of checking needless litigation¹ and with a view to enable parties to obtain adjudication of questions relating to execution without unnecessary expense or delay, which a fresh trial might entail.² The rule of *res judicata*, however, deals with the finality of a decision of a Court on matters actually or constructively in issue before it and bars a *fresh trial of any kind* of such questions in subsequent proceedings between the parties; while Section 47 deals with the *enforcement* of such decisions and enacts that the questions specified in the Section shall be *tried in execution* and not by a separate *suit*.³ In other words, where there is an *executable* judgment, no *suit* lies for the enforcement thereof, or for the determination of the questions specified in the Section.⁴ The object of the Section being to save unnecessary expense and delay and to afford finally relief to parties cheaply and

Note 2

1. ('72) 18 Suth W R 185 (188).
('09) 1 Ind Cas 416 (419) : 31 All 82 (F B).
('82) 6 Bom 7 (8).
('98) 22 Bom 463 (466) (F B).
('93) 17 Bom 49 (52).
('25) AIR 1925 Cal 1258 (1259).
('09) 4 Ind Cas 121 (122) (Cal).
('17) AIR 1917 Mad 177 (177).
('93) 16 Mad 447 (449).
('92) 15 Mad 226 (228).
('90) 13 Mad 504 (507).
2. ('94) 21 Cal 437 (444, 450, 458).
('90) 17 Cal 769 (773).
3. See the cases in foot-note (4).
4. ('25) AIR 1925 P C 34 (35) : 52 Cal 314 : 52 Ind App 79 (P C).
('34) AIR 1934 Cal 327 (327) : 60 Cal 1467. (Money decree creating charge on property—Separate suit to enforce charge is not maintainable.)
(1864) 10 Moo Ind App 203 (211) (P C).
('90) 13 All 98 (100).
('35) AIR 1935 Pat 222 (224). (Suit for possession under lease—Decree—Order for delivery—Subsequent suit for demolition of building not maintainable.)
('39) AIR 1939 Pat 260 (261). (If execution of decree for possession is barred by limitation, fresh suit by decree-holder for same purpose is also barred—Mere inundation of land does not amount to dispossession of judgment-debtor or constructive possession of decree-holder so as to create fresh right to sue.)
('37) AIR 1937 Pesh 3 (4). (S. 47 applies to execution of decrees of the Privy Council.)
('66) 1 Agra 93 (96).
('03) 5 Bom L R 1036 (1040). (Rights under a consent decree.)
('86) 10 Bom 461 (467) : 13 Ind App 66 (P C).
('73) 10 Bom H C R 433 (434).
('30) AIR 1930 Cal 586 (587). (Possession through Court or out of Court not got in execution for want of steps—Suit barred.)
('23) AIR 1923 Cal 252 (255). (A decree which merely declares the rights of the parties is incapable of execution. A separate suit lies in such a case to enforce the rights declared by the decree.)
('78) 3 Cal 30 (35, 37, 38) (F B).

- ('21) AIR 1921 Lah 394 (395). (Decree for possession in a mortgage suit obtained—No further suit for possession lies unless it can be shown that possession was obtained under the decree and the judgment-debtor had been subsequently dispossessed.)
('17) AIR 1917 Lah 11 (12).
('93) 1893 Pun Re No. 16.
('94) 17 Mad 343 (355) : 21 Ind App 71 (P C).
('70) 6 Mad H C R 13 (14). (Decree for possession of land with crops—Claim for both in execution and suit.)
('70) 5 Mad H C R 375 (377).
('70) 5 Mad H C R 185 (188).
('69) 4 Mad H C R 453 (458).
('30) AIR 1930 Nag 17 (18).
No suit will lie even if the execution of the decree is barred by limitation; see the following cases:
('21) AIR 1921 All 369 (372) : 43 All 170.
('20) 2 Lah L Jour 724 (727).
('16) AIR 1916 All 163 (164) : 38 All 509.
('82) 4 All 481 (481). (3 N W P H C R 62, Foll.)
('68) 3 Agra 383 (383) (F B).
('68) 3 Agra 381 (382) (F B).
('19) AIR 1919 Bom 34 (35) : 43 Bom 703.
('82) 6 Bom 7 (8).
('82) 5 Bom 382 (384).
('69) 6 Bom H C R A C 231 (234).
('27) AIR 1927 Cal 411 (412) : 54 Cal 524. (Decree for khas possession not executed—Suit barred.)
('06) 33 Cal 679 (681, 682).
('97) 24 Cal 473 (487, 489, 491).
('82) 10 Cal L Rep 258 (262).
('78) 1 Cal L Rep 254 (255).
('76) 25 Suth W R 372 (373).
('75) 23 Suth W R 407 (407).
('73) 20 Suth W R 412 (413).
('30) AIR 1930 Lah 74 (75). (Final decree for redemption—Payment made by decree-holder—Execution barred by limitation—Second suit for redemption or possession is barred.)
('25) AIR 1925 Mad 279 (280) : 48 Mad 482.
('18) AIR 1918 Mad 370 (371) : 41 Mad 641.
[See ('98) AIR 1938 Pat 41 (42) : 16 Pat 748. (Suit to recover money recovered under subsisting decree does not lie. A I R 1923 P C 167 Foll.)]
[See also ('16) AIR 1916 Cal 661 (664).]

7 speedily without the necessity of a fresh suit,⁶ it must be construed as liberally as the
 3 language would reasonably admit of.⁶ It embraces all matters connected with the execution of an existing decree, between the parties or their representatives and covers all questions relating to the execution, discharge or satisfaction of the decree.⁷ It does not matter whether such questions arise before or after the decree has been executed⁸ and the fact that an alternative remedy by suit is provided in certain circumstances,⁹ or that an application was made under another provision of the Code,¹⁰ does not prevent the Section from being applied for the decision of the questions falling within its scope. The Section does not make any distinction between a money decree and a mortgage decree¹¹ or between the Court which passed the decree and the Court executing it, inasmuch as both qualifications may be possessed by the same Court.¹²

But in order that the Section may apply, the following two conditions must be satisfied :

1. The question must be one arising *between the parties* to the suit in which the decree is passed, or their representatives, and
2. it must relate to the *execution, discharge or satisfaction* of the decree.¹³
See Notes 4 and 28 *infra*.

The Section applies to the execution of decrees of the Privy Council.^{13a}

The Section does not apply to the decrees of foreign Courts¹⁴ or to the Ganjam and Vizagapatam Agency Tracts.¹⁵

3. Applicability to proceedings under other Acts. — It has been seen in Note 2 above that in order that Section 47 may apply, one of the essential requisites is that the question must relate to execution, discharge or satisfaction of a decree. Where, therefore, an order passed in proceedings under the provisions of other Acts is enforceable under the provisions of those Acts *as if it were a decree*, Section 47

5. ('92) 19 Cal 683 (689) : 19 Ind App 166 (P C).

('04) 31 Cal 737 (741).

('36) AIR 1936 Cal 537 (539).

('15) AIR 1915 P C 88 (89) (P C).

('73) 20 Suth W R 162 (162).

[See also ('01) 24 All 209 (210, 211).

('36) AIR 1936 Mad 636 (638).]

6. ('20) AIR 1920 Mad 324 (330) : 43 Mad 107 (F B).

('24) AIR 1924 Nag 246 (247) : 20 Nag L R 90.

('36) AIR 1936 Pat 289 (294) : 15 Pat 545.

('85) 7 All 73 (78).

('22) AIR 1922 Bom 370 (374) : 46 Bom 529.

('07) 34 Cal 642 (648, 654, 659) (F B).

('06) 33 Cal 857 (860).

('97) 24 Cal 473 (492).

(1900) 23 Mad 55 (59).

('22) AIR 1922 Pat 572 (572).

7. ('27) AIR 1927 Cal 106 (108) : 53 Cal 837.

('10) 7 Ind Cas 940 (943) : 34 Bom 575.

('37) AIR 1937 All 407 (409). (But the Section ought to be so interpreted as not to render redundant the other provisions contained in the Code.)

('85) 7 All 641 (643).

('36) AIR 1936 Cal 409 (412) : I L R (1937) 1 Cal 57. (Execution Court can allow set-off even in cases not strictly covered by O. 21 R. 19.)

('90) 17 Cal 711 (718) (F B).

8. ('95) 17 All 478 (480).

('33) AIR 1933 All 429 (431).

('02) 24 All 291 (294).

('36) AIR 1936 Lah 725 (727).

('38) AIR 1938 Nag 363 (364).

9. ('16) AIR 1916 Mad 1008 (1010).

10. ('16) AIR 1916 Cal 471 (472).

('26) AIR 1926 Mad 968 (969). (Application made under O. 21 Rr. 99 and 101.)

('35) AIR 1935 All 183 (185). (S. 47—To see whether application comes under S. 47, substance of application must be examined and not heading given to it by party.)

11. ('29) AIR 1929 Lah 762 (763).

12. ('85) 7 All 73 (76).

13. ('15) AIR 1915 Cal 137 (138).

('12) 13 Ind Cas 365 (367) (Cal).

('10) 7 Ind Cas 769 (770) (Cal).

('02) 6 Cal W N 279. (283).

('38) AIR 1938 Lah 4 (5). (Amendment of decree is not a matter falling under this Section—No appeal lies from order amending decree.)

('21) AIR 1921 Mad 612 (615).

13a. ('37) AIR 1937 Pesh 3 (4).

14. ('13) 20 Ind Cas 704 (707) (Mad). (Per Sundara Iyer J.)

15. ('07) 30 Mad 280 (281).

('11) 12 Ind Cas 73 (74) : 36 Mad 128.

('23) AIR 1923 Mad 114 (114).

will apply.¹ Thus, it has been held that an award filed under Section 11 of the Indian Arbitration Act, being under Section 15 enforceable as if it were a decree; Section 47 will apply to proceedings in execution thereof.² As to cases of orders under other Acts which are not enforceable as decrees and to which Section 47 does not apply, see the undermentioned cases.³

Before the enactment of the present Code, and the incorporation therein of the provisions of the Transfer of Property Act relating to orders absolute for sale or foreclosure of mortgaged property, the question arose whether, when such an order absolute has been made, any question that may arise as to such an order is not one relating to the execution of the decree within the meaning of Section 244 of the old Code. There was a conflict of opinion on the matter among the several High Courts.⁴ The question is not of any importance now under the present Code.

Note 3

1. ('06) 1906 Pun L R No. 103, p. 322: 1906 Pun Re No. 53. (Order under Land Acquisition Act.)
- ('33) AIR 1933 Mad 305 (306): 56 Mad 712. (The words in S. 70 of the Madras Hindu Religious Endowments Act attract the operation of S. 47.)
- ('38) AIR 1938 All 124 (125). (Order passed under S. 47 in execution under Agra Tenancy Act, is not decree—Second Appeal from such order does not lie.)
- ('32) AIR 1932 All 92 (94): 53 All 715. (Order of ejectment under Sec. 80, Agra Tenancy Act 1926.)
- ('35) AIR 1935 Cal 89 (89). (Bengal Tenancy Act Section 173 (3).)
- ('28) AIR 1928 Cal 202 (203). (Order under S. 173, Bengal Tenancy Act.)
- ('97) 1 Cal W N 534 (536): 24 Cal 707. (Do.)
- ('07) 34 Cal 787 (808). (Order under Public Demands Recovery Act; not following 29 Cal 73, 29 Cal 94, 6 Cal W N 331 and distinguishing 6 Cal W N 630, 2 Cal L Jour 504. But see 5 Cal L Jour 638 (641), 10 Ind Cas 532 (535) (Cal).)
- ('06) 33 Cal 84 (91). (Order under Public Demands Recovery Act (Act 1 (B O) of 1897.))
- ('05) 32 Cal 691 (696). (Do.)
- ('03) 7 Cal W N 591 (593). (Order under S. 13, Bengal Tenancy Act.)
- ('02) 6 Cal W N 190 (191). (Decree under S. 13, Bengal Tenancy Act.)
- ('86) 12 Cal 511 (513). (Decree under S. 53, Registration Act 20 of 1866.)
- ('26) AIR 1926 Lah 547 (547). (Award under Co-operative Societies Act—Enforceable as a decree of Court.)
- ('27) AIR 1927 Mad 440 (440, 441). (Order under Section 77, Madras Estates Land Act.)
- ('35) AIR 1935 Pat 227 (228). (Bengal Tenancy Act, Section 148A.)
- ('21) AIR 1921 Sind 29 (32): 15 Sind L R 47. (Order under Section 22, Dekkhan Agriculturists Relief Act.)
- [See also ('14) AIR 1914 Cal 177 (177). (Order under S. 173, Bengal Tenancy Act.)
- Section 6, cl. (4) of the Malabar Compensation for Tenants' Improvements Act. (Madras Act 1 of 1900.)]
2. ('21) AIR 1921 Sind 132 (133): 16 Sind L R 245.

- ('34) AIR 1934 Lah 49 (50). (Order rejecting application for enforcement of award is appealable. The fact that a plea that the award was without jurisdiction has been raised does not preclude the applicability of this Section.)
- ('29) AIR 1929 Lah 228 (229).
3. ('88) 15 Cal 179 (183). (Proceedings under the Bengal Landlord and Tenant Protection Act 10 of 1859.)
- ('10) 7 Ind Cas 387 (388) (Cal). (Do.)
- ('70) 13 Suth W R 34 (35). (Do.)
- ('04) 26 All 149 (151). (Decree of Revenue Court under N. W. P. Act 12 of 1881.)
- ('36) AIR 1936 All 451 (451). (Order in proceedings under S. 79, Agra Tenancy Act, although falls within S. 47 is an order and not a decree.)
- ('30) AIR 1930 Cal 302 (303). (Order under S. 174, Bengal Tenancy Act.)
- ('96) 1 Cal W N 30 (30). (Do.)
- ('27) AIR 1927 Pat 177 (177, 178): 6 Pat 366. (Order under S. 227 (3), Orissa Tenancy Act.)
- [See ('34) AIR 1934 All 192 (192). (Order under S. 47 in proceedings governed by Agra Tenancy Act is not decree—See S. 248 of the Agra Tenancy Act.)]
- [See also ('36) AIR 1936 All 868 (869). (Order under Agra Tenancy Act is appealable as an order and not as a decree.)
- ('09) 1 Ind Cas 304 (305) (Cal). (Held doubtful.)
- ('98) 3 Cal W N 344 (345). (A proceeding under S. 174 of the Bengal Tenancy Act is not a proceeding for the execution of a decree.)
- ('28) AIR 1928 Mad 1107 (1107). (Order under S. 192, Estates Land Act.)]
- [But see ('79) 1879 Pun Re No. 126, p. 371. (Order under Land Revenue Act 33 of 1871, Punjab, now repealed by Act 17 of 1877.)
- ('12) 13 Ind Cas 365 (367). (Order under S. 174, Bengal Tenancy Act.)]
4. The following cases held that it is :
 - ('01) 24 All 179 (184).
 - ('90) 12 All 61 (62) (F B).
 - ('92) 14 All 520 (520).
 - ('91) 13 All 278 (280) (F B).
 - ('08) 31 Mad 354 (358).
 - ('02) 25 Mad 244 (265, 269, 288) (F B).
 - ('01) 4 Oudh Cas 123 (126).

4. Question must be one arising 'between the parties' to the suit in which the decree is passed or their representatives. — This, as has been said before, is one of the essential conditions for the applicability of the Section. The words 'between the parties' do not necessarily mean parties on *opposite sides* as plaintiff and defendant, but mean parties *opposed to each other* in the suit.¹ See Note 5 below, 'Parties arrayed on the same side.' Where a question for decision does not arise between the parties to the suit as explained above or their representatives, it cannot be decided under this Section.² On the other hand, all questions that arise between such parties or their representatives and relating to the execution, discharge or satisfaction of the decree must be decided under this Section and not by a separate suit.³

The Section does not confer on the decree-holder any right of proceeding in execution against persons who are not judgment-debtors under the decree except as provided by Section 50, *infra*.⁴ As to whether a representative not falling under Section 50 can be made a party to the execution proceedings either by the Court *suo motu* or on his own application, see Notes to O. 22 R. 10. See also Section 145 and Notes thereto.

The following cases held that it is not :

('02) 29 Cal 651 (653).

('98) 25 Cal 133 (134, 135).

('04) 6 Bom L R 1043 (1049).

('09) 4 Ind Cas 121 (122) (Cal).

('04) 8 Cal W N 102 (104).

('02) 29 Cal 644 (646).

('94) 21 Cal 818 (823).

Note 4

1. ('13) 19 Ind Cas 448 (448) (Mad).

('32) AIR 1932 Cal 126 (128, 129) : 59 Cal 117.

2. ('29) AIR 1929 Mad 850 (851, 852).

('34) AIR 1934 Lah 478 (479). (Two decree-holders proceeding against same property — Decision by executing Court that one is not entitled to priority over other is no bar to regular suit for establishing priority.)

('23) AIR 1923 All 292 (292).

('23) AIR 1923 Bom 450 (450, 451).

('20) AIR 1920 Bom 228 (228) : 44 Bom 977.

('88) 12 Bom 80 (85).

('07) 6 Cal L Jour 437 (440).

('03) 8 Cal W N 230 (231).

('96) 1 Cal W N 114 (117).

('85) 11 Cal 150 (152, 153).

('68) 10 Suth W R 93 (93, 94).

('16) AIR 1916 Lah 301 (302).

('76) 1876 Pun Re No. 75.

('36) AIR 1936 Mad 733 (739). (Dispute between the decree-holder auction-purchaser and stranger, as to delivery of possession.)

('27) AIR 1927 Mad 240 (241).

('17) AIR 1917 Mad 217 (217).

('16) AIR 1916 Mad 430 (430).

('97) 20 Mad 487 (489). (Question between judgment-debtor and auction-purchaser — Decree-holder not being interested in or affected by it.)

('96) 19 Mad 331 (334).

('25) AIR 1925 Nag 288 (289).

('33) AIR 1933 Oudh 146 (147).

('14) AIR 1914 Oudh 359 (359) : 17 Oudh Cas 374.

('19) AIR 1919 Pat 454 (464).

('17) AIR 1917 Pat 337 (338) : 2 Pat L Jour 219,

('16) AIR 1916 Pat 315 (316). (Question between a party and his partner.)

[See also ('99) 22 Mad 372 (377).]

3. See the following cases :

('24) AIR 1924 All 752 (752).

('99) 21 All 356 (358).

('88) 10 All 570 (576). (Question as to legality of purchase by judgment-debtors of right of some of decree-holders.)

('28) AIR 1928 Bom 534 (536) : 53 Bom 46.

('23) AIR 1923 Bom 381 (382).

('09) 1 Ind Cas 459 (459) : 33 Bom 39. (No substantial distinction in regard to questions arising in execution between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree.)

('99) 23 Bom 237 (242, 244.)

('81) 5 Bom 673 (677) (FB).

('16) AIR 1916 Cal 471 (472).

('15) AIR 1915 Cal 570 (571).

('10) 6 Ind Cas 414 (414) (Cal). (Suit for declaration that only one of the judgment-debtors alone is liable under the decree cannot be maintained.)

('07) 11 Cal W N 239 (241).

('97) 24 Cal 473 (478, 492) (FB).

('26) AIR 1926 Lah 165 (165, 166) : 7 Lah 1. (Execution sale confirmed—Suit by one of the judgment-debtors that property was not saleable does not lie.)

('19) AIR 1919 Lah 430 (432) : 1 Lah L Jour 230 (230, 231).

('02) 1902 Pun Re No. 8.

('36) AIR 1936 Mad 733 (739).

('16) AIR 1916 Mad 521(522):39 Mad 584. (Legal representatives of receiver—Liability of.)

('12) 15 Ind Cas 224 (224) (Mad).

('93) 16 Mad 447 (449).

('84) 7 Mad 255 (258).

('22) AIR 1922 Nag 189 (191).

4. ('36) AIR 1936 Mad 870 (871). (Decree-holder impleaded a purchaser after decree of the charged properties, in his execution application — Held, not entitled to.)

5. Parties arrayed on the same side. — The words 'between the parties' do not, as has been seen already, necessarily mean parties ranged on *opposite sides* as plaintiff and defendant but mean parties *opposed to each other* in the suit.¹ Thus, in a partition suit, parties who are co-defendants are often arrayed against each other. In such a case a question between them relating to the execution of the decree may fall within Section 47.² But it is necessary that the *opposite side* should be interested in the question raised between parties on the same side. Thus, a dispute between joint decree-holders will be a dispute 'between parties' if the *judgment-debtor* is interested in such dispute but not otherwise.³⁻⁴ Similarly, a dispute between co-judgment-debtors will be a dispute between parties if the *judgment-creditor* is interested in such dispute⁵ but not otherwise.⁶

Illustrations

1. *A* obtains a mortgage decree in respect of four items against *B* and *C*, *B* being a subsequent mortgagee of items 1, 2 and 4 and *C* the purchaser of item 3 after *A*'s mortgage. *B* applies that item 3 should be sold first and that items 1, 2 and 4 should be sold only if the proceeds of the sale of item 3 prove insufficient to discharge the decree. Is the question thus raised between *B* and *C* a question 'between the parties to the suit?' Yes, inasmuch as the question is one affecting the *decree-holder's right* in execution.⁷

2. *A* obtains a money decree against *B* and *C* and a receiver is appointed in execution to recover the decree-amount from out of certain properties belonging to *B* and *C*. After a certain portion of the decree-amount is thus recovered, *C* pays up the balance thus completely discharging the decree. *B* thereupon applies for delivery of the property in the hands of the receiver, *jointly* to *B* and *C* and not to *C* alone as claimed by the latter. Here the decree having been satisfied, the *decree-holder* has absolutely no interest in the dispute between *B* and *C*. The question is therefore not one "between the parties to the suit" and Section 47 does not apply.⁸

3. *A* and *B* obtain a *joint* decree against *C*. By virtue of an alleged power of attorney by *B* in favour of *A*, the latter applies to execute the whole decree to the exclusion of *B*. Here the

Note 5

1. ('13) 19 Ind Cas 448 (448, 449) (Mad).
(34) AIR 1934 Pat 627 (628).
(32) AIR 1932 Cal 126 (128, 129) : 59 Cal 117.
(Puisne mortgagee and mortgagor defendants in suit on first mortgage—Interest opposed to each other—They are parties.)
(37) AIR 1937 Lah 592 (593).
(36) AIR 1936 Lah 116 (119).
(25) AIR 1925 Mad 353 (354).
(24) AIR 1924 Mad 518 (519).
(24) AIR 1924 Mad 365 (365).
(27) AIR 1927 Rang 45 (46) : 4 Rang 418.
2. ('13) 19 Ind Cas 448 (448, 449) (Mad).
(33) AIR 1933 All 57 (58, 59) : 54 All 1031.
- 3-4. ('97) 29 Mad 183 (183). (For contribution of decree-amount.)
(92) 2 Mad L Jour 14 (15). (Do.)
(37) AIR 1937 Cal 177 (178).
(72) 17 Suth W R 415 (415).
(71) 17 Suth W R 136 (137).
(27) AIR 1927 Pat 288 (289) : 6 Pat 386. (Right to compensation money.)
See also cases in foot-notes (9) and (10), below.
[But see ('37) AIR 1937 Cal 730 (731) : 1 L R (1938) 1 Cal 175. (In this case, the interest of the judgment-debtor was not affected by dispute between rival decree-holders for rateable distribution—Yet it is held that the dispute is under Section 47.)].
5. ('13) 19 Ind Cas 448 (448, 449) (Mad). (Co-

- judgment-debtors.)
(25) AIR 1925 Mad 353 (354).
- (24) AIR 1924 Mad 365 (366). (Co-judgment-debtors.)
(79) 4 Mad 285 (286). (Judgment-debtor and representative of another judgment-debtor.)
(13) 18 Ind Cas 312 (314) (Oudh). (Co-judgment-debtors.)
(27) AIR 1927 Rang 45 (46) : 4 Rang 418. (Defendant and assignee of co-defendant.)
6. ('17) AIR 1917 Mad 218 (219). (Co-judgment debtors.)
(95) 18 All 106 (106, 107). (Co-judgment-debtors —Suit for contribution.)
(07) 29 All 207 (209, 210). (Judgment-debtor and representative of co-judgment-debtor.)
(85) 7 All 681 (686). (Co-judgment-debtors.)
(84) 6 All 12 (13).
(35) AIR 1935 Mad 714 (715).
(07) 1 Sind L R 172 (174, 175). (Representatives of judgment-debtor—Mortgagee of judgment-debtor and auction-purchaser.)
[See also ('39) AIR 1939 Lah 137 (139). (Question between judgment-debtor and person alleged to be surety.)]
7. ('13) 19 Ind Cas 448 (448) (Mad). (It was held that the matter did relate to execution of the decree.)
(24) AIR 1924 Mad 365 (365). (Do.)
[But see ('29) AIR 1929 All 291 (293) : 51 All 752.]
8. ('17) AIR 1917 Mad 218 (219).

47 judgment-debtor C is in no way interested in the solution of the dispute between A and B and the question is not therefore one "between the parties to the suit."⁹

The High Court of Allahabad and the Judicial Commissioner's Court at Nagpur have, however, held that a question is not within Section 47 unless it is one between parties ranged on *opposite sides* as decree-holder and judgment-debtor.^{9a} It is submitted that this view is not correct.

A question between two *rival decree-holders* for rateable distribution of the assets of a judgment-debtor or for other reliefs is not a question between the parties to any suit inasmuch as neither of them was a party to the suit brought by the other.¹⁰ If, however, the question raised between them *affects the judgment-debtor*, the question will be one also between the decree-holder who raises the question and the judgment-debtor, that is, between the parties to the suit.¹¹ A question between a party and *his own representative* is not one between the parties to a suit.¹² Similarly, a dispute as between the representatives of the same party will not fall within this Section.^{12a}

9. ('72) 17 Suth W R 136 (137). (Approved in AIR 1924 Mad 518.)

('24) AIR 1924 Mad 518 (519).

('99) 23 Bom 623 (625).

[See ('31) AIR 1931 Rang 24 (24).]

9a. ('25) AIR 1925 Nag 186 (187); 21 Nag L R 34.

('29) AIR 1929 All 291 (292); 51 All 752. (Sen, J.)

('85) 1885 All W N 204 (205); 7 All 681. (Obiter.)

10. ('31) AIR 1931 Bom 252 (253, 254).

('34) AIR 1934 Lah 478 (479). (Two decree-holders proceeding against same property—Decision by executing Court that one is not entitled to priority over other is no bar to a regular suit for establishing priority.)

('07) 1907 All W N 201 (201). (Rival claims to surplus sale proceeds between the subsequent mortgagees.)

('92) 14 All 210 (211).

('31) AIR 1931 Bom 350 (351); 55 Bom 473.

('15) AIR 1915 Cal 658 (659); 42 Cal 1.

('10) 8 Ind Cas 4 (5) (Cal).

('09) 1 Ind Cas 783 (784); 36 Cal 130.

('68) 9 Suth W R 514 (516) (FB).

('68) 9 Suth W R 223 (230).

(1865) 2 Suth W R Misc 41 (42).

('36) AIR 1936 Lah 181 (181).

('32) AIR 1932 Lah 96 (96). (Rateable distribution between rival decree-holders not affecting judgment-debtor.)

('29) 113 Ind Cas 776 (777) (Lah).

('36) AIR 1936 Mad 136 (137); 59 Mad 399. (Judgment-debtor not interested in the dispute.)

('26) AIR 1926 Mad 1104 (1105).

('25) AIR 1925 Mad 1265 (1266).

('24) AIR 1924 Mad 97 (98).

('22) AIR 1922 Mad 99 (99).

('16) AIR 1916 Mad 792 (793); 38 Mad 221.

('85) 8 Mad 494 (495).

('36) AIR 1936 Oudh 277 (277); 12 Luck 720.

('21) AIR 1921 Pat 401 (402); 5 Pat L Jour 415.

('36) AIR 1936 Pesh 52 (53).

('37) AIR 1937 Rang 134 (135).

('31) AIR 1931 Rang 56 (58); 8 Rang 485.

('29) AIR 1929 Rang 193 (200).

[See also ('06) 33 Cal 92 (96, 97). (Satisfaction of decree over—Nothing to be executed between the parties—Suit by non-impleaded subsequent mortgagee for surplus sale proceeds.)

('19) AIR 1919 Mad 949 (949). (Rival auction-purchaser.)]

11. ('18) A I R 1918 Mad 1322 (1324).

('11) 12 Ind Cas 911 (912) (Bom).

('39) AIR 1939 Bom 112 (114); ILR (1939) Bom 133.

[See also ('35) AIR 1935 Lah 302 (303); 16 Lah 990. (Orders deciding matter in execution although ostensibly relating to rateable distribution is appealable.)]

12. ('09) 1 Ind Cas 416 (423); 31 All 82 (FB).

(Judgment-debtor and auction-purchaser.)

('08) 30 All 379 (383). (Do.)

('21) AIR 1921 Mad 81 (82). (Do.)

('37) AIR 1937 All 742 (747); ILR (1937) All 921

(FB). (The dispute between a decree-holder purchaser and a judgment-debtor is not a dispute between parties to the suit within the meaning of Section 47, C. P. C.)

('02) 24 All 519 (520). (Assumed.)

('01) 25 Bom 631 (635). (Do.)

('80) 5 Cal 592 (593). (Decree-holder and assignee of a part of the decree.)

('37) AIR 1937 Lah 465 (467); I L R (1937) Lah 162. (Decree-holder and assignee of the decree.)

('37) AIR 1937 Lah 347 (348). (Question between judgment-debtor and auction-purchaser.)

('87) 1887 Pun Re No. 12. (Assumed.)

('21) AIR 1921 Nag 59 (60). (Do.)

('35) AIR 1935 Oudh 272 (273); 11 Luck 26. (Question between decree-holder and person attaching decree.)

('30) AIR 1930 Rang 281 (282). (Assumed.)

('18) AIR 1918 Sind 63 (64); 11 Sind L R 74. (Decree-holder and his transferee.)

[See also ('35) AIR 1935 Lah 609 (610). (Question as to validity of assignment of decree is one between the decree-holder and the assignee and not one between the parties to the suit.)

12a. ('34) AIR 1934 All 730 (730).

('98) 25 Cal 49 (52). (Two representatives of decree-holder.)

('36) AIR 1936 Lah 116 (120).

Where a decree gives two independent reliefs against two sets of defendants, one set cannot be considered parties to the suit in any question relating to the execution of that portion of the decree that arises between the decree-holder and the other set of defendants.¹³

6. "Arising," meaning of.—The words 'all questions arising' should be read as meaning 'all questions *directly* arising.'¹ Further they do not mean only such questions as are *actually raised* in the execution proceedings; for if it were so, a party, by not raising a particular question in execution proceedings, might retain the right to bring a separate suit in order to agitate that question. The words only mean that the questions must be such as would relate to or affect the rights of parties to the suit.² The words 'arising between the parties to the suit' contemplate their having continued to be parties to the suit up to the stage at which the question arises.³ In other words, they indicate that the person raising the question should be either a party or a representative of the party to the suit *at the time* when the question is raised.⁴

7. "Parties to the suit," meaning of.—Except where a person sues or is sued in a *representative* capacity,¹ the expression 'parties to the suit' is restricted to *de facto* parties admitted rightly or wrongly as parties *on the record*.² A person against whom no relief is claimed and no decree is passed but who has been impleaded as a party to the suit must be deemed to be a party to the suit within the meaning of the Section.^{2a} A person, whose name is not on the record as a party at the time the decree is passed, does not become a party by acquiring, subsequent to the decree, an interest in the disputed property,³ or by applying for execution,⁴ or by objecting to a sale in execution.⁵ On the other hand, a party *on the record* does not cease to be a party because he is not impleaded as a party in the appeal in which the final decree was passed.⁶ A party, however, whose name is *struck off from the record*, ceases to be a

('27) AIR 1927 Mad 1025 (1025, 1026). (Assignee of decree-holder and attaching creditor of decree-holder.)

('26) AIR 1926 Mad 691 (691). (Assignee of decree and person holding charge over decree.)

('34) AIR 1934 Pat 627 (628).

('32) AIR 1932 Pat 329 (330). (Dispute as to extent of shares as between several heirs of deceased decree-holder is not within Section.)

[But see ('37) AIR 1937 Oudh 365 (366) : 13 Luck 237.]

13. ('96) 19 Mad 331 (334).

('01) 23 All 346 (348, 353). (Case law discussed.)

[See also ('74) 22 Suth W R 392 (393).]

[But see ('31) AIR 1931 Bom 114 (118). (Where one defendant is also interested in the reliefs granted against the other, Section applies.)]

Note 6

1. ('84) 7 All 170 (174) (FB). (Per Duthoit J.)

2. ('27) AIR 1927 Cal 106 (109) : 53 Cal 837.

3. ('28) AIR 1928 Mad 276 (276). (Defendant's name struck off before the passing of the decree. He cannot agitate any question relating to the decree in execution proceedings under S. 47 as he is not a party to the decree.)

4. ('31) AIR 1931 All 490 (494, 495, 499) : 54 All 25 (FB). (Defendant died before the decree. His legal representatives not brought on record are not parties to the suit.)

Note 7

1. See ('27) AIR 1927 Mad 1048 (1050) : 51 Mad 46 (FB).

2. ('78) 2 Cal L Rep 545 (546). (A person substituted as legal representative of deceased judgment-debtor in execution becomes a party entitled to appeal.)

('34) AIR 1934 All 699 (700). (Suit on bond—Person impleaded as defendant on ground that he had no right to amount due under bond is not pro forma defendant but party within S. 47.)

('17) AIR 1917 All 460 (461) : 39 All 47.

('87) 1887 Pun Re No. 97.

[See ('13) 20 Ind Cas 898 (899) : 16 Oudh Cas 350.

2a. ('39) AIR 1939 Lah 207 (208).

3. ('68) 3 Agra 193 (193). (Interest acquired by gift.)

4. ('77) 2 Cal 327 (335) : 4 Ind App 66 (PC).

('78) 3 Cal 371 (373, 374). (Applicant has no right of appeal against order refusing application for execution.)

5. (1865) 2 Suth W R Misc 56 (56).

('30) AIR 1930 Mad 538 (539) : 53 Mad 581.

('09) 3 Ind Cas 24 (25) : 31 All 599.

('86) 8 All 626 (634, 635).

('89) 1889 Pun Re No. 63.

('86) 10 Mad 53 (54, 55).

6. ('93) 17 Bom 49 (53).

[See also ('19) AIR 1919 Pat 396 (397). (Party to decree not impleaded in execution proceedings continues to be a party.)]

be only deemed to be parties in the *capacity in which they were so represented*. They can in no sense be deemed to be parties in *any other capacity*, especially if such capacity is adverse to the person who represented them.²² Thus, where the *karnavan* of a Malabar *tarwad* is sued as representing the *tarwad*, the other members of the *tarwad* will be represented by the *karnavan* merely in respect of their interests as *members of the tarwad*; in their *individual capacity*, they cannot be represented by the *karnavan* and cannot be deemed to be parties to the suit constructively.²³

In the undermentioned case,²⁴ it was held that where certain persons are sued as the legal representatives of a deceased person and a decree is obtained against them, another person who also claims to be a legal representative of the deceased cannot be regarded as a party to the suit.

Where a person is impleaded as a party to a suit in one capacity and he raises in execution proceedings an objection in a different capacity, such objection will not fall within this Section.²⁵

8. Plaintiff whose suit is dismissed and defendant against whom suit is dismissed — Explanation. — Under the old Code, there was a conflict of opinion as to whether such a person was a party to the suit, the Allahabad¹ and Calcutta² High Courts holding that he was not and the High Courts of Bombay,³ Madras⁴ and the Judicial Commissioner's Court of Nagpur⁵ holding that he was. The conflict has now been set at rest by the addition of the Explanation to the Section. Under the present Code, therefore, a plaintiff, whose suit has been dismissed and a defendant against whom a suit has been dismissed are nevertheless parties to the suit for the purpose of this Section.⁶

(‘07) 4 All L Jour 117 (120, 121). (Hindu widow represents the estate—Reversioners, if brought on the record, are parties.)

(‘96) 23 Cal 454 (459). (Do.)

(‘85) 11 Cal 45 (51). (Suit against Hindu widow — Adopted son will be deemed to be a party and a claim by the latter is one under the Section.)

(‘87) AIR 1937 Mad 610 (614, 618): I L R (1937) Mad 880 (FB). (Hindu father sued as representative of joint family represents his sons.)

(‘36) AIR 1936 Pat 319 (320). (Where decree is against a junior member of joint family, burden of proof is on decree-holder to show that the judgment-debtor was sued in a representative capacity.)

(‘25) AIR 1925 Pat 179 (180): 4 Pat 172. (Objection by General Manager of the Court of Wards on behalf of the ward who was a party, is objection by the ward himself through the Manager.) [See also (‘33) AIR 1933 Oudh 102 (104). (Decree against assets of Hindu grandfather—Debt not illegal or immoral—Execution against son as manager binds other sons and grandsons.)]

22. (‘27) AIR 1927 Mad 1043 (1050): 51 Mad 46 (FB).

[See also (‘90) 17 Cal 57 (64, 65).]

23. (‘27) AIR 1927 Mad 1043 (1050): 51 Mad 46 (FB). (Overruling 30 Mad 215 and 24 Mad 658.)

[See also (‘87) 10 Mad 117 (120).]

[But see (‘04) 14 Mad L Jour 137 (138).]

24. (‘36) AIR 1936 Sind 166 (167): 30 Sind L R 170.

25. (‘36) AIR 1936 Mad 733 (744, 745).

Note 8

1. (‘10) 5 Ind Cas 496 (497): 32 All 321.

(‘01) 23 All 346 (354).

(‘96) 18 All 52 (53).

(‘93) 1893 All W N 67 (68).

(‘89) 11 All 74 (77, 78).

(‘99) 2 Oudh Cas 51 (55).

2. (‘03) 30 Cal 134 (141).

(‘02) 29 Cal 696 (698, 699).

(‘68) 10 Suth W R 191 (192).

(‘67) 7 Suth W R 361 (362).

3. (‘93) 17 Bom 49 (52, 53).

4. (1900) 23 Mad 361 (366) (FB). (Overruling 15 Mad 226.)

(‘99) 22 Mad 131 (133).

(‘85) 8 Mad 473 (475, 477).

5. (‘04) 17 C P L R 178 (190).

(‘02) 15 C P L R 106 (111).

6. (‘28) AIR 1928 All 234 (235). (A I R 1918 All 397 Followed; A I R 1926 All 745 Dist.)

(‘33) AIR 1933 All 57 (58): 54 All 1031. (Exonerated party continues to be party to suit.)

(‘25) AIR 1925 All 328 (330). (Do.)

(‘24) AIR 1924 All 313 (313).

(‘19) AIR 1919 All 192 (193).

(‘18) AIR 1918 All 397 (398).

(‘23) AIR 1923 Bom 381 (381).

(‘38) AIR 1938 Cal 113 (114): I L R (1938) 1 Cal 280.

(‘21) AIR 1921 Cal 242 (244).

(‘24) AIR 1924 Lah 589 (590).

(‘30) AIR 1930 Mad 12 (14, 15).

(‘28) 113 Ind Cas 547 (548) (Mad).

(‘27) AIR 1927 Mad 253 (254).

Even under the present Code, a difference of opinion has arisen as to whether a party who has been *exonerated* from the suit on the ground of *misjoinder of parties*, but whose name has not been actually struck off from the record is a party to the suit for the purposes of the Section. It has been held by the High Court of Madras⁷ that where a Court finds that a party has been improperly impleaded, resulting in a *misjoinder of parties*, the proper procedure is to *strike out* the name of the party from the record and that the mere fact that the Court failed to do its duty but merely "exonerated" such party from the suit or dismissed the suit against him cannot place the party in a worse position than a party in respect of whom the Court does adopt the correct procedure; a party, therefore, who is exonerated from the suit, or against whom the suit is dismissed on the ground of *misjoinder of parties*, is in the same position as if his name is *struck off* from the record and is not a party to the suit within the meaning of Section 47. The High Court of Rangoon has followed the view of the High Court of Madras.⁸ See also the undermentioned cases of the other High Courts.^{8a} On the same principle it has been held that where a person has been *properly* impleaded as a party, but the plaintiff does not wish to proceed against him or is unable to prove his claim against him, the proper procedure is to *dismiss* the suit against him and not to *strike out* his name from the record. If, however, his name is wrongly "struck off," it has been held by the High Court of Madras that, he nevertheless does not cease to be a party to the suit.⁹ But the High Court of Lahore has taken a contrary view and has held that in such a case the question whether this Section applies or not must be determined with regard to the order on the form as actually framed, *viz.*, *striking off* and not with regard to the form in which it should have been framed.^{9a} It is proper for the executing Court, when such questions arise, to consider not only the decree itself but the judgment and the pleadings also and see whether, upon the facts of the case, the parties, though the suit was dismissed against them, remained parties to the suit.¹⁰

8a. Person against whom suit abates.—In the undermentioned case,¹ a person was added as a defendant to the suit. But, on his death, his legal representatives were not brought on the record. It was held that such legal representatives could not be impleaded as joint judgment-debtors in the execution proceedings.

9. Surety under Section 145.—Under Section 145, a surety against whom execution has been taken out is a party within the meaning of Section 47 only for

- ('25) AIR 1925 Mad 1133 (1134).
- ('20) AIR 1920 Mad 206 (208).
- ('18) AIR 1918 Mad 1368 (1368).
- ('18) AIR 1918 Mad 321 (322).
- ('18) AIR 1918 Mad 123 (125): 41 Mad 418 (FB).
- ('16) AIR 1916 Mad 1008 (1010).
- ('29) AIR 1929 Nag 179 (179, 180).
- ('36) AIR 1936 Pat 552 (553). (Plaintiff abandoning claim against a defendant and suffering his suit to be dismissed against him.)
- ('29) AIR 1929 Pat 472 (472).
- ('29) AIR 1929 Pat 141 (144) : 8 Pat 717.
- ('25) AIR 1925 Pat 482 (483).
- ('31) AIR 1931 Rang 314 (316).

- 7. ('30) AIR 1930 Mad 817 (820) : 54 Mad 81 (FB). (AIR 1926 Mad 484 Overruled and AIR 1918 Mad 911 Approved.)
- ('33) AIR 1933 Mad 435 (436).
- ('10) 8 Ind Cas 161 (161) (Mad).

('39) AIR 1939 Mad 280 (281).

('37) AIR 1937 Mad 268 (270).

8. ('27) AIR 1927 Rang 137 (138) : 5 Rang 110.

8a. ('27) 1927 All 378 (379) : 49 All 379.

('33) AIR 1933 Nag 246 (247). (If such person's name is retained he is a party — Not a party only when his name is struck off.)

('74) 21 Suth W R 346 (347).

('26) AIR 1926 Lah 202 (202, 203).

('15) AIR 1915 Lah 323 (324).

('19) AIR 1919 Nag 120 (121) : 15 Nag L R 146.

('82) 8 Cal 402 (418).

9. ('26) AIR 1926 Mad 687 (689).

9a. ('34) AIR 1934 Lah 737 (738).

10. ('30) AIR 1930 Mad 817 (820) : 54 Mad 81.

Note 8a

- 1. ('36) AIR 1936 Pat 110 (110). (AIR 1934 All 1027, Foll.)

*the purposes of appeal.*¹ Beyond this he cannot be deemed to be a party within the Section.² Hence, if he seeks to get his bond cancelled on the ground of fraud,^{2a} or applies for discharge on the fulfilment of the condition imposed,³ he can proceed only by way of suit and not under Section 47.

The surety can be proceeded against either by way of execution⁴ or by a suit;⁵ but if he is proceeded against in execution, he becomes a judgment-debtor and must contest his liability in the execution proceeding itself.⁶

Under the old Code a person who became a surety after the decree was passed was held not to be a party so as to attract the remedy by way of execution.⁷ But now the distinction no longer holds good.

See also Note 11 to Section 145, *infra*.

10. Government in proceedings under Order 33. — Under the Code of 1882, it was held by the High Courts of Bombay and Madras that the Government in proceedings relating to pauper suits was not a party to the suit within Section 47.¹ The Allahabad High Court, on the other hand held a contrary view.² Order 33 Rule 13 was newly added in the present Code to set this conflict at rest. Under that Rule, it is provided that all matters arising between the Government and any party to the suit under Rules 10, 11 or 12 of Order 33, "shall be deemed to be questions arising between the parties to the suit within the meaning of Section 47." A Collector applying under Order 33 for payment of court-fee in pauper suits is now a party within Section 47 and an order on his application is one under the Section.³

See also Order 33 Rule 13.

11. Custodian of attached property. — Whether the custodian of attached property under O. 21 R. 43 is a "party" for any purpose depends upon the question

Note 9

1. ('25) AIR 1925 All 844 (345).
- ('24) AIR 1924 All 105 (106) : 45 All 649.
- ('88) 1888 All W N 13 (13).
- ('86) 1886 All W N 38 (38).
- ('80) 2 All 604 (612) (F B).
- ('32) AIR 1932 Bom 77 (77, 78).
- ('01) 3 Bom L R 549 (553).
- ('15) AIR 1915 Cal 237 (237).
- ('71) 15 Suth W R 538 (540).
- ('67) 8 Suth W R 24 (25).
- ('37) AIR 1937 Lah 658 (660) : ILR (1938) Lah 140.
- ('34) AIR 1934 Lah 538 (539). (Surety not appealing—Order against him becomes final.)
- ('28) AIR 1928 Lah 181 (183).
- ('86) 1886 Pun Re No. 104.
- ('38) AIR 1938 Mad 215 (216).
- ('03) 13 Mad L Jour 484 (484, 485).
- ('35) AIR 1935 Rang 39 (41).
- ('17) AIR 1917 Upp Bur 16(17) : 2 Upp Bur Rul 103.
2. ('19) AIR 1919 P C 55 (58) : 42 All 158 : 22 Oudh Cas 212 : 46 Ind App 228 (P O).
- ('28) AIR 1928 All 527 (528, 529) : 51 All 346.
- ('35) AIR 1935 All 373 (374).
- ('37) AIR 1937 Lah 658 (660) : ILR (1938) Lah 140. (Declaratory suit by surety that decree is adjusted by judgment-debtor is maintainable.)
- ('31) AIR 1931 Rang 206 (207) : 9 Rang 434.
- 2a. ('20) AIR 1920 Mad 75 (77) : 43 Mad 325. (Cancellation sought on the ground of fraud—

28 Mad 117, not followed.)

3. ('93) 15 All 183 (184, 185).
4. ('24) AIR 1924 Nag 258 (263) : 20 Nag L R 93.
- ('20) AIR 1920 Low Bur 58 (59) : 10 Low Bur Rul 236.
- ('09) 4 Ind Cas 1005 (1005) (Lah).
- ('21) AIR 1921 Nag 130 (131). (Suit for damages for wrongful detention of moveables entrusted to plaintiff as sapurdar not barred by S. 47—Can be treated as an application.)
- [But see ('32) AIR 1932 Lah 324 (325). (Suit by defendant against sapurdar for rent of premises of defendant where defendant's attached goods remained—Not maintainable.)]
5. ('11) 12 Ind Cas 549 (550) : 36 Bom 42.
- ('35) AIR 1935 All 373 (374).
6. ('30) AIR 1930 Lah 399 (400).
- ('25) AIR 1925 Lah 618 (618).
7. ('87) 1887 Pun Re No. 99.
- ('71) 1871 Pun Re No. 62.

Note 10

1. ('82) 6 Bom 590 (592).
- ('94) 18 Bom 454 (456).
- ('91) 15 Bom 77 (78).
- ('08) 23 Mad 73 (81).
2. ('91) 13 All 326 (329).
- ('96) 18 All 419 (421).
- ('87) 9 All 64 (67).
3. ('19) AIR 1919 Pat 99 (101) : 4 Pat L Jour 166.
- ('11) 12 Ind Cas 29 (30) : 35 Bom 448.

whether he can be proceeded against in execution under Section 145 of the Code as a surety. If he can be so proceeded against, the principles mentioned in Note 9 above will apply. Otherwise they will not apply. There is a conflict of opinion as to whether he can be proceeded against under Section 145 as a surety, for which see Note 4 to Section 145, *infra*.

12. Unnecessary party. — See Note 8 above.

13. Intervenor. — An intervenor who is impleaded as a party will, of course, be a party to the suit within the meaning of Section 47.¹ But a person who pays down money to avoid an attachment of his properties wrongly identified as the judgment-debtor's is not a party and cannot claim his money back in execution under this Section.²

14. Trespassers. — The word "parties" in the Section, as has been seen in Note 7 above, means parties to the suit and *on the record*. So, a third party who, at the instigation of the judgment-debtor, obstructs the decree-holder in getting possession of the property,¹ or who violates the rights of the attaching decree-holder by cutting and carrying away the crops on the attached land,² is not a party to the suit within the meaning of the Section, and consequently a claim for possession or for damages against such person must be enforced only by way of *suit* and not in execution.

15. Party sued in a representative capacity. — A person actually made a party to a suit cannot be said to be not a party thereto merely because he is sued in a *representative* capacity.¹ On the other hand, his right in *every capacity*, whether representative or individual, must be deemed to be the rights of a party to the suit within the meaning of Section 47 and should be determined in execution and not by a separate suit.²

As regards the position of persons who were represented by a party to the suit, see Note 7, above.

16. Questions as to who is a party can be decided by the executing Court. — When, during the execution of a decree, the question arises as to who is a party to the suit or whether a person is such a party, the executing Court can and should itself decide the question. Thus, where an objection is taken that a certain person was not a party to the suit at the time of decree and therefore it is not open to the executing Court to issue process against his legal representative, the executing Court can and must determine the question under the Section.¹ Similarly, where a decree has been obtained by a *benamidar* and execution is sought to be obtained by the true owner and the judgment-debtor challenges the ownership of the latter, the question as to who is the party to the suit, within the meaning of the Section, entitled

Note 13

1. See ('67) 8 Suth W R 114 (115).
2. ('16) AIR 1916 Sind 22 (22); 9 Sind L R 213.

Note 14

1. ('98) 2 Cal W N 311 (314).
[See also ('36) AIR 1936 Mad 733 (740). (Dispute between decree-holder purchaser and third party in possession is not within the Section.)]
2. ('07) 17 Mad L Jour 334 (336); 30 Mad 413.

Note 15

1. ('72) 18 Suth W R 185 (188).
('19) AIR 1919 Cal 623 (624).
('09) 3 Ind Cas 763 (764) (Bom).
('90) 17 Cal 57 (64).
('69) 11 Suth W R 368 (368).

('86) 1886 Pun Re No. 88.

('17) AIR 1917 Mad 168 (169).

('26) AIR 1926 Oudh 64 (64).

2. ('27) AIR 1927 Mad 1043 (1050) : 51 Mad 46 (F B).

[See also ('31) AIR 1931 Bom 114 (118).]

[But see ('33) AIR 1933 Mad 152 (153): 56 Mad 453. (Application for sale of charged properties—Interim Receiver appointed under the Provincial Insolvency Act applying under S. 52 of that Act—*Held*, the question is not within S. 47 as the Receiver could not be deemed to have represented the defendant.)]

Note 16

1. ('17) AIR 1917 Pat 623 (623); 2 Pat L Jour 192.

to execute, ought to be decided under this Section by the executing Court.² For the purpose of deciding the said questions, it is proper for the Court to consider not only the decree itself but the judgment and the pleadings in the case also.³

17. 'Representative,' who is. — The word 'representative' in the Section has a much wider meaning than the words "legal representative" used in Section 50 *infra*¹ inasmuch as it includes not only a legal representative² but any representative-in-interest, *i.e.*, any transferee of the interest of a party whether by assignment, succession or otherwise,³ who so far as such interest is concerned, is *bound by the decree*.⁴ In *Ajodhya Roy v. Hardwar Roy*,⁵ their Lordships of the Calcutta High Court observed as follows :

2. ('28) AIR 1928 Cal 835 (836).

[But see ('31) AIR 1931 Rang 24 (24). (But a suit by principal against agent for transfer of the decree in his name not barred.)]

3. ('30) AIR 1930 Mad 817 (818); 54 Mad 81 (FB).
Note 17

1. ('05) 28 Mad 466 (470) (F B).

('35) AIR 1935 Lah 306 (307).

('36) AIR 1936 Mad 870 (871).

('39) AIR 1939 Nag 183 (184).

2. ('20) AIR 1920 Mad 324 (332) : 43 Mad 107 (F B).

('39) AIR 1939 Nag 183 (184).

('36) AIR 1936 Pat 126 (128). (Person in possession as intermeddler is representative.)

('35) AIR 1935 Sind 214 (215); 29 Sind L R 251.

3. ('09) 1 Ind Cas 213 (214) (Cal).

('26) AIR 1926 Cal 793 (803) : 53 Cal 781 (F B).

('04) 26 All 447 (460, 461, 463) (FB). (An auction-purchaser of property in a sale under simple money decree is a 'representative'.)

('38) AIR 1938 Cal 390 (392) : I L R (1938) 2 Cal 125. (Usufructuary mortgagee from the judgment-debtor is his representative.)

('36) AIR 1936 Cal 67 (68). (Person obtaining property of judgment-debtor agreeing to pay his decretal debt—Right of decree-holder to proceed against him by way of execution application.)

('30) AIR 1930 Cal 586 (588). (Purchaser from the decree-holder auction-purchaser.)

('35) AIR 1935 Lah 306 (307). (Purchaser of the equity of redemption.)

('33) AIR 1933 Lah 352 (353) : 14 Lah 591.

('04) 28 Mad 119 (122).

('39) AIR 1939 Nag 183 (184).

('34) AIR 1934 Pat 413 (419) : 13 Pat 735.

('18) AIR 1918 Pat 306 (307). (Representative includes a purchaser of a party's interest.)

[See also ('01) 24 Mad 689 (692).]

4. ('26) AIR 1926 Cal 798 (808) : 53 Cal 781 (FB).

('97) 24 Cal 62 (73) (FB).

('38) AIR 1938 Cal 818 (820). (Transferee of property from judgment-debtor in money decree not bound by decree and is not his representative.)

('37) AIR 1937 Cal 565 (567).

('36) AIR 1936 Cal 590 (592). (Decree on mortgage obtained collusively—Other person obtaining decree against mortgagor and attaching mortgaged property—Mortgage decree is nullity—Such other person is not affected by mortgage decree and cannot be regarded as representative of mortgagor.)

('36) 164 Ind Cas 375 (375) (Cal). (Transferee from judgment-debtor or auction-purchaser is representative of judgment-debtor only if decree binds him.)

('34) AIR 1934 Cal 827 (828) : 61 Cal 1068. (Previous auction-purchaser of the property re-attached in execution of another decree is not representative of judgment-debtor under S. 47, as his interests are not affected by the decree.)

('31) AIR 1931 Cal 202 (204). (Person not bound by decree—Not a representative—Relationship of landlord and tenant ceasing to exist—Mortgagee of tenure is not a representative of judgment-debtor.)

('26) AIR 1926 Cal 356 (357). (Mortgagee of patni interest is representative of the judgment-debtor patnidar.)

('16) AIR 1916 Cal 661 (662). (Decree against the sons of the defendant as his representatives not binding on executrices who are the real representatives.)

('08) 7 Cal L Jour 299 (300).

('07) 5 Cal L Jour 80 (87).

('39) AIR 1939 Nag 183 (184).

('36) AIR 1936 Nag 163 (166) : I L R (1936) Nag 172. (Contract to sell property—Subsequent attachment—Vendee in pursuance of contract to sell is not representative of vendor within meaning of S. 47 as he is not bound by the decree.)

('38) AIR 1938 Pat 478 (479). (A purchaser from a sharer in a partition decree is bound by the decree.)

('36) AIR 1936 Pat 561 (562) : 15 Pat 414. (Purchaser of entire occupancy holding at certificate sale under the Public Demands Recovery Act for arrears of rent is not a representative of the occupancy tenant within the meaning of S. 47, C. P. Code as he is not bound by a decree that is passed against the vendor in respect of the property purchased by the vendee.)

('34) AIR 1934 Pat 413 (419) : 13 Pat 735. (Person not bound by decree.)

('35) AIR 1935 Sind 214 (215) : 29 Sind L R 251. (Person attaching money lying in Court to the credit of the judgment-debtor and getting the money subject to the conditions under which it was lying in Court held to be representative of the judgment-debtor.)

5. ('09) 1 Ind Cas 213 (214) (Cal). (Followed in AIR 1933 Lah 352.)

"To determine, therefore, whether a particular person is a representative of a party to the suit, the two tests to be applied are, *first*, whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has, by act of parties or by operation of law, vested in the person who is sought to be treated as representative, and, *secondly*, if there has been any devolution of interest, whether, so far as such interest is concerned, that person is *bound by the decree*."

It is not necessary that the transfer of the interest should be *after decree*; it may be before or after decree.⁶ Thus, a transferee of property during the pendency of suit concerning that property will be affected by the doctrine of *lis pendens* and will be bound by the decree; he will therefore be a representative of the party whose interest has been transferred.⁷

The following persons have been held to be representatives of parties within the meaning of this Section —

- (a) A devisee of the decree-holder.⁸
- (b) A legatee⁹ or universal donee.^{9a}
- (c) A person taking the judgment-debtor's share in joint property by survivorship.¹⁰
- (d) A second-mortgagee defendant paying off the first-mortgagee plaintiff and stepping into his shoes.¹¹⁻¹²

The following are not representatives of parties within the meaning of the Section —

- (a) An unrecorded co-sharer in a tenancy is not a representative of the recorded tenant.¹³
- (b) A rival decree-holder is not a representative of the judgment-debtor.¹⁴
- (c) A person claiming adversely to the debtor is not a representative of the debtor.¹⁵

6. ('05) 32 Cal 1031 (1034, 1035). (Dissenting from 12 Cal 458.)

('97) 24 Cal 62 (75) (F B). (Transfer after decree.)

('90) 12 All 313 (317) (F B).

('23) AIR 1923 Cal 345 (350).

('89) AIR 1939 Nag 183 (184). (Transferee of interest of judgment-debtor after decree is his representative.)

[See also ('99) 3 Cal W N 276 (277, 278). (Representative means the representative of a party to the suit and not one to the execution proceedings only.)]

7. ('37) AIR 1937 P C 260 (261) : 31 Sind L R 652 (P C). (Affirming A I R 1933 All 201.)

(1900) 22 All 243 (246). (A mortgagee who takes a mortgage during the pendency of a suit by a prior mortgagee is a representative of the mortgagor defendant.)

('34) AIR 1934 Cal 145 (146). (Lessee from judgment-debtor pending suit.)

('36) AIR 1936 All 479 (480). (Subsequent mortgagee during pendency of suit on first mortgage is representative of mortgagor.)

('33) AIR 1933 All 201 (202) : 55 All 235. (Usufructuary mortgagee during the pendency of a suit for foreclosure.)

('99) 21 All 20 (22). (Purchaser of property under attachment.)

('38) AIR 1938 Bom 367 (369) : I L R (1938) Bom 649.

('98) 22 Bom 939 (944).

('06) 10 Cal W N 240 (241). (Purchaser from tenant during a rent suit.)

('37) AIR 1937 Mad 580 (581).

[But see ('32) AIR 1932 Cal 423 (424). (Partition suit—Transferee impleaded—Consent decree between sharers, but not against transferee—Transferee, though representative, cannot be proceeded in execution unless impleaded under O. 22 R. 10 in execution.)]

8. ('99) 23 Bom 536 (538).

9. See ('27) AIR 1927 Rang 273 (274) : 5 Rang 393.

9a. ('30) AIR 1930 Oudh 268 (270).

10. ('07) 5 Cal L Jour 491 (495, 504) : 34 Cal 642 (F B).

[See also ('31) AIR 1931 Sind 84 (87) : 26 Sind L R 51. (Person taking property in partition.)]

11-12. ('32) AIR 1932 Cal 126 (129) : 59 Cal 117. (Puisne mortgagee—Defendant purchaser.) ('99) 9 Mad L Jour 177 (179).

13. ('10) 7 Ind Cas 769 (771) (Cal).

14. ('26) AIR 1926 Mad 1104 (1105).

[See also ('34) AIR 1934 Nag 201 (203) : 30 Nag L R 240. (Liquidator proceeding against judgment-debtor is not his representative in connection with proceedings in execution of another decree against the same judgment-debtor.)]

15. ('06) 1906 All W N 62 (63).

See also the following cases :

('71) 16 Suth W R 307 (308).

('86) 14 Cal 316 (320).

Chief Court of Oudh⁹ and the Court of the Judicial Commissioner of Nagpur¹⁰ are conflicting: some, holding that he is a representative of the judgment-debtor; others, holding that he is not a representative of any of the parties, and yet others, holding that he is a representative of the *decree-holder*. It is submitted that the first mentioned view is correct on principle. The purchaser in execution of a *mortgage* decree is a representative of the mortgagor.^{10a} There is a conflict of decisions as to whether such a purchaser is a representative of both the mortgagor and the mortgagee. It has been held, in the undermentioned cases,¹¹ that a sale under a mortgage decree passes to the purchaser, the interests of the *mortgagor* as well as of the *mortgagee*, and that the purchaser is, consequently, the representative of *both* the mortgagor and the mortgagee. In a recent Full Bench case of the Allahabad High Court, Sulaiman, C. J., has, however, expressed the view that the auction-purchaser does not purchase the *mortgagee's* interest also in the execution sale, but gets the mortgagee's right by virtue of the doctrine of *subrogation*.^{11a} It is submitted that the former view is correct. Whether, in any particular case, he is to be considered the representative of the judgment-debtor or of the decree-holder, is a question which depends upon the nature of the dispute involved in the enquiry.

Illustrations

1. In execution of a money-decree obtained by A, B purchased the property of the judgment-debtor. The sale was set aside on an application by the judgment-debtor under O. 21 R. 90, and the purchase money returned to B. On appeal, however, the lower Court's order was reversed, and the sale was confirmed. B having failed to return the purchase money, A filed a suit against B for the *recovery of the purchase money*. *Held*, that the suit was barred by this Section. *Rahim Uddin v. Ram Lal*, I. L. R. 27 Allahabad 155.

2. A executed five mortgage-deeds hypothecating different portions of his property in favour of M. M brought a suit on foot of all the mortgages and obtained a consolidated decree for sale for the whole amount. After obtaining an order absolute, M applied for sale of the properties in execution. Meanwhile, G, the plaintiff who had purchased a portion of the properties in execution, brought the present suit for the determination of the same question. *Held*, that the suit was barred by this Section. *Guljari Lal v. Madho Ram*, I. L. R. 26 Allahabad 447 (F. B.).

In the first of the above cases, it will be seen that B is the representative of the judgment-debtor and the question of the return of the purchase money is one relating to the *satisfaction* of the decree. The question is, therefore, one falling

9. (11) 10 Ind Cas 722 (722) : 14 Oudh Cas 89. (Representative of judgment-debtor.)
(15) AIR 1915 Oudh 134 (135). (Not a representative of either.)
(28) AIR 1928 Oudh 442 (445, 446) : 3 Luck 719. (Depends upon the nature of the question in dispute. In this case *held* representative of judgment-debtor.)
(09) 8 Ind Cas 586 (588) : 12 Oudh Cas 175. (Not a representative of decree-holder.)
[See also (18) AIR 1918 Oudh 379 (385). (An auction-purchaser, even if the decree-holder, is representative of the judgment-debtor.)]
10. (22) AIR 1922 Nag 189 (191). (Representative of judgment-debtor.)
(23) AIR 1923 Nag 161 (162). (Not a representative of judgment-debtor.)
(26) AIR 1926 Nag 68 (70). (Representative of decree-holder.)
(24) AIR 1924 Nag 328 (330) : 20 Nag L R 179. (Representative of decree-holder for the purpose of an adjudication between judgment-debtor and

10a. (87) AIR 1937 Nag 59 (59) : 1 L R (1937) Nag 156.
(38) AIR 1938 Rang 250 (251) : 1938 Rang L R 583. (Decree-holder purchaser.)
(24) AIR 1924 Sind 101 (103, 104) : 17 Sind L R 73.
11. (26) AIR 1926 All 457 (459).
(29) AIR 1929 Rang 183 (183).
(22) AIR 1922 All 495 (496) : 44 All 488.
(32) AIR 1932 Cal 126 (131) : 59 Cal 117.
(98) 16 Ind 121 (125, 126).
(77) 2 Ind 108 (112).
[See also (96) 20 Bom 390 (393).]
11a. (31) AIR 1931 All 466 (480) : 53 All 1023 (F.B.).
(37) AIR 1937 All 742 (746) : 11 R (1937) All 921 [See also (21) AIR 1921 Ind 420 (421). (Mortgage decree purchaser is in the same position as a money decree purchaser.)]
(09) 12 Oudh Cas 45 (51).]

within Section 47 and a separate suit is barred. In the case mentioned in illustration 2 above, *G* having purchased the interest of *B*, is his representative, and the question raised by him is one relating to the *execution* of the decree. Section 47 therefore applies and the suit is barred. So far, the case of a *stranger purchaser* has been dealt with. Where, however, the *decree-holder himself* becomes the purchaser in execution of a decree obtained by him, it has been held by the High Courts of Madras¹² and Calcutta,¹³ the Chief Court of Oudh¹⁴ and the Courts of the Judicial Commissioners of Nagpur¹⁵ and Sind,^{15a} that he retains his character of a party to the suit and does not divest himself of his character as such by reason of his having become the purchaser. A question therefore arising between the decree-holder-purchaser and the judgment-debtor in respect of the purchase, is, according to this view, one "between the parties to the suit." On the other hand, the High Courts of Allahabad,¹⁶ Bombay,¹⁷ Lahore¹⁸ and Patna¹⁹ hold that there is no distinction between a decree-holder-purchaser and a stranger purchaser and that the fact of his being a party to the suit is only an accident which will not have the effect of making his position better or worse than that of a stranger purchaser. The observations of the Judicial Committee of the Privy Council in the undermentioned case²⁰ seem to support the view of the Madras and Calcutta High Courts though it is not clear from the report of the decision that this aspect of the question was before their Lordships' mind. But, where the representative character of the decree-holder-purchaser comes in question in a *distinct proceeding*, his character as decree-holder in one execution proceeding can have no effect on his position in another and he will be in the same position as that of a stranger purchaser.²¹

12. (1900) 26 Mad 740 (741).
- (95) 28 Mad 87 (89, 90).
- (96) AIR 1936 Mad 571 (572).
- (96) AIR 1926 Mad 567 (568).
- (16) AIR 1916 Mad 480 (482).
- (91) 25 Mad 529 (532).
- (98) 21 Mad 416 (416, 417).
- (13. (96) AIR 1926 Cal 798 (808); 53 Cal 781 (FB).
- (1900) 27 Cal 84 (86).
- (27) AIR 1927 Cal 57 (60).
- [See also (92) AIR 1932 Cal 414 (416, 417).
- (98) 7 Cal 436 (438).
- (04) 31 Cal 737 (742).
- (14. (92) AIR 1928 Oudh 199 (202); 3 Luck 182 (FB).
- [But see (18) AIR 1918 Oudh 379 (385).]
15. (17) AIR 1917 Nag 24 (25).
- (18) AIR 1918 Nag 102 (103).
- (38) AIR 1938 Nag 212 (215, 216); ILR (1938) Nag 583.
- (35) AIR 1935 Nag 30 (31); 31 Nag L R 217.
- 15a. (25) AIR 1925 Sind 171 (173); 18 Sind L R 34.
16. (99) 1 Ind Cas 416 (423, 424); 31 All 82 (FB).
- (99) 2 Ind Cas 454 (455) (All). (Transferee from stranger auction-purchaser; 31 All 82 Foll.)
- (28) AIR 1928 All 368 (370); 50 All 670.
- (28) AIR 1928 All 363 (364); 50 All 686.
- (25) AIR 1925 All 703 (704).
- (25) AIR 1925 All 236 (236); 47 All 304. (Claim by judgment-debtor for recovery of wrong or excessive property sold to a stranger purchaser more than 3 years after sale—Not tenable; 31 All 82 Foll.)
21. (20) AIR 1920 Mad 322 (323); 43 Mad 107 (FB).
20. (17) AIR 1917 P O 121 (122); 22 Mad 403; 45 Ind App 54 (P C).
- and other cases.]]
726. (Decided without reference to Foll. Cases)
- [But see (25) AIR 1925 Pat 478 (473); 4 Ind App 54 (P C).
- AIR 1932 Pat 80 (86).]
- (FB). (Same case after Full Bench answer, see AIR 1931 Pat 241 (252, 255); 10 Pat 670.
- (31) AIR 1931 Pat 312, 313; 9 Pat 775.
- (30) AIR 1930 Pat 811 (312, 313).
- four 232 (FB).
19. (16) AIR 1916 Pat 216 (217, 218); 1 Pat L No. 8.
- (18) AIR 1918 Lah 204 (205, 206); 1918 Pun Re No. 121.
- (19) AIR 1919 Lah 16 (18); 1919 Pun Re No. 121.
- (29) 119 Ind Cas 226 (226) (Lah).
- (30) AIR 1930 Lah 363 (363).
- (Overruled.)]
- [But see (11) 11 Ind Cas 987 (988); 35 Bom 452.
- (20) AIR 1920 Bom 223 (223); 44 Bom 977.
- (20) AIR 1920 Bom 90 (93); 44 Bom 352.
- (06) 3 All L Jour 234 (236, 237, 238). (Do.)]
- (20) AIR 1920 Bom 90 (93); 44 Bom 352.
- (06) 3 All L Jour 234 (236, 237, 238). (Do.)]
- (08) 5 All L Jour 285 (288). (Do.; 3 All L Jour 234 Foll.)
- All 82 (FB.)
- [But see (08) 30 All 72 (74). (Overruled in 31 All 82 (FB).]
- (95) 17 All 222 (224, 225) (FB).
- (96) 18 All 36 (37).
- (01) 23 All 476 (478).
- (14) AIR 1914 All 467 (468).
- (23) AIR 1923 All 470 (471); 45 All 96.

In applying the principles stated above to cases of disputes between the auction-purchaser and the judgment-debtor arising in proceedings relating to delivery of possession, two questions may arise—

- (1) whether an appeal will lie from an order in such an enquiry, and
- (2) whether the dispute can be agitated in a separate suit.

The answer to the questions depends upon whether the question is one "between the parties," and, secondly, whether it relates to the execution, discharge or satisfaction of the decree. All the Courts are agreed that, where the purchaser is a stranger, he can, apart from the summary remedy provided by O. 21 Rr. 95-102, agitate the matter in a *separate suit* and that if he avails himself of such summary remedy, no appeal would lie from an order passed in such proceedings.²² The reason is that if the purchaser is not at all a representative of the judgment-debtor (as has been held in some decisions referred to above), the question is not one between the parties, and, even if he is a representative of the judgment-debtor, still, the question is only one between the judgment-debtor and his representatives, and consequently, is not one "between the parties." See Note 7. But when the decree-holder is the purchaser, the question is one "between the parties," and Calcutta²³ and the Courts of Madras²⁴ and the High Courts of Madras²⁵ and Calcutta²⁶ and the Courts of the Judicial Commissioners of

(136) 163 Ind Cas 602 (601) (Nag). (Mortgaged decree-holder—Purchaser is representative of judgment-debtor in proceedings for execution of rent decree against mortgagor.)
(138) AIR 1938 Pat 216 (220). (Decree-holder purchaser is representative of judgment-debtor in execution proceeding against same judgment-debtor by another decree-holder.)
(136) AIR 1936 Pat 289 (293); 15 Pat 515. (Decree-holder purchaser is representative of judgment-debtor in regard to another decree-holder executing against same judgment-debtor.)

(103) 26 Mad 740 (741).
(103) 13 Mad L Jour 237 (238) : 26 Mad 740.
(102) 25 Mad 529 (432).
(101) 24 Mad 185 (189).
[See also (29) AIR 1928 Mad 1270 (1270).]
[But see (33) AIR 1938 Mad 482 (484) : 57 Mad 844.
(96) 6 Mad L Jour 256 (258).
(92) 15 Mad 226 (228).
(84) 7 Mad 592 (594).
24. (26) AIR 1926 Cal 798 (803, 807) : 53 Cal 781 (F B).
(30) AIR 1930 Cal 586 (588).
(34) AIR 1934 Cal 541 (542).
(33) AIR 1933 Cal 680 (680) : 60 Cal 832. (Between decree-holder purchaser and judgment-debtor under O. 21 R. 100—Matter is governed by A I R 1926 Cal 795 (F B).)
(93) AIR 1933 Cal 311 (311, 312). (Dismissal of application for possession made by decree-holder purchaser—Appeal lies.)
(92) AIR 1932 Cal 126 (128) : 59 Cal 117.
(18) 20 Ind Cas 874 (875, 876) (Cal).
(04) 31 Cal 737 (742).
(1900) 27 Cal 34 (38).

[See (34) AIR 1934 Cal 277 (273) : 60 Cal 140.

(Under certain circumstances case held not to fall within the Section).]
[But see the following cases which are no longer law in view of the Full Bench ruling in A I R 1926 Cal 798 : 53 Cal 781 :—

(25) AIR 1925 Cal 1250 (1250).
(23) AIR 1923 Cal 345 (348, 351).
(19) AIR 1919 Cal 368 (369).
(19) AIR 1919 Cal 86 (85).
(15) AIR 1915 Cal 137 (139).
(97) 1 Cal W N 658 (658, 659).]

23. (05) 28 Mad 87 (89, 90).
(27) AIR 1927 Mad 288 (290, 291) : 50 Mad 403. (Suit by decree-holder purchaser for possession of the property purchased is barred by this Section.)
(39) AIR 1939 Mad 369 (370) (S B). (Reversing A I R 1936 Mad 571 on another point.)
(36) AIR 1936 Mad 571 (572).
(33) AIR 1933 Mad 569 (570).
(25) AIR 1925 Mad 1198 (1199).
(20) AIR 1920 Mad 979 (980).
(16) AIR 1916 Mad 1008 (1010).
(05) 28 Mad 119 (121).

Nagpur,²⁵ Sind²⁶ and Peshawar^{20a} a question relating to delivery of possession is one relating to the execution, discharge or satisfaction of the decree. They proceed on the view that, so far as the decree-holder is concerned, his decree cannot be said to be satisfied until he has either obtained the sale proceeds or possession of the property which represent the money for which he obtained his decree. The High Courts of Allahabad,²⁷ Bombay,²³ Patna,²⁹ Lahore,³⁰ and Rangoon³¹ and the Chief Courts of Oudh³² hold, on the other hand, that, upon the judgment-debtor's property being sold and the amount due under the decree being realised, the decree is fully executed, discharged and satisfied, and no question relating to the execution, discharge, or satisfaction of the decree remains to be considered, and, that, whether or not the auction-purchaser obtains possession of the property sold, is wholly immaterial for the purposes of the decree. The result is that, according to the former view, where a decree-holder purchases the property in court-auction, his remedy for recovery of possession from the judgment-debtor is only by way of an application under O. 21, R. 95, and a separate suit would be barred. Also, an order passed in execution upon a question relating to delivery of possession between himself and the judgment-debtor would be appealable as a decree under Section 96 read with Section 2 clause (2). According to the latter view, the purchaser has an additional remedy by way of suit and no appeal would lie from an order passed in execution proceedings with respect to a dispute between the purchaser and the judgment-debtor either on the view that it is not a question relating to execution, discharge or satisfaction of a decree or on the view that the matter is not one between the parties or their representatives. Where the decree-holder purchases obtains possession under the sale and is thereafter

25. (27) AIR 1927 Nag 294 (295).

(17) AIR 1917 Nag 24 (25).

(38) AIR 1938 Nag 212 (215); I L R (1938) Nag 589.

(33) AIR 1938 Nag 369 (370). (Application by

decree-holder purchaser under R. 95—Resistance

offered—Application under R. 97 held barred by

limitation—Fresh application for possession by

decree-holder purchaser held not barred—But

suit would be barred.]

[But see (32) AIR 1932 Nag 140 (141) : 28

Nag L R 250.]

26. (25) AIR 1925 Sind 171 (173) : 18 Sind

L R 84.

(36) AIR 1936 Sind 11 (13) : 30 Sind L R 290.

26a. (36) AIR 1936 Pesh 85 (86).

27. (09) 1 Ind Cas 416 (424, 428) : 31 All 82 (FB).

(07) 29 All 468 (466).

(37) AIR 1937 All 742 (750) : I L R (1937) All

921 (F B).

(18) AIR 1918 All 405 (405) : 40 All 216.

(08) 30 All 231 (234, 235). (Symbolical possession

given—Fresh suit for actual possession lies.)

(06) 1906 All W N 213 (214) : 28 All 722. (Do.)

(02) 24 All 519 (520). (Objection by judgment-

debtor that house on land did not pass and

should not have been delivered to auction-

purchaser, not within the Section.)

28. (24) AIR 1924 Bom 429 (431) : 48 Bom 550

(F B).

(24) AIR 1924 Bom 527 (528).

(30) AIR 1930 Bom 375 (377) : 54 Bom 479.

(23) AIR 1923 Bom 62 (62) : 46 Bom 914. (Suit

by judgment-debtor against stranger purchaser

for recovery of land wrongly sold.)

(16) AIR 1916 Oudh 111 (112) : 18 Oudh Cas. 345.

(FB).

32. (28) AIR 1928 Oudh 199 (203) : 3 Luck 182

(36) AIR 1936 Rang 298 (299).

(30) AIR 1930 Rang 281 (282).

31. (30) AIR 1930 Rang 61 (62) : 8 Rang 162.

(88) 1888 Pun Re No. 58.]

(35) AIR 1935 Lah 144 (145).

[But see (37) AIR 1937 Lah 145 (146).

(19) AIR 1919 Lah 16 (18) : 1919 Pun Re No. 121.

(20) AIR 1920 Lah 169 (160) : 1 Lah 134.

(29) AIR 1929 Lah 121 (122).

145, disapproved.)

(39) AIR 1939 Lah 211 (212) : (AIR 1937 Lah

No. 8.

30. (18) AIR 1918 Lah 204 (206) : 1918 Pun Re

A I R 1916 Pat 216.]

726. (Decided without reference to the F B in

[But see (25) AIR 1925 Pat 478 (479) : 4 Pat

(18) AIR 1918 Pat 395 (396) : 3 Pat L Jour 571.

(18) AIR 1918 Pat 546 (547).

(19) AIR 1919 Pat 297 (304) : 4 Pat L Jour 716.

(29) AIR 1929 Pat 559 (560).

(30) AIR 1930 Pat 308 (310) : 9 Pat 332.

(30) AIR 1930 Pat 80 (86).

answer. See A I R 1932 Pat 80 (86).

to 263) : 10 Pat 670 (F B). (Same case after F B

(31) AIR 1931 Pat 241 (243 to 247, 252, 255, 261

(38) 177 Ind Cas 692 (693) (Pat).

(30) AIR 1930 Pat 311 (312, 313) : 9 Pat 775.

232 (F B).

29. (16) AIR 1916 Pat 216 (216) : 1 Pat L Jour

(Overruled in A I R 1924 Bom 429 (F B).]

[But see (11) 11 Ind Cas 987 (988) : 35 Bom 452.

(98) 22 Bom 939 (944).

dispossessed again by the judgment-debtor, a suit for possession by the decree-holder is not barred under this Section, inasmuch as the matter in dispute in such a case arises after the satisfaction of the decree and does not relate to the execution, discharge or satisfaction of the decree.³² A dispute between the decree-holder purchaser and a *third party* in possession will not come within this Section.³⁴

As to cases in which the auction-purchaser is interested in a dispute between the decree-holder and the judgment-debtor, see Note 49, *infra*.

20. Transferee from auction-purchaser.—The High Courts of Calcutta¹ and Madras² have held that a transferee from a decree-holder purchaser is a representative of the decree-holder. A contrary view has been held by the Chief Court of Lower Burma.³ The High Court of Madras has also held in the undermentioned case⁴ that the purchaser from a decree-holder purchaser under a *money decree* is the representative of the judgment-debtor for the purpose of an enquiry into a question relating to the execution of a distinct decree affecting the same property.

21. Transferee from a party.—The term 'representative' includes, as has been seen already in Note 17 above, the transferee of the interest of a party who, so far as such interest is concerned is bound by the decree. A transferee from a party may be bound by the decree against such party, on any of the following grounds and will consequently be his representative within the meaning of Section 47—

(1) Where the suit is one in which any right to immovable property is directly and specifically in question and the transferee gets a transfer of such property *pendente lite*.⁵ See Section 52 of the Transfer of Property Act, 1882. It was, however, held by Mr. Justice Oldfield in the undermentioned case,⁶ that where it is found in the suit that the transferee had no title at all which he could transfer, the transferee *pendente lite* is not his representative. Mr. Justice Ramesam dissented from this view. It is submitted that the view of Mr. Justice Oldfield cannot be supported on principle. It has been held by the High Court of Bombay that a transferee *pendente lite* cannot be a representative of the transferor within the meaning of Section 47 for the purpose of

attacking the decree-holder's right to sue.^{1b}

33. (1936) AIR 1936 Rang 298 (299).
34. (1930) AIR 1936 Rang 739 (740).
- Note 20
1. (1930) AIR 1930 Cal 586 (588).
2. (1926) AIR 1926 Mad 857 (858).
- (191) 14 Mad L Jour 474 (477) : 28 Mad 87.
- [But see (16) AIR 1916 Mad 480 (480).]
3. (1922) AIR 1922 Low Bur 18 (22) : 11 Low Bur Rul 17.
4. (1920) AIR 1920 Mad 824 (833) : 43 Mad 107 (107).
- (17) AIR 1917 Mad 664 (665). (Court auction-purchaser in one money decree is not representative of judgment-debtor entitled to object to execution of another money decree.)
- [But see (19) 4 Ind Cas 1067 (1068) (Mad). (Vended from auction-purchaser in a rent suit—Not a representative—Not entitled to object in execution of another decree.)]
- Note 21
1. (1926) AIR 1926 Mad 968 (969).
- (194) 26 All 101 (104). (Transfer when execution proceeding was pending.)
- (1938) AIR 1938 All 201 (202) : 55 All 235.

- (1900) 22 All 380 (381).
- (1900) 22 All 248 (246, 247).
- (1900) 22 All 145 (145).
- (194) 1894 All W N 145 (145).
- (198) 22 Bom 939 (944). (This continues up to date of sale.)
- (199) 3 Ind Cas 791 (792) (Cal). (Do.)
- (198) AIR 1928 Cal 94 (96) : 54 Cal 1064.
- (192) AIR 1928 Cal 423 (424).
- (1926) AIR 1926 Cal 356 (357).
- (14) AIR 1914 Cal 828 (829) : 41 Cal 418.
- (12) 13 Ind Cas 542 (544) (Cal).
- (107) 11 Cal W N 312 (314).
- (192) 29 Cal 813 (822).
- (189) 16 Cal 355 (364).
- (186) 12 Cal 458 (463).
- (1927) AIR 1927 Lah 905 (906).
- (198) 4 Mad L Jour 291 (293).
- (18) AIR 1918 Nag 102 (103).
- (1920) AIR 1920 Pat 710 (711).
- 1a. (1921) AIR 1921 Mad 559 (560).
- 1b. (1928) AIR 1928 Bom 65 (66) : 52 Bom 208.

- (2) Where properties have been *attached* in execution of a money decree and the transfer is of an interest in such properties pending *attachment*.³ See Section 64, *infra*.
- (3) Where the transfer is made by the judgment-debtor under O. 21 R. 83.³
- (4) Where the transfer is made by the judgment-debtor of an occupancy holding *which is not transferable by custom*.⁴
- (5) Where the transfer is made by the judgment-debtor of a holding, in respect of which a rent decree has been obtained by the landlord under Section 148A of the Bengal Tenancy Act (VIII of 1885).⁵
- (6) A person who becomes owner, by process of law, of property mortgaged to him by a deed of conditional sale is a representative of his mortgagor.⁶
- A transferee, in the following cases, will not be bound by the decree against the transferor, in respect of the interest transferred and is, therefore, not his representative—
- (1) Where the suit does not relate to any property and the transfer is made by the judgment-debtor of properties, which have *not been attached* in execution of the decree in such suit or the attachment of which has been set aside.⁶
- (2) Where the transfer is made by a party before the institution of the suit against him.⁷
- (3) *X* mortgages an absolute occupancy land governed by the C. P. Tenancy Act, 1920, first to *M* and then a portion to *S*. In execution of a decree obtained by *S* on his mortgage, the portion is sold and the landlord *G*

2. ('99) 21 All 20 (22).
 ('97) 19 All 882 (883).
 ('01) 28 Cal 492 (498). (License pending attachment—[yard of property is a representative.])
 ('26) AIR 1926 Lah 184 (185) : 6 Lah 544.
 ('32) AIR 1932 Mad 86 (89) : 55 Mad 495. (Reversing AIR 1927 Mad 450).
 ('10) 7 Ind Cas 418 (419) : 34 Mad 450.
 ('07) 17 Mad L Jour 321 (321).
 ('97) 20 Mad 878 (883).
 [But see ('05) 27 All 378 (379). (Application to direct transferee of debt pending attachment to refund the moneys collected by him contrary to attachment, is not one in execution.)]
 3. ('01) 28 All 116 (118).
 4. ('18) AIR 1918 Pat 483 (484) : 3 Pat L Jour 579.
 ('29) AIR 1929 Pat 227 (228).
 ('21) 64 Ind Cas 124 (125) (Cal).
 ('15) AIR 1915 Cal 268 (271).
 ('15) AIR 1915 Cal 242 (248) : 42 Cal 172 (FB).
 ('09) 3 Ind Cas 39 (40) (Cal).
 ('06) 10 Cal W N 240 (241).
 ('37) AIR 1937 Pat 562 (563).
 [But see ('09) 3 Ind Cas 461 (462) (Cal).]
 5. ('17) AIR 1917 Pat 597 (597, 598) : 2 Pat L Jour 478.
 ('05) 32 Cal 1081 (1084).
 ('28) AIR 1928 Cal 94 (95, 96) : 54 Cal 1064.
 ('07) 11 Cal W N 812 (814).

- 5a. ('94) 16 All 284 (285).
 6. ('26) AIR 1926 Lah 184 (185) : 6 Lah 544. (Obiter.)
 ('90) 1890 Pun Re No. 151.
 ('39) AIR 1939 All 264 (267, 268) : 1 L R. (1939) All 854. (Transfer by judgment-debtor before attachment.)
 ('09) 4 Ind Cas 406 (407) : 32 All 129. (Attachment subsequently set aside.)
 ('18) AIR 1918 Mad 142 (142). (Do.)
 (1900) 1900 All W N 107 (108).
 ('94) 16 All 286 (291).
 ('88) 10 All 1 (4). (Implied).
 ('88) 5 All 94 (97).
 ('67) 2 Agre 380 (381).
 ('21) AIR 1921 Bom 45 (46) : 45 Bom 812.
 ('18) 21 Ind Cas 938 (940) (Cal).
 ('11) 9 Ind Cas 307 (308) (Cal).
 ('02) 6 Cal W N 127 (128).
 ('12) 14 Ind Cas 40 (42, 43) : 1912 Pun Re No. 64.
 ('17) AIR 1917 Mad 705 (705).
 ('20) AIR 1920 Nag 205 (205).
 ('21) AIR 1921 Pat 189 (190).
 [See also ('30) AIR 1930 Mad 688 (692) : 53 Mad 750. (It must be shown that the decree is binding upon him.)]
 ('19) AIR 1919 Pat 454 (464).
 7. ('97) 1 Cal W N 114 (117).
 ('81) 7 Cal 403 (405).
 ('75) 2 Subb W R Misc 13 (14, 15).
 ('17) AIR 1917 Lah 388 (389).

deposits the value of the portion sold in Court under Section 6 of the Tenancy Act and obtains possession. *G* is not the representative of *S* in respect of a decree obtained by *M* against *S* and others in respect of his mortgage, inasmuch as, on the deposit under the Tenancy Act, the mortgage attaches to the *deposited amount* and not to the property transferred.⁸

22. Purchaser from party to suit in which injunction has been granted affecting such property.—A purchaser of property from a party to a suit in which an injunction has been granted affecting such property is not the representative of that party inasmuch as the injunction does not run with the land and the purchaser cannot claim the benefit of the order of injunction.¹

23. Official Assignee or Official Receiver.—The Official Assignee or Official Receiver, *claiming property on behalf of the creditors of an insolvent judgment-debtor* is not a "representative" of the judgment-debtor within the meaning of the Section.¹ See also Note 58 to Section 11.

A receiver in insolvency may represent both the creditors and the insolvent according to the circumstances of the case.^{1a}

23a. Liquidator of company.—The liquidator of a co-operative society claiming priority over a mortgagee of the judgment-debtor who has obtained a decree on the mortgage and is seeking to execute the decree is not a representative of the judgment-debtor and an order of the executing Court allowing the claim of such liquidator is not one under this Section.¹

24. Transferee of decree.—Under O. 21 R. 16, the transferee of a decree, by assignment in writing, or by operation of law, may apply to execute the decree and the decree may be executed in the same manner as if the application were made by the decree-holder. The transferee in such a case is a representative of the decree-holder within the meaning of Section 47.¹ So is a transferee from such a

8. ('30) AIR 1930 Nag 199 (200) : 26 Nag L R

Note 22

1. ('08) 10 Bom L R 18 (20) : 32 Bom 181 (184).

See note 18 to S. 50 also.

Note 23

1. ('32) AIR 1932 Cal 208 (204) : 35 Cal WN 971

(973). (Interim receiver applying to the Court

under O. 21 R. 90 to set aside the sale—Such

receiver is not a representative of the judgment-

debtor.)

(25) AIR 1925 Mad 688 (688).

(08) 30 All 486 (487).

(85) 7 All 752 (755).

(97) 21 Bom 205 (219).

(36) AIR 1936 Cal 573 (574) : 1 L R (1987) 1 Cal

(264).

(32) AIR 1932 Cal 208 (204).

(02) 29 Cal 428 (432). (Overruling 28 Cal 419.)

(35) AIR 1935 Mad 151 (152) : 58 Mad 403.

[See also ('36) AIR 1936 Sind 2 (3).]

1a. ('35) AIR 1935 Cal 508 (504) : 62 Cal 457.

Note 23a

1. ('34) AIR 1934 Nag 201 (203) : 30 Nag L R

240.

Note 24

1. ('99) 26 Cal 250 (252).

(19) AIR 1919 All 337 (337) : 41 All 432.

(06) 28 All 613 (614).

(04) 1 All L Jour 61 (63).

(94) 16 All 483 (492).

(91) 1891 All WN 87 (88).

(88) 10 All 354 (358). (Assignee from the plain-

tiff in a pre-emption suit for refund of money

deposited on dismissal of suit.)

(87) 9 All 46 (48). (Point conceded.)

(35) AIR 1935 Bom 298 (302) : 59 Bom 417.

(Decree obtained by Hindu widow—Widow re-

marrying and forfeiting estate—The heir entitled

to the decree on such forfeiture is a transferee by

operation of law of the decree.)

(87) 11 Bom 506 (512). ("By operation of law"

includes "by operation of equity".)

(85) 9 Bom 141 (145).

(21) AIR 1921 Cal 74 (75). (Sale in Court auction

of property with arrears of rent—Decree for rent

obtained by judgment-debtor pending suit must

also be deemed to be transferred by operation of

law.)

(10) 7 Ind Cas 55 (58) (Cal).

(06) 33 Cal 857 (860).

(03) 7 Cal WN 54 (56).

30. Question as to the existence of the decree.—It has been seen in Note 8 to Section 38 *ante*, that a question of *territorial* or *pecuniary* jurisdiction of the Court which passed the decree cannot be allowed to be raised in execution proceedings,^{1a} but that a question as to jurisdiction of the Court in other matters rendering the decree a *nullity* can be entertained even by the executing Court. Thus, a question whether a decree is a *nullity* and not in existence by reason of the fact that it was passed by a Court without jurisdiction¹ or that it was passed against a dead person,²⁻³ is a question which can be entertained in execution. Similarly, the executing Court can see whether the decree to be executed is a *subsisting and operative* decree capable of execution.⁴ Similarly, again, the executing Court can, in a case where a decree is *lost or destroyed*, find out what are the terms of the decree or whether the decree was in existence.⁵ See Note 8 to Section 38 *ante* for a full discussion.

It has been held that the want of proper representation of a minor against whom a decree has been passed cannot be gone into by the Court executing such decree,^{6a} the reason being that the decree is not a *nullity* in such cases.

But, though the executing Court can go into the question of jurisdiction or of the existence of the decree, the question cannot be regarded as one "relating to the execution, discharge or satisfaction, of the decree" within the meaning of Section 47 and the refusal of the executing Court to execute the decree on the ground of want of jurisdiction will not bar a separate suit by the aggrieved party or operate as *res judicata*.⁶

(25) AIR 1925 Pat 625 (631) : 4 Pat 510.

(25) AIR 1925 Pat 516 (517).

(24) AIR 1924 Pat 504 (505).

(23) AIR 1923 Pat 875 (378) : 2 Pat 538.

(17) AIR 1917 Pat 425 (428).

(17) AIR 1917 Pat 275 (276).

(31) AIR 1931 Rang 252 (256) : 9 Rang 480 (FB).

(29) AIR 1929 Rang 275 (275). (Correctness of

decree cannot be called in question in execution.)

(22) AIR 1922 Low Bur 22 (25).

(16) AIR 1916 Low Bur 86 (86).

(10) 8 Ind Cas 610 (610) (Rang).

(11) 11 Ind Cas 192 (194) : 5 Sind L R 71.

(10) 7 Ind Cas 558 (554) : 4 Sind L R 1.

Note 30

1a. (81) AIR 1931 Rang 252 : 9 Rang 480 (FB).

1. (95) 17 All 478 (482).

(27) AIR 1927 Cal 578 (578).

(29) AIR 1929 Lab 449 (451).

(28) AIR 1928 Lab 829 (830).

(27) AIR 1927 Lab 651 (652).

(25) AIR 1925 Lab 494 (494) : 6 Lab 313.

(08) 26 Mad 31 (33). (Consent decree affecting

transfer of emoluments opposed to public policy.)

(29) AIR 1929 Nag 357 (358) : 26 Nag L R 60.

(38) AIR 1938 Oudh 213 (214). (Decree against

person who is not a party to the suit.)

(35) AIR 1935 Oudh 358 (360) : 11 Luck 187 (FB).

(35) AIR 1935 Oudh 57 (58) : 10 Luck 508.

(30) AIR 1930 Rang 337 (341, 342) : 8 Rang 544.

[But see] (32) AIR 1932 Lab 291 (292). (Reference

to arbitration by one partner — Even if decree

is nullity, executing Court cannot go behind it.)

2-3. (35) AIR 1935 Cal 130 (131).

(35) AIR 1935 Lab 439 (439) : 17 Lab 32.

(21) AIR 1921 All 404 (404) : 43 All 328.

able.)

want of jurisdiction in trial Court—Not appeal-

execution—Transferee Court declining owing to

(04) 28 Bom 378 (382). (Decree transferred for

ed is not one relating to execution.)

stence of a valid decree against estate of a decas-

(72) 11 Beng L R 149 (157). (Question as to exi-

6. (31) AIR 1931 All 490 (496, 499) : 54 All 25 (FB).

(35) AIR 1935 Nag 235 (236) : 31 Nag L R 403.]

[But see] (28) AIR 1928 Mad 1057 (1059).

(04) 7 Oudh Cas 199 (201).

not be raised in execution.)

adverse to that of the minor, the objection can-

guardian and item of a minor defendant was

(36) AIR 1936 Mad 618 (622) : 59 Mad 642.

(Where the objection is that the interest of the

is the remedy.)

question does not fall under this Section and suit

834. (Minor impleaded as a major in suit—The

(37) AIR 1937 Mad 509 (510) : 1 L R (1937) Mad

5a. (24) AIR 1924 Lab 448 (448) : 5 Lab 54.

(1864) 1864 Subh W R Gap 378 (379).

5. (86) 1 Aggra 78 (78).

(31) AIR 1931 Rang 252 (256) : 9 Rang 480 (FB).

without a judgment is a complete nullity.)

(38) AIR 1938 Rang 372 (375). (Decree passed

(67) 8 Subh W R 506 (506).

(98) 26 Cal 175 (177, 178).

(11) 11 Ind Cas 280 (283) (Cal).

4. (13) 19 Ind Cas 630 (632) (Cal).

(28) AIR 1928 Pat 272 (272) : 7 Pat 331.

(21) AIR 1921 Lab 219 (220).

(27) AIR 1927 Bom 53 (54).

(18) AIR 1918 All 226 (227) : 40 All 423.

31. Pre-decree matters.—There is a conflict of opinion on the question whether a Court executing a decree can, under this Section, entertain an objection to the date of the decree. The High Courts of Nagpur¹ have held that it cannot. The High Courts of Allahabad² and Bombay³ have held broadly that it can. The High Court of Madras has expressed divergent views on the question. One group of cases hold that an agreement postponing the execution of a decree for a time is a matter that can be gone into in execution, notwithstanding the fact that the effect of postponing execution will be virtually to vary the terms of the decree.⁴ This view is based mainly on the long course of decisions in the Madras Presidency to that effect. Another group of cases hold that except in cases of agreements relating to execution,⁵ a pre-decree arrangement which attacks the decree itself cannot be gone into in execution on the broad ground that it would be most dangerous to allow the decree itself to be attacked in execution.⁶ It is submitted with respect that the first of the two views of the Madras High Court is not correct on principle. If an executing Court cannot go behind the decree, i.e., cannot vary, add to or alter its terms, but must execute the decree as it stands, then it cannot deal with a pre-decree arrangement as to its execution, etc., which must necessarily have the effect of varying the decree to some extent. Further, Section 47 speaks of questions relating to the execution, discharge or satisfaction of the decree. The words "the decree" refer to the decree passed by the Court and of which the decree-holder is seeking execution and not any decree as agreed to by parties.

32. Matters subsequent to the decree. — See Notes 33 to 71, *infra*.

NOTE 31

1. (104) 81 Cal 179 (182).
- (102) 6 Cal W N 796 (1798).
- (35) AIR 1985 Cal 177 (178) : 62 Cal 421. (But there is no bar to a suit for injunction being brought, restraining the decree-holder from executing his decree.)
- (30) AIR 1980 Cal 856 (356).
- (102) 29 Cal 810 (812).
2. (27) AIR 1927 Lah 894 (895). (Agreement against personal execution amounts to variation of the decree.)
- (22) 67 Ind Cas 758 (754) (Lah). (Discharge antecedent to decree.)
- (37) AIR 1937 Lah 537 (540); I.L.R. (1937) Lah 209. [See (21) AIR 1921 Lah 248 (249) : 1 Lah 445.
3. (26) AIR 1926 Rang 140 (141, 142) : 4 Rang 118. (Agreement prior to decree that decree was not to be executed for its full amount.)
- (27) AIR 1927 Rang 48 (48).
- (28) AIR 1928 Rang 36 (37) : 5 Rang 685. (Agreement prior to decree not to execute it.)
4. (15) AIR 1915 Nag 128 (129) : 11 Nag L R 110. (Agreement prior to decree not to execute it.)
- (38) AIR 1938 Nag 265 (266). (Decree on award—Judgment-debtor paying after award but before decree—Amount cannot be given credit in execution.)
- (29) AIR 1929 Nag 339 (340).
5. (109) 2 Ind Cas 608 (609) (All).
6. (96) 22 Bom 468 (468) (P.B).
- (73) 10 Bom H.C.R. 361 (365). (Agreement to execute the decree agreement not barred.)
- (30) AIR 1930 Mad 673 (674).
- (23) AIR 1923 Mad 619 (620).

7. (18) AIR 1918 Mad 1174 (1178) : 40 Mad 238 (P.B).
- (26) AIR 1926 Mad 582 (583) : 49 Mad 513.
- (18) AIR 1918 Mad 1814 (1815). (Executing Court can go into question of tender alleged to be made before suit and refuse interest to decree-holder.)
- (31) AIR 1981 Mad 26 (27, 28). (Where an agreement is anomalous in character, i.e., while in point of time it is post-decree, in point of character and intention it is pre-decree, having been executed in ignorance of the fact that a decree had already been passed, it should be treated as a pre-decree agreement.)
- (25) AIR 1925 Mad 591 (592). (Not to execute against one of the judgment-debtors.)
- (24) AIR 1924 Mad 611 (611).
- (17) AIR 1917 Mad 310 (311) : 39 Mad 541.
- (10) 8 Ind Cas 1071 (1072) (Mad). (Agreement not to enforce decree does not affect validity of decree.)
- 7a. (35) AIR 1935 Mad 860 (862, 863) : 58 Mad 994 (P.B). (Agreement not to execute can be pleaded in execution.)
8. (31) AIR 1981 Mad 399 (403) : 54 Mad 184. (Attempt to reconcile the conflict.)
- (20) AIR 1920 Mad 124 (124) : 48 Mad 725. (Pre-decree agreement to treat decree as in part inexecutable.)
- (31) AIR 1981 Mad 26 (27, 28). (Suit on pre-decree agreement not barred.)

cutte the decree in a particular manner.

(34) AIR 1934 Bom 370 (372) : 58 Bom 610.

85. Decree incapable of execution.—As has been seen in Note 2 *ante*, this

Section bars a suit to enforce an executable judgment. But to admit of an application under the Section, the decree must not only be subsisting or in course of execution but also be one capable of being executed; and the question whether a decree is capable or incapable of execution is, as has been seen in Note 30 *ante*, presently one coming under this Section? and a decision on such a question is a decree? A decree which merely declares the rights of parties and does not direct any act to be done; in other words, a decree in which no coercive order is made which the Court contemplates enforcing by execution, is merely a declaratory decree which is incapable of being executed and only a separate suit and not an application under this Section will lie to enforce the rights so declared by the decree. Similarly, a decree which does not provide for a certain relief though it declares a right to such relief is one not capable of being executed. Thus, a partition decree without actually allotting shares or a decree for joint possession is incapable of being executed; a suit, and not an application under Section 47, is the proper remedy to obtain a partition by metes and bounds. So also, where a relief could not be obtained, or an objection could not have

(116) AIR 1919 Mad 645 (Sis). (Agreement not to

obtain decree not to be given into.)

[See also (32) AIR 1921 Mad 616 (Sis). (Agree-

ment prior to suit not pleaded in suit.)]

Note 33

1. (111) 10 Ind Cas 691 (Sis) : 1 Typo-Set Bales.

[See also (12) AIR 1915 All 120 (Sis). (Appl.

has judgment granting a writ—Not incorporated

red in decree.)

(121) AIR 1921 Rang 22 (Sis). (Decree for posses-

sion of land — Demolition of superstructure

cannot be effected in execution.)]

2. (33) 1893 All W N 139 (110) : 17 All 473.

(33) AIR 1923 Mad 41 (41) : 12 Ind 230.

3. (13) AIR 1915 Mad 197 (198) : 12 Ind 664

4. (13) AIR 1915 All 61 (61) : 31 All 97.

(33) AIR 1923 All 499 (172) : 33 All 246 (213)

(Application giving security for stay of execution

of decree in another suit—Writ, order directing

security to not execute.)]

(66) 1 N W P H C B 134 (126).

(61) 2 Agm 23 (24).

(33) 12 Bom 416 (115).

(60) of Cal L Jour 55 (51).

(23) AIR 1923 Cal 223 (223).

(10) 1 Ind Cas 461 (458) (Cal).

(37) 2 Cal W N 38 (38, 37). (Decree creating

charge in default of payment—Suit to enforce

change not execution.)]

(33) 23 Cal 603 (506). (Do.)

(33) 23 Cal 603 (506). (Do.)

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(33) 23 Cal 603 (506). (Do.)

(33) 23 Cal 603 (506). (Do.)

(33) AIR 1923 Bom 119 (121). (Decree declaring

sum to be due from defendant to plaintiff.)

(37) AIR 1921 Bom 64 (66). (Declaratory decree

does not become executable merely because there

is a question in it that the money would be

received by execution.)

(123) AIR 1923 Sind 313 (316).

(12) of Ind Cas 301 (302) : 1 Sind L B 192.

(36) 1890 Bom 2 4 433 (434).

(30) 1890 Bom 2 7 12 (12).

(63) 2 Cal L Jour 113 (113) : 21 All 535 : 32 Ind

423 (23 C).

(12) AIR 1915 All 163 (163).

(12) AIR 1915 All 207 (207).

(12) AIR 1915 All 100 (103) : 12 Ind 30.

(12) AIR 1915 All 23 (24).

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been taken⁹ in execution, or where the decree is vague and indefinite,⁹ or where the decree becomes incapable of execution by events subsequent to the decree,¹⁰ or where the decree is fully executed,¹¹ or where a fresh suit is ordered,¹² the remedy is only by way of suit and not an application under this Section, the decree in all these cases being incapable of execution. Scheme-decrees under Section 92, Civil Procedure Code, generally are declaratory, but it cannot be laid down as a general rule that all scheme-decrees are always declaratory and can never be executable. The question whether a decree forming a scheme is executable or not depends upon the language and on the scope of the decree or of that particular part of the decree in respect of which the question arises. Such a decree may, in part, be declaratory, and, in part, be declaratory.¹³ Directions in such a decree are matters intended to be enforced in execution.¹⁴ Otherwise, where it is merely declaratory, it cannot be enforced under Section 47 in execution.¹⁵

As to cases wherein the decrees were held not incapable of execution, see the undermentioned cases.¹⁶

- (705) 27 All 325 (833) : 32 Ind App 123 (P C).
[See also (30) AIR 1930 Mad 364 (370). (Decree for money—Question of pledge of jewels not raised—Raisable in separate suit.)]
8. (09) 1 Ind Cas 704 (704) : 31 All 45.
9. (16) AIR 1916 All 62 (62).
(16) AIR 1916 All 328 (324). (Decree directing that sale of the right, interest and title of the judgment-debtor reserving the prior mortgages' rights over the property is not vague.)
10. (13) 19 Ind Cas 375 (376) (All).
(02) 24 All 44 (52).
(20) AIR 1920 All 129 (131) : 42 All 544. (Decree in this case was held to have not become incapable of execution.)
(05) 28 All 1 (18) : 32 Ind App 229 (P C).
(30) AIR 1930 Bom 132 (134) : 54 Bom 162.
(94) 18 Bom 495 (504).
(93) 20 Cal 260 (263, 264).
(24) AIR 1924 Lah 615 (616). (Decree in this case was held to have not become incapable of execution.)
11. (97) 1 Cal W N 708 (710).
(75) 12 Bom H C R 163 (165).
(10) 5 Ind Cas 148 (149) (Cal). (Proper course, if there had been any mistake, would be for the decree-holder to come in review.)
(36) AIR 1936 Cal 400 (401). (Judge passing order recording full satisfaction of decree—Suit for rectification not barred by S. 47.)
(89) 10 Cal 538 (541). (Proper course, if there had been any mistake, would be for the decree-holder to come in review.)
(71) 16 South W R 269 (269).
(29) AIR 1929 Lah 121 (122, 123).
(24) AIR 1924 Lah 634 (634).
(20) AIR 1920 Lah 65 (65).
(14) AIR 1914 Lah 427 (427) : 1914 Pun Re No. 42.
(01) 1901 Pun Re No. 63. (Proper remedy held was application for review.)
(71) 6 Mad H C R 304 (306).
(11) 10 Ind Cas 991 (993) : 1 Upp Bur Rul 66.
(05) 1905 Upp Bur Rul C. P. C. 36.
(07) 1 Sind L R 172 (175).
12. (04) 1 All L Jour 649 (651) : 27 All 254.
(25) AIR 1925 All 240 (240). (Suit by decree-holder specially directed to file, by an order under O. 21 R. 58.)
13. (28) AIR 1928 Mad 61 (66).
14. (94) 17 Mad 343 (354, 355) : 21 Ind App 71 (P C). (Nominée to a religious office under the terms of the decree allowed to appeal.)
(32) AIR 1932 Mad 41 (44) : 54 Mad. 345. (Decree in a suit under S. 92 directing the delivery of trust property to new trustee is an executable decree and not declaratory.)
(37) AIR 1937 Mad 326 (327). (Scheme-decree allowing arrears of pay and padbharam expenses of archakas from date of suit to date of judgment is executable as regards that portion.)
(32) AIR 1932 Mad 193 (194, 195).
(31) 60 Mad L Jour 178 (178) (P N).
(90) 18 Mad 338 (342). (Appointment of a head of a mutt under the decree.)
(26) AIR 1926 Nag 326 (327).
(14) AIR 1914 Low Bur 226 (228).
15. (25) AIR 1925 P C 155 (156) (P C).
(33) 1933 Mad W N 183 (184). (Provisions inserted in that part of the decree containing the scheme are prima facie inexecutable, even though in form, they may be directory.)
(37) AIR 1937 Mad 326 (327). (Do).
(31) AIR 1931 All 765 (765).
(27) AIR 1927 Bom 422 (423).
(27) AIR 1927 Mad 1110 (1110).
(26) AIR 1926 Mad 799 (800).
(26) AIR 1926 Mad 655 (655).
(26) AIR 1926 Mad 130 (130).
(24) AIR 1924 Mad 369 (370, 371) : 47 Mad 139.
(28) AIR 1928 Rang 168 (171) : 6 Rang 97.
[See (34) AIR 1934 Pesh 43 (44).]
16. (14) AIR 1914 Sind 61 (61) : 8 Sind L R 58. (Award decree directing plaintiff to pay Rs. 500 to defendant and thereupon to eject him from a certain house is capable of execution.)
(14) AIR 1914 Oudh 268 (268). (Decree providing for realization of maintenance from the person and property of the defendants is executable.)

38. Decree incapable of execution.—As has been seen in Note 2 ante, this

Section bars a suit to enforce an executable judgment. But to admit of an application under the Section, the decree must not only be subsisting or in course of execution but also be one capable of being executed¹ and the question whether a decree is capable or incapable of execution is, as has been seen in Note 30 ante, pre-eminently one coming under this Section² and a decision on such a question is a decree.³ A decree which merely declares the rights of parties and does not direct any act to be done, in other words, a decree in which no definite order is made which the Court contemplates enforcing by execution, is merely a declaratory decree which is incapable of being executed and only a separate suit and not an application under this Section will lie to enforce the rights so declared by the decree.⁴ Similarly, a decree which does not provide for a certain relief though it declares a right to such relief is one not capable of being executed.⁵ Thus, a partition decree without actually allotting shares or a decree for joint possession is incapable of being executed; a suit, and not an application under Section 47, is the proper remedy to obtain a partition by metes and bounds.⁶ So also, where a relief could not be obtained, or an objection could not have

(19) AIR 1919 Mad 918 (918). (Agreement not to obtain decree not to be gone into.)
[See also (21) AIR 1921 Mad 616 (616). (Agreement prior to suit not pleaded in suit.)]

Note 33

1. (11) 10 Ind Cas 991 (992) : 1 C P J Bar Rule 66. [See also (15) AIR 1915 All 120 (121). (Appellate judgment granting a relief—Not incorporated in decree.)]

(27) AIR 1927 Rang 82 (82). (Decree for possession of land — Demolition of superstructure cannot be effected in execution.)

2. (95) 1595 All W N 109 (110) : 17 All 478.

(33) AIR 1933 Lah 41 (41) : 11 Lah 280.

3. (15) AIR 1915 Mad 197 (198) : 12 Ind Cas 664.

(666) : 37 Mad 29.

4. (15) AIR 1915 All 61 (61) : 37 All 97.

(33) AIR 1933 All 269 (272) : 55 All 846 (FB)

(Appellant giving security for stay of execution of decree in another suit—Held, order directing security is not executable.)

(69) 1 N W P H C R 154 (156).

(67) 2 Agr 28 (24).

(88) 12 Bom 416 (418).

(86) 64 Cal L Jour 55 (57).

(23) AIR 1923 Cal 252 (255).

(10) 7 Ind Cas 487 (488) (Cal).

(97) 2 Cal W N 38 (38, 34). (Decree creating charge in default of payment—Suit to enforce charge, not execution.)

(95) 22 Cal 908 (908). (Do.)

(95) 22 Cal 859 (864). (Do.)

(71) 14 South W R 485 (486).

(30) AIR 1928 Mad 474 (475).

(25) AIR 1925 Mad 1260 (1261, 1262).

(12) 13 Ind Cas 618 (618) (Mad).

(07) 2 Mad L T Jm 94 (94, 95).

(84) 7 Mad 80 (82).

(82) 4 Mad 219 (220).

(29) AIR 1929 Nag 34 (35).

(27) AIR 1927 Oudh 457 (460).

(05) 8 Oudh Cas 861 (870).

(08) 6 Oudh Cas 239 (242, 245).

(98) 1 Oudh Cas 289 (300).

(35) AIR 1935 Pesh 119 (121). (Decree declaring sum to be due from defendant to plaintiff.)

(34) AIR 1934 Pesh 64 (66). (Declaratory decree is a direction in it that the money could be recovered by execution.)

(25) AIR 1925 Sind 318 (319).

(13) 24 Ind Cas 861 (862) : 7 Sind L R 192.

(96) 1596 Bom P J 483 (484).

(90) 1590 Bom P J 72 (72).

(05) 2 Cal L Jour 173 (178) : 27 All 925 : 32 Ind App 123 (P C).

(02) 7 Cal W N 153 (159).

(15) AIR 1915 Lah 207 (207).

(19) AIR 1919 Mad 100 (103) : 42 Mad 90.

(19) AIR 1919 Mad 68 (64).

(29) AIR 1929 Nag 34 (36).

(88) 17 C P L R 62 (66). (Case under S. 87, T. P. Act.)

(99) 1599 All W N 124 (125).

(28) AIR 1928 Bom 365 (366).

(01) 6 Bom L R 35 (37).

(19) AIR 1919 Cal 994 (995).

(16) AIR 1916 Cal 170 (171).

(20) AIR 1920 Lah 159 (160) : 1 Lah 134. (Suit by auction-purchaser of share of co-partner in joint Hindu family.)

(31) 1931 Mad W N 1176 (1176).

(80) 1930 Mad W N 1051 (1053). (Symbolical possession alone got under prior decree—Suit for actual possession not barred.)

(27) AIR 1927 Mad 952 (953).

(26) AIR 1926 Mad 232 (233). (Suit by mortgagee of decree-holder auction-purchaser of undivided share.)

(10) 7 Ind Cas 558 (559) (Mad).

(06) 29 Mad 294 (295, 296).

(26) AIR 1926 Pat 154 (155).

[But see (27) AIR 1927 Cal 411 (412) : 54 Cal 524. (Decree for khas possession — No steps for execution taken for khas possession — Suit barred.)]

7. (06) 9 Oudh Cas 7 (16, 17) : 32 Ind App 329 :

28 All 1 (P C).

been taken⁹ in execution, or where the decree is vague and indefinite,⁹ or where the decree becomes incapable of execution by events subsequent to the decree,¹⁰ or where the decree is fully executed,¹¹ or where a fresh suit is ordered,¹² the remedy is only by way of suit and not an application under this Section, the decree in all these cases being incapable of execution. Scheme-decrees under Section 92, Civil Procedure Code, generally are declaratory, but it cannot be laid down as a general rule that all scheme-decrees are always declaratory and can never be executed. The question whether a decree framing a scheme is executable or not depends upon the language and on the scope of the decree or of that particular part of the decree in respect of which the question arises. Such a decree may, in part, be declaratory, and, in part, be declaratory.¹³ Directions in such a decree are matters intended to be enforced in execution.¹⁴ Otherwise, where it is merely declaratory, it cannot be enforced under Section 47 in execution.¹⁵

As to cases wherein the decrees were held not incapable of execution, see the undermentioned cases.¹⁶

- (05) 27 All 925 (933) : 32 Ind App 123 (P C).
[See also (30) AIR 1930 Mad 864 (870). (Decree for money—Question of pledge of jewels not raised—Raisable in separate suit.)]
8. (09) 1 Ind Cas 704 (704) : 31 All 45.
9. (16) AIR 1916 All 62 (62).
(16) AIR 1916 All 828 (824). (Decree directing that sale of the right, interest and title of the judgment-debtor reserving the prior mortgages' rights over the property is not vague.)
10. (13) 19 Ind Cas 375 (375) (All).
(02) 24 All 44 (52).
(20) AIR 1920 All 129 (131) : 42 All 544. (Decree in this case was held to have not become incapable of execution.)
(05) 28 All 1 (18) : 32 Ind App 229 (P C).
(30) AIR 1930 Bom 132 (134) : 54 Bom 162.
(94) 18 Bom 495 (504).
(93) 20 Cal 260 (263, 264).
(24) AIR 1924 Loh 615 (616). (Decree in this case was held to have not become incapable of execution.)
11. (97) 1 Cal W N 708 (710).
(75) 12 Bom H C R 163 (165).
(10) 5 Ind Cas 148 (149) (Cal). (Proper course, if there had been any mistake, would be for the decree-holder to come in review.)
(96) AIR 1936 Cal 400 (401). (Judge passing order recording full satisfaction of decree—Suit for rectification not barred by S. 47.)
(89) 10 Cal 538 (541). (Proper course, if there had been any mistake, would be for the decree-holder to come in review.)
(71) 16 Suth W R 269 (269).
(29) AIR 1929 Loh 121 (122, 123).
(24) AIR 1924 Loh 634 (634).
(20) AIR 1920 Loh 65 (65).
(14) AIR 1914 Loh 427 (427) : 1914 Pun Re No. 42.
(01) 1901 Pun Re No. 63. (Proper remedy held was application for review.)
(11) 10 Ind Cas 991 (993) : 1 Upp Bur Rul 66.
(05) 1905 Upp Bur Rul C. P. C. 36.
(07) 1 Sind L R 172 (175).
12. (04) 1 All L Jour 649 (651) : 27 All 254.

- (25) AIR 1925 All 240 (240). (Suit by decree-holder specifically directed to file, by an order under O. 21 R. 58.)
13. (28) AIR 1928 Mad 61 (66).
14. (94) 17 Mad 348 (354, 355) : 21 Ind App 71 (P C). (Nominice to a religious office under the terms of the decree allowed to appeal.)
(32) AIR 1932 Mad 41 (44) : 54 Mad 345. (Decree in a suit under S. 92 directing the delivery of trust property to new trustee is an executable decree and not declaratory.)
(37) AIR 1937 Mad 326 (327). (Scheme-decrees allowing arrears of pay and paying expenses of archakas from date of suit to date of judgment is executable as regards that portion.)
(32) AIR 1932 Mad 193 (194, 195).
(31) 60 Mad L Jour 178 (178) (P N).
(90) 13 Mad 388 (342). (Appointment of a head of a mutt under the decree.)
(26) AIR 1936 Nag 326 (327).
(14) AIR 1914 Low Bur 226 (228).
15. (25) AIR 1925 P C 155 (156) (P C).
(33) 1933 Mad W N 183 (184). (Provisions inserted in that part of the decree containing the scheme are prima facie inexecutable, even though in form, they may be directory.)
(37) AIR 1937 Mad 326 (327). (Do).
(31) AIR 1931 All 765 (765).
(27) AIR 1927 Bom 422 (423).
(27) AIR 1927 Mad 1110 (1110).
(26) AIR 1926 Mad 655 (655).
(26) AIR 1926 Mad 655 (655).
(26) AIR 1926 Mad 130 (130).
(24) AIR 1924 Mad 369 (370, 371) : 47 Mad 139.
(28) AIR 1928 Rang 168 (171) : 6 Rang 97.
[See (34) AIR 1934 Pesh 43 (44).]
16. (14) AIR 1914 Sind 61 (61) : 8 Sind L R 58. (Award decree directing plaintiff to pay Rs. 500 to defendant and thereupon to eject him from a certain house is capable of execution.)
(14) AIR 1914 Oudh 268 (268). (Decree providing for realization of maintenance from the person and property of the defendants is executable.)

34. Questions arising between the preliminary and final decrees.—Where

provision is made under the Code, as in suits on mortgage or for partition or for administration of an estate, for the passing of preliminary and final decrees, matters arising after, and out of, the preliminary decree, but before the final decree, are not matters relating to the execution, discharge or satisfaction of any decree, inasmuch as the matters in controversy in the suit are not completely disposed of, the only decree finally determining the suit and as such executable being the *final decree*. Thus, an order directing accounts to be taken in an administration suit,¹ or an order appointing or refusing to appoint a commissioner for effecting a partition in a partition suit,² or an order on an application for final decree,³ or for making absolute a decree *nisi* for sale, foreclosure or redemption of a mortgage,⁴ is an order passed in the *suit itself* and does not come under this Section. Where a preliminary decree for redemption in a mortgage suit is passed and allowed to be barred by time without the decree being made final, the Section is no bar to a fresh suit for redemption.⁵

35. Question as to excess or deficient execution.—Where in execution of a decree, land not included in or covered by the decree¹ or which is in excess of the

(99) AIR 1939 Bom 114 (115). (Order simply directing award to be filed—No judgment recorded—Order is not executable as decree.)

(14) AIR 1914 Cal 775 (775). (Decree for possession giving boundaries and the property identifiable—Decree cannot be said to be incapable of execution.)

(67) 7 Subh W R 372 (373). (Decree for possession of land—No mention of house—Objection by judgment-debtor that house is not on land decreed—Question is one under S. 47.)

(35) AIR 1935 Mad 576 (577). (Decree declaring right to hereditary office—Question whether any act of defendant is an interference with the right declared must be dealt with in execution and not by separate suit.)

(12) 14 Ind Cas 588 (589) (Mad). (Decree directing demolition of a wall is executable.)

(10) 6 Ind Cas 681 (681) (Mad). (Declaration of right to keys—*Held* capable of execution.)

(37) AIR 1937 Nag 151 (152) : 1 L R (1937) Nag 153. (Decree in subsequent suit affecting rights of parties to previous decree—Previous decree not reversed or varied—Such decree is executable.)

(30) AIR 1930 Nag 17 (18). (Decree creating charge on house not subject of suit—Decree is capable of execution.)

(20) AIR 1920 Nag 40 (42). (A decree is not incapable of execution merely because it omits to specify the shares of the judgment-debtor in the property decreed, if the decree-holder has secured possession.)

(30) AIR 1930 Oudh 302 (303). (Compromise decree in a partition suit allowing monthly maintenance—Decree omitting the date when payments were to begin—Other party to realise the amount from person or property—Decree *held* executable.)

(23) AIR 1928 Oudh 160 (160). (Decree while decreeing plaintiff's claim for cancellation of bond in suit, giving right to defendant to recover certain sum from plaintiff's property—Defendant *held* could execute it.)

(27) AIR 1927 Cal 614 (615) : 54 Cal 419.

(28) AIR 1928 Cal 865 (867).

(88) 12 Bom 449 (453).

(93) 25 All 343 (346).

1. (16) AIR 1916 All 104 (105, 106) : 38 All 339.

Note 35

703. (Decree before T. F. Act came into force.)

[But see (19) AIR 1919 Bom 34 (35) : 43 Bom

(14) AIR 1914 Bom 200 (201) : 39 Bom 41.]

[See also (18) AIR 1918 Bom 1 (2) : 43 Bom 334.

40 and 116 to S. 11.

5. See for fuller discussion of the subject, Notes

4. (9) 2 Ind Cas 296 (298) : 33 Bom 273.

(19) AIR 1919 Mad 709 (709) : 42 Mad 52.

(19) AIR 1919 All 14 (15) : 42 All 170.

3. (25) AIR 1925 Nag 132 (133) : 22 Nag L R 110.

[See also (16) AIR 1916 Mad 809 (810).

(16) AIR 1916 Mad 127 (128). (Contention

2. (97) 24 Cal 725 (735, 738, 739) (F B).

1. (83) 9 Cal 773 (776, 777).

Note 34

possession—Decree is executable.)

Arbitrator finding that specific sum was due to mortgagee and that he was entitled to immediate

(37) AIR 1937 Pesh 48 (49). (Award decree—

Execution permitted.)

inadequately decided in reciprocal part of decree—

402. (Nature of claim as set forth in plaint

(21) AIR 1921 Pat 360 (362) : 5 Pat L four

Decree is capable of execution.)

creating charge on house not subject of suit—

(26) AIR 1926 Pat 31 (31, 32) : 4 Pat 693. (Decree

execution.)

anomalous to say that the decree is incapable of

execution has already taken place it would be

(30) AIR 1930 Pat 536 (537) : 9 Pat 499. (Where

enforce charge.)

is created by decree separate suit is necessary to

for sale and execution as such—Where charge

charge on property—Decree to be treated as one

in favour of Hindu widow—Decree declaring

(37) AIR 1937 Pat 654 (655). (Maintenance decree

decree," is sold to or taken possession of by the *decree-holder*, the proper remedy for the judgment-debtor to recover the whole or the excess land is by an *application* under this Section and not by a separate *suit*, as the matter is one in execution between the parties to the suit. Where, however, such possession is taken by the decree-holder, not through the officer of the Court but by his *own act*, the judgment-debtor is not barred by Section 47 from bringing a suit to recover land thus wrongly taken as the possession could not be said to have been taken in *execution* of a decree.³ Similarly, where monies are improperly realised by a *third party* in defiance of an order of injunction, the question is not one between the parties and is not within the Section.⁴ But monies unduly or wrongly realised by the decree-holder as due under a decree,⁵ or surplus sale-proceeds or jewels wrongly seized,⁶ or moveables misappropriated,⁷ are recoverable only under this Section and not by a separate suit. Similarly, where the decree-holder, who has realised smaller sums in full satisfaction owing to mistake or the misrepresentation of the judgment-debtor, wants to claim the balance, the question as to the deficient execution is one relating to the execution of the decree, and a separate suit in respect thereof is barred.⁸

36. Question of damages for acts done under cover of execution.—Where damages result from acts done under cover of execution proceedings, a separate suit for the recovery of such damages lies. The question is not one relating to the execution, discharge or satisfaction of the decree itself but is one outside the decree.¹

(08) 12 Cal W N 1027 (1028).
(95) 22 Cal 488 (485).
(74) 22 Subh W R 435 (435).
(28) AIR 1928 Lah 986 (937).
(26) AIR 1926 Mad 968 (969).
(70) 5 Mad H C R 185 (189).
(38) AIR 1938 Nag 193 (194).
(24) AIR 1924 Nag 246 (247).
(24) AIR 1924 Nag 122 (123).
(04) 7 Oudh Cas 213 (215).
(19) AIR 1919 Pat 141 (142).
(99) 2 Upp Bur Rul 249.
(25) AIR 1925 Sind 126 (126) : 19 Sind L R 302.
[But see (23) AIR 1923 AH 470 (471) : 45 AH 96.]

2. (22) AIR 1922 P C 252 (253) : 48 Ind App
155 : 44 Mad 483 (P C).
(25) AIR 1925 AH 551 (552).
(06) 3 AH L Jour 601 (602).
(03) 1903 AH W N 208 (209) : 26 AH 152. (Decree

ordering sale of undefined rights and interests—
Property sold in execution alleged to be in excess
of share of judgment-debtor—Sale not objected
to at the time—Suit to recover *held* not main-
tainable.)
(07) 6 Cal L Jour 257 (259).
(70) 14 Subh W R 39 (40).
(30) AIR 1930 Mad 12 (13).
(19) AIR 1919 Mad 269 (271) : 42 Mad 753.
(12) 13 Ind Cas 133 (134) (Mad).
(38) AIR 1938 Nag 276 (281).
(28) AIR 1928 Rang 245 (247).

[But see (02) 1902 AH W N 144 (145) : 24 AH 519.
(30) AIR 1930 AH 865 (866). (But where he has
an opportunity to appear and raise the question
but does not do so, he cannot afterwards raise
the question either under S. 47 or by a suit.)
(29) AIR 1929 Lah 121 (122). (Question between
auction-purchaser and judgment-debtor.)

(29) AIR 1929 Pat 391 (392). (Do.)
3. (73) 12 Beng L R 201 (208).
(69) 12 Subh W R 85 (86).
(04) 7 Oudh Cas 213 (215).
(25) AIR 1925 Pat 376 (378).
[See also (11) 11 Ind Cas 200 (201) (Cal). (Over-
payment by judgment-debtor out of Court.)]
4. (05) 27 AH 378 (380).
5. (30) AIR 1930 P C 86 (90) (P C).
(95) 17 AH 478 (481).
(86) 1886 AH W N 38 (38).
(78) 2 AH 61 (62, 63) (F B).
(67) 2 Agre 45 (46).
(20) AIR 1920 Bom 208 (209) : 44 Bom 97.
(28) AIR 1928 Cal 776 (777).
(78) 4 Cal L Rep 577 (579, 580).
(71) 15 Subh W R 160 (161).
(04) 1904 Fnn R No. 45.
(22) AIR 1922 Pat 166 (167) : 1 Pat 336.
6. (97) 2 Cal W N 429 (431).
(75) 28 Subh W R 207 (207). (Refund of sale-
proceeds since decree was compromised.)
(04) 14 Mad L Jour 295 (296).
(1900) 23 Mad 55 (58).
7. (16) AIR 1916 Pat 308 (309).
8. (01) 5 Cal W N 627 (629).
(82) 6 Bom 148 (150).
(87) 9 AH 229 (231).
Note 36

1. (07) 6 Cal L Jour 527 (529).
[See also (06) 28 AH 72 (73).
(69) 11 Subh W R 516 (516).
(08) 31 Mad 37 (39, 40).]
[But see (18) AIR 1918 Mad 94 (96). (S. 6 of the
Malabar Compensation for Tenants' Improve-
ments Act makes the question of damages one
under S. 47.)
(99) 2 Oudh Cas 315 (318).]

not recognised by the executing Court,⁸ or for damages for breach of an agreement against execution,⁹ or of a contract to enter up satisfaction of the decree.¹⁰

See O. 21 R. 2 for a full discussion of the whole matter.

41. Agreement against execution of decree.—In Note 31 above, agreements against execution entered into *before* the passing of the decree have been dealt with. Where, after the passing of the decree, the parties enter into an agreement against execution of the decree, the question whether such an agreement can be pleaded as a bar to execution depends upon the nature of the agreement and the intention of the parties. If it is clearly the intention of the parties to abandon the decree and to enter into a new and different contract in supersession of the decree, the contract may form the basis of a subsequent suit and the Section is no bar.¹ Where, however, the agreement does not so supersede the decree but is merely pleaded as a bar to execution, the executing Court can inquire into and decide the matter under the Section,² subject to the provisions of O. 21 R. 2, where such an agreement amounts to an *adjustment* of the decree.³ In *Oudh Commercial Bank Ltd. v. Bind Bansi Kuer*,⁴ their Lordships of the Privy Council observed as follows :

"It appears to the Court acting under Section 47 that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under Section 47. In such a case, to say that the creditor may, perhaps, have a separate suit, is to misread the Code, which, by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court."

8. (113) 19 Ind Cas 622 (623) : 35 All 243.

- (133) AIR 1933 Pesh 53 (55).
 (37) AIR 1937 P O 256 (259) : 64 Ind App 302 : I L R (1938) 1 Cal 66 : 31 Sind L R 637 (PC).
 (AIR 1935 Cal 596 Reversed).
 (96) 19 Bom 546 (549).
 (03) 1903 Pun Re No. 98.
 (86) 1885 Pun Re No. 51.
 (04) 14 Mad L Jour 359 (366, 367). (Agreement securing some additional benefit.)
 [See (33) AIR 1933 Mad 888 (839).]
 2. (84) 6 All 228 (230).
 (84) 6 All 16 (17). (Agreement to give time.)
 (13) 20 Ind Cas 874 (875, 876) (Cal). (Do.)
 (35) AIR 1935 All 364 (365).
 (82) 4 All 240 (242).
 (12) 13 Ind Cas 204 (205) (Mad).
 (82) 8 Mad L Jour 193 (194). (Agreement by decree-holder auction-purchaser not to take delivery of possession for consideration—Agreement held could be set up in execution.)
 [See (37) AIR 1937 Pat 672 (672). (Under the peculiar terms of the compromise (postponing date of confirmation of sale under mortgage decree), held, executing Court had no option but to contract sale on the date mentioned and had no power to compel the parties to comply with the terms of the compromise.)]
 [See also (83) 1883 All W N 93 (96) (PB).]
 3. (113) 20 Ind Cas 874 (876) (Cal).
 4. (39) AIR 1939 PC 80 (86) : 14 Luck 192 : I L R (1939) Kar 136 (PC). (AIR 1932 All 273 approved.)
- Note 41**
1. (81) 3 All 781 (786).
 429.
 (23) AIR 1923 Rang 88 (89-90) : 11 Low Bur Bul
 10. (118) AIR 1918 Mad 720 (721).
 (82) 5 Mad 397 (400).
 (14) AIR 1914 Mad 640 (640).
 (39) AIR 1939 Mad 499 (500).
 (99) 23 Bom 394 (396, 397).
 (84) 10 Cal 354 (356, 357).
 9. (12) 13 Ind Cas 944 (945) (Cal).
 for money paid is maintainable.]]
 ruled and final decree passed—Suit for recovery mortgage should not be passed—Objection over that debt had been satisfied and final decree on [See also (38) AIR 1938 Pesh 12 (14). (Objection (13) 22 Ind Cas 963 (964) : 1 Upp Bur Bul 191. (29) AIR 1929 Rang 269 (270) : 7 Rang 310. (77) 1 Mad 203 (204). (83) 6 Mad 41 (43). (85) 8 Mad 277 (283). (98) 21 Mad 409 (410). (77) 1877 Pun Re No. 66. (70) 18 Suth W R 69 (73, 74) (PB). (79) 3 Cal L Rep 414 (416). (98) 25 Cal 718 (723, 724). (79) 4 Bom 295 (297). (23) AIR 1923 Bom 258 (253). (81) 3 All 538 (540). (81) 3 All 538 (535). (08) 30 All 464 (466).
 8. (113) 19 Ind Cas 622 (623) : 35 All 243.

42. Contribution among judgment-debtors.—Where one of two or more judgment-debtors purchases the decree in full¹ or in part,² or is compelled to pay the whole of the decree amount himself in execution,³ a suit by such judgment-debtor against others for contribution and recovery of his share of the common debt is not barred, as such a question cannot be said to relate to matters in execution, discharge, or satisfaction of the decree between the parties to the suit within the meaning of the Section. As regards the general right to sue for contribution of costs paid under a decree, see Note 34 to Section 35 *ante*.

43. Maladministration of estate of deceased judgment-debtor.—Where a decree-holder, unable to realise the decree amount out of the estate of a deceased judgment-debtor, raises a question as to the *maladministration* of the estate by the executors, the matter is one which involves a much wider question than one merely relating to the execution of the decree and cannot be decided under this Section. A suit will, therefore, lie against the executors for the administration of the estate and for an account on the footing of maladministration.¹

44. Stay of execution.—Under the old Code, there was a difference of opinion as to whether a question of *stay* of execution of a decree is one relating to the execution of the decree, one group of cases holding that it is,² and another, that it is not.³ In order to remove this conflict, the words "or to the stay of execution thereof" were inserted in clause (c) of Section 244 by Act VII of 1888, after which the trend of decisions was uniform in holding that such questions are within the Section.⁴ The words "or to the stay of execution thereof" were, however, omitted from Section 47 of this Code and the omission has again created a conflict of views in the various High Courts. Three such different views, at least, have been expressed—

(1) That the question of stay of execution is clearly a matter *relating to the execution* of the decree and that the decision on such a question is a *decree* and is therefore appealable.⁵

(2) That such a question is one relating to execution but that the decision thereon cannot be said to be one "on the rights of the parties" and consequently cannot amount to a *decree* and is therefore not appealable.⁶

- Note 42**
1. (68) 9 South W R 280 (234).
2. (88) 15 Cal 187 (198, 194).
3. (96) 18 All 106 (107).
(98) 21 Mad 45 (46). (Contribution for costs of execution paid.)
Note 43
1. (08) 35 Cal 1100 (1108). (24 Cal 478 explained.)
Note 44
1. (84) 7 All 78 (78).
(88) 12 Bom 279 (280).
(86) 13 Cal 111 (112).
(86) 12 Cal 624 (625).
(81) 7 Cal 733 (738).
2. (83) 9 Cal 214 (215).
(08) 29 Bom 71 (73). (12 Bom 279 doubted.)
3. (98) 22 Bom 463 (472).
(04) 31 Cal 373 (375, 376).
(01) 28 Cal 734 (735, 736).
(1900) 23 Mad 568 (570).
(08) 2 Sind L R 24 (25).
(88) 10 All 389 (394). (Following 7 All 73.)

4. (30) AIR 1930 Lah 187 (190) : 11 Lah 402.
(27) AIR 1927 Lah 915 (915).
(25) AIR 1925 Lah 69 (69).
(24) AIR 1924 Lah 671 (672).
(24) AIR 1924 Lah 631 (631).
(24) AIR 1924 Lah 602 (603).
(23) AIR 1923 Lah 514 (515).
(22) AIR 1922 Lah 480 (480).
(20) AIR 1920 Low Bur 138 (139) : 10 Low Bur 326.
5. (31) AIR 1931 All 129 (130, 131). (Following AIR 1929 All 85; AIR 1924 All 808.)
(33) AIR 1933 Nag 84 (85) : 29 Nag L R 121.
(29) AIR 1929 All 85 (85).
(24) AIR 1924 All 808 (808, 809, 811) : 46 All 733.
(15) AIR 1915 Cal 122 (124). (Order refusing to stay execution is not an order under S. 47 which has the characteristics of a decree under S. 2.)
(14) AIR 1914 Cal 149 (149) : 20 Ind Cas 72 (72) : 41 Cal 160.
(11) 12 Ind Cas 745 (748, 750) (Cal).
(28) 106 Ind Cas 890 (891) (Lah). (Order for security to stay execution.)

(3) The question does not relate to execution at all within the meaning of this Section.⁶

The first two views proceed on the assumption that omission of the words in Section 47 by the Legislature was by reason of their being considered superfluous and a surplusage.⁷ The last view proceeds on the assumption that the omission was deliberate and intended to show that they should not be considered to be within the Section. It is submitted with respect that the last view is not correct. Reference to the history of the enactment is not a legitimate method of interpreting a Section where there is no ambiguity of any kind and there is nothing in the language of the Section itself that a stay of execution is not a matter relating to execution.

It has been held by the High Court of Madras that it is only where the order in question as to stay of execution is passed by the Court *executing the decree* that the matter will come under Section 47. An order for stay by the Appellate Court in an appeal from the decree is not one within Section 47.⁸

45. Question of liability of certain property to attachment and sale.—All objections to attachment and sale in execution of a decree raised *between parties* to the suit or their representatives on the ground that the properties are *not liable to be attached*,¹ or are *not saleable* in execution of that decree,² are matters coming

- (18) AIR 1918 Mad 1174 (1177) : 40 Mad 233.
 (Per Abdul Rahim Offg. C. J., Phillips J. Contra.)
 (17) AIR 1917 Mad 810 (811) : 39 Mad 541 (FB).
 (36) AIR 1936 Oudh 369 (370).
 (25) AIR 1925 Rang 225 (225) : 3 Rang 255.
 (Order relating to sufficiency of security held not appealable.)
 [See also (26) AIR 1926 Cal 880 (880).]
 (28) 106 Ind Cas 866 (866, 867) (Lab.).
 (24) AIR 1924 All 794 (795).
 (38) AIR 1938 Nag 84 (85) : 29 Nag L R 121.
 (21) AIR 1921 Bom 208 (208) : 45 Bom 241.
 (20) AIR 1920 Cal 71 (72).
 (27) AIR 1927 Lab 852 (852). (Following AIR 1921 Bom 208.)
 (27) AIR 1927 Lab 235 (235).
 (22) AIR 1922 Lab 400 (400).
 (38) AIR 1938 Rang 317 (317, 318) : 1938 Rang L R 580.
 (31) AIR 1931 Rang 221 (222) : 9 Rang 354.
 7. (17) AIR 1917 Mad 310 (311) : 39 Mad 541.
 8. (15) AIR 1915 Mad 41 (41).

Note 45

1. (25) AIR 1925 All 594 (595).
 (34) AIR 1934 Pat 281 (282).
 (35) AIR 1935 All 364 (366).
 (38) AIR 1938 Cal 162 (163).
 (38) AIR 1938 Cal 118 (114) : L R (1938) 1 Cal 280.
 (27) AIR 1927 Cal 106 (108) : 53 Cal 837.
 (23) AIR 1928 Cal 344 (344).
 (21) AIR 1921 Cal 242 (244).
 (39) AIR 1939 Lab 256 (257).
 (35) AIR 1935 Lab 942 (943).
 (30) AIR 1930 Lab 628 (628). (Objection that the land of judgment-debtor could not be attached as he was agriculturist—On an adverse decision the judgment-debtor filed a separate suit for this purpose—It was dismissed.)
 (09) 4 Ind Cas 121 (122) (Cal).
 (10) 7 Ind Cas 48 (48) (Cal).
 (11) 10 Ind Cas 417 (420) (Cal). (Do.) holding.
 (17) AIR 1917 Cal 672 (672). (Sale of occupancy Section 266 of the old Code.)
 (91) 1891 Bom F J 207. (Not saleable under (95) 19 Bom 328 (331). (Service vatan.)
 (31) AIR 1931 Bom 446 (447). (Not saleable under Section 60, C. P. Code.)
 (85) 7 All 641 (643).
 (84) 6 All 393 (395). (Do.)
 (84) 6 All 448 (449). (Do.)
 Section 9 of the U. P. Rent Act.
 (86) 8 All 146 (147, 148) (FB). (Not saleable under Section 245 of the old Code.)
 (88) 1888 All W N 155 (155). (Not saleable under rights.)
 (18) AIR 1918 All 278 (279). (Bx-proprietary Section 20, Agra Tenancy Act.)
 (Sale of occupancy holding—Objection based on (21) AIR 1921 All 118 (119) : 43 All 547 (FB). (35) AIR 1935 All 588 (589).
 (35) AIR 1935 All 678 (682) : 58 All 98.
 (35) AIR 1935 All 1016 (1017) : 58 All 360.
 2. (27) AIR 1927 All 574 (575).
 (35) AIR 1935 All 1016 (1017) : 58 All 360.
 (35) AIR 1935 All 588 (589).
 (21) AIR 1921 All 118 (119) : 43 All 547 (FB). (Sale of occupancy holding—Objection based on Section 20, Agra Tenancy Act.)
 (18) AIR 1918 All 278 (279). (Bx-proprietary rights.)
 (88) 1888 All W N 155 (155). (Not saleable under Section 245 of the old Code.)
 (86) 8 All 146 (147, 148) (FB). (Not saleable under Section 9 of the U. P. Rent Act.)
 (84) 6 All 448 (449). (Do.)
 (84) 6 All 393 (395). (Do.)
 (85) 7 All 641 (643).
 (31) AIR 1931 Bom 446 (447). (Not saleable under Section 60, C. P. Code.)
 (95) 19 Bom 328 (331). (Service vatan.)
 (91) 1891 Bom F J 207. (Not saleable under Section 266 of the old Code.)
 (17) AIR 1917 Cal 672 (672). (Sale of occupancy holding.)
 (11) 10 Ind Cas 417 (420) (Cal). (Do.)
 (10) 7 Ind Cas 48 (48) (Cal).
 (09) 4 Ind Cas 121 (122) (Cal).

within the Section²² and a separate *suit* in respect thereof will be barred. But such an objection preferred by a *third party* does not come within this Section²² and a separate *suit* by him in respect thereof will not be barred.³ A person against whom a suit has been dismissed is a party to the suit within the meaning of this Section and hence, an objection by such person will be covered by this Section.^{3a} An objection raised by a judgment-debtor not in his private capacity but in a representative capacity as shewait of an idol on the ground of the property belonging to the idol, will be one by a stranger and not by a party to the suit and as such will not be covered by this Section.⁴ As to whether an order on such objection by a party, and therefore coming under the Section, is *appealable* as a decree, see Note 84 *infra*.

Where a puisne mortgagee who is impleaded as a party to a suit on a prior mortgage objects to the sale of the mortgaged property on the ground that it belongs to him, his objection being one which attacks the decree itself, does not relate to the execution, discharge or satisfaction of the decree and hence is not covered by this Section.⁵ But an objection by him that the sale should not be unconditional so as to conclude his rights can be entertained by the executing Court under this Section.⁶

See also Notes 1 and 24 to O. 21 R. 58 *infra*.

46. Question, if property attached belongs to judgment-debtor. — Where,

in execution of a *money decree*, properties in the hands of the legal representative of the debtor are attached, and the representative objects to the attachment on the

- (105) 9 Cal W N 972 (972). (Judgment-debtor having no saleable interest in the property.)
 (1900) 27 Cal 416 (416) (F.B.). (Sale of occupancy holding.)
 (1900) 27 Cal 187 (189). (Do.)
 (99) 26 Cal 727 (731). (Do. 8 All 146 Followed.)
 (89) 16 Cal 608 (606).
 (99) AIR 1989 Lab 113 (114, 115, 116) : 1 L R (1989) Lab 108.
 (81) AIR 1981 Lab 141 (142). (Order refusing to sell, agricultural land but ordering temporary alienation.)
 (30) AIR 1980 Lab 628 (628). (Debtor an agriculturist.)
 (16) AIR 1916 Mad 727 (727).
 (93) 16 Mad 447 (449). (If the proceeding sought to be set aside relates to the execution and the consent is between the parties to the suit the specific ground on which the proceeding is impeached is not material within the meaning of S. 244 (now S. 47).)
 (98) AIR 1938 Nag 558 (559).
 (35) AIR 1935 Nag 80 (31, 32) : 31 Nag L R 217.
 (31) AIR 1931 Oudh 45 (49) : 6 Luck 452. (Property claimed as waft.)
 (30) AIR 1930 Oudh 256 (258). (Want of sanction under S. 20 of the Oudh Laws Act.)
 (25) AIR 1925 Oudh 618 (619) : 28 Oudh Cas 175. (Judgment-debtor having no saleable interest in the property. 8 All 146, Followed.)
 2a. (97) AIR 1937 Pat 562 (563). (Purchaser of non-transferable holding disposed of in execution of rent decree against transferor can apply under S. 47.)
 (29) AIR 1929 Pat 472 (472). (A defendant against whom a suit is dismissed is nevertheless party to the suit.)

- (29) AIR 1929 Pat 141 (142) : 8 Pat 717.
 (36) AIR 1936 Pat 256 (257).
 (26) AIR 1926 Oudh 64 (64).
 (29) AIR 1929 Pat 472 (472).
 (29) AIR 1929 Pat 141 (142) : 8 Pat 717.
 (36) AIR 1936 Pat 256 (257).
 (See also) (36) AIR 1936 Mad 733 (744, 745). (Party impleaded in suit in one capacity and objecting in execution proceedings in another capacity—Objection is not one within this Section.)
 [But see (39) AIR 1939 Sind 22 (23). (Judgment-debtor contending that properties held by him are waft properties—S. 47 applies.)]
 5. (36) AIR 1936 Pat 552 (553).
 6. (36) AIR 1936 Pat 552 (553).

ground that the property is *his own* and not that of the debtor,¹ or that he has a charge or lien thereon,² the question is one in execution of the decree between a party and a representative of the opposite party and is within the Section. Similarly, where a person is sued as the legal representative of a deceased person, an objection raised by such legal representative on the ground that the property attached belongs to him and not to the deceased, will come within this Section as raising a question between the parties to the suit.³ But, where he objects, not on his own behalf, but as representing third parties, or as trustee,⁴ the objection is really one by such third parties and falls under O. 21 R. 58 and not under this Section.

Note 46

1. (29) AIR 1929 All 602 (603) : 51 All 878.

(34) AIR 1934 Mad 621 (622).

(37) AIR 1937 All 97 (98).

(35) AIR 1935 All 183 (184).

(28) AIR 1928 All 704 (705).

(23) AIR 1923 All 115 (116).

(17) AIR 1917 All 460 (461) : 39 All 47. (17 Cal 711, Followed.)

(09) 3 Ind Cas 495 (496) (All).

(06) 28 All 51 (53, 54).

(99) 21 All 328 (328).

(99) 1899 All W N 24 (24).

(90) 12 All 318 (321, 324, 327) (FB).

(90) 12 All 73 (78).

(87) 9 All 605 (608).

(85) 7 All 733 (734).

(85) 7 All 547 (549, 550).

(04) 6 Bom L R 697 (699).

(96) 1896 Bom F R 847 (847).

(85) 9 Bom 458 (460).

(85) AIR 1935 Cal 14 (14).

(84) AIR 1934 Cal 258 (259).

(28) 115 Ind Cas 353 (353) (Cal).

(21) AIR 1921 Cal 242 (244).

(16) AIR 1916 Cal 814 (814).

(15) AIR 1915 Cal 275 (276) (Do).

(12) 16 Ind Cas 385 (386) (Cal) (Do).

(12) 16 Ind Cas 255 (255) (Cal). (Decree against the L. R.)

(1900) 27 Cal 84 (86).

(90) 17 Cal 711 (714, 718, 721) (F B).

(89) 16 Cal 1 (7, 8).

(73) 20 South W R 162 (162).

(71) 15 South W R 163 (164).

(30) AIR 1930 Lah 1068 (1070). (Decree against mortgagor's legal representative claiming independent interest and objecting to sale of that interest — To be decided in execution.)

(27) AIR 1927 Lah 895 (896).

(21) AIR 1921 Lah 173 (175).

(87) 1887 Pun Re No. 47.

(37) AIR 1937 Mad 108 (108).

(03) 26 Mad 501 (502).

(94) 17 Mad 399 (400). (Objection to sale.)

(83) 7 Mad 255 (257, 258).

(82) 5 Mad 391 (393, 394).

(06) 3 All L Jour 370 (371).

(85) 7 All 36 (37). (Objection as a writ.)

(39) AIR 1939 Nag 147 (149) : ILR (1939) Nag 165.

(31) AIR 1931 Nag 27 (28). (Objection to sale.)

(26) AIR 1926 Nag 476 (480).

(93) 6 C P L R 4 (5).

(33) AIR 1933 Oudh 473 (474). (If legal representative proves his possession the onus is on the decree-holder to prove that the property belongs to debtor.)

(29) AIR 1929 Oudh 21 (21).

(26) AIR 1926 Oudh 64 (64).

(05) 8 Oudh Cas 405 (408).

(98) Oudh Cas Sup Vol 60 (65). (S. 244 (now S. 47 C. P. C.) makes no distinction between representatives brought on record before and representatives brought on record after the decree.)

(84) AIR 1934 Pat 188 (190).

(22) AIR 1922 Pat 572 (573).

(87) AIR 1937 Pesh 82 (83). (Objection in such a case can be raised even after sale.)

(34) AIR 1934 Rang 127 (128).

(28) AIR 1928 Rang 29 (30) : 5 Rang 659.

(27) AIR 1927 Rang 273 (274) : 5 Rang 398.

(24) AIR 1924 Rang 323 (325, 326) : 2 Rang 168.

(31) AIR 1931 Sind 84 (87) : 25 Sind L R 374.

(85) 47 and 53 can be extended even to property which comes into legal representative's hand by partition before judgment-debtor's death.)

(See also (86) 1886 Bom F R 250 (251).

(19) AIR 1919 Cal 623 (624). (A separate suit by L. R. to set aside sale does not lie — Objection ought to have been taken under Section 47. Objection that the property belonged to L. R. and not to the deceased judgment-debtor hence not liable to be sold.)

[But see (39) AIR 1939 Pat 354 (355, 356).

(25) AIR 1925 Sind 156 (158).]

2. (29) AIR 1929 Lah 762 (763). (Sec. 47 is not restricted to money decrees but covers all decrees.)

(09) 2 Ind Cas 432 (432) (Mad).

(03) 1903 Pun L R No. 20. (Lien.)

2a. (39) AIR 1939 Lah 256 (257).

(38) AIR 1938 Mad 731 (733) : ILR (1938) Mad 1080.

(34) AIR 1934 Mad 621 (622).

(34) AIR 1934 Rang 127 (128).

3. (16) AIR 1916 Mad 789 (789).

(88) 15 Cal 437 (445).

(28) AIR 1928 All 392 (393) : 50 All 801.

(24) AIR 1924 All 183 (184). (As mutawalli of wakf.)

(06) 28 All 644 (646).

(06) 1906 All W N 157 (157, 158).

(06) 3 All L Jour 370 (371).

(85) 7 All 36 (37). (Objection as a writ.)

Where, in execution of a mortgage decree, the mortgaged properties are brought to sale, and the legal representative of the judgment-debtor objects on the ground that the property is not that of the judgment-debtor or that it could not have been validly mortgaged by him, the objection is really one which attacks the decree itself which directs the sale of the properties. Such an objection, therefore, cannot be gone into by the executing Court, but should be raised in a separate suit.⁴ But, where in execution of a mortgage decree, properties *not mortgaged* are brought to sale as part of the mortgaged properties, the objection of the legal representative that such properties are his own properties will fall under this Section.⁵

47. Question, if debts were contracted without legal necessity or tainted with immorality or that the attached property is self-acquired or ancestral.—The question of the liability of a Hindu son for a debt contracted by the father and its binding nature upon him, the liability of the property of the father in the hands of the son,¹ and the question as to whether the debt was contracted without legal necessity,² are questions relating to the execution of the decree and must be determined under this Section. Similarly, the objection to the execution of the decree that the debts are tainted with immorality or illegality can be gone into in execution proceedings under this Section.³ The question whether the property is ancestral or self-acquired in the hands of the sons to satisfy their father's debts is again one

- (80) 2 All 752 (753).
(98) 23 Bom 287 (242, 243).
(15) AIR 1915 Cal 327 (331) : 42 Cal 440. (As a shewait of an idol.)
(18) 20 Ind Cas 790 (791, 792) (Cal), (Do.)
(11) 12 Ind Cas 163 (164) : 39 Cal 298.
(08) 12 Cal W N 808 (809).
(07) 11 Cal W N 145 (147).
(02) 6 Cal W N 663 (667). (A separate suit by a shewait to set aside the sale of debutter property was held maintainable.)
(02) 6 Cal W N 68 (64, 65).
(90) 17 Cal 57 (65). (As a shewait of an idol.)
(87) 1887 Pun Re No. 12.
(18) AIR 1918 Mad 1140 (1140).
(08) 31 Mad 125 (126). (Objection as a trustee.)
(1900) 28 Mad 195 (202) (F B), (Do.)
(39) AIR 1939 Nag 183 (185).
(80) AIR 1930 Nag 298 (294) : 27 Nag L R 10.
(11) 12 Ind Cas 411 (411) (Oudh). (Objection as a trustee of the property for religious purposes.)
(22) AIR 1922 Pat 196 (196) : 1 Pat 687.
[But see (39) 1889 Pun Re No. 9. (The question whether the attached property is of the judgment-debtor is one relating to execution.)
(27) AIR 1927 Oudh 120 (120, 122) : 2 Luck 145.]
4. (99) 12 C P L R 73 (77).
(32) 55 Cal L Jour 114 (119). (Sons of mortgagor also implicated in suit—Decree—Saleability of property in decree cannot be questioned in execution.)
(32) AIR 1932 All 49 (50). (Mortgagor's L. R. pleading rights under a paramount title acquired before final decree but not provided for therein cannot be raised in execution.)
(12) 14 Ind Cas 7 (8) (Cal).

- (99) AIR 1939 Lab 178 (179, 180). (Reversing AIR 1939 Lab 51.)
(35) AIR 1935 Lab 549 (550).
(09) 2 Ind Cas 18 (23) : 32 Mad 429. (Dissenting from 7 Mad 255 which was however approved by the Privy Council on another point.)
[See also (29) AIR 1929 All 291 (293) : 51 All 752. (Order imposing conditions on the order of sale of properties fixed by decree.)
(35) AIR 1935 Bom 95 (96). (Mortgage decree on null and void—Objection taken in execution that it is not saleable, and not taken at the trial of suit—Objection cannot be allowed in execution.)
(29) AIR 1929 Rang 275 (275).]
[But see (36) AIR 1936 Mad 675 (677). (Question of paramount title can be raised under S. 47.)]
5. (39) AIR 1939 All 368 (369) : 1 L R (1939) All 385.
Note 47

1. (18) AIR 1918 All 397 (398).
(09) 1 Ind Cas 459 (459) : 33 Bom 39. (Son object-ing the execution on the ground of immorality of debts.)
(30) 127 Ind Cas 507 (509) (Bom). (33 Bom 39; AIR 1918 Bom 13, Foll.)
(09) 1 Ind Cas 442 (444) (Cal).
(07) 34 Cal 642 (648, 651, 657) (F B).
(87) 1887 Pun Re No. 87.
2. (12) 13 Ind Cas 670 (671) (Lab).
3. (08) 10 Bom L R 939 (942, 943) : 33 Bom 39.
(96) 20 Bom 385 (389).
(10) 6 Ind Cas 582 (583) (Cal).
(06) 33 Cal 676 (678).
(23) AIR 1923 Pat 143 (148) : 6 Pat L Jour 45E.
[See also (34) AIR 1934 Cal 118 (119).]

51. Setting aside sales in execution.—As between the judgment-debtor and a decree-holder an objection to the sale in execution of the decree or an application to set it aside is one in execution and must be determined in execution and not by a separate suit.¹ But the power to set aside the sale, in cases where the grounds for so setting it aside fall within O. 21 Rr. 89, 90 or 91, is circumscribed by those provisions. To hold otherwise would be to render those provisions superfluous so far as parties to the suit or their representatives are concerned. An application to set aside a sale on grounds *not within the purview of those provisions* must be dealt with under this Section independently of those provisions.²

52. Decree obtained by fraud.—A question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree but one which affects its very subsistence and *validity* and such a question can only be raised by a separate suit.¹ See also Note 29 *supra* and Section 38 Note 8. Therefore, where not only the sale is impugned as being fraudulent, but the very decree in execution of which the sale took place is impeached as having been obtained by fraud, the Section is not a bar to a suit to set aside the sale thereunder.²

53. Fraud in execution proceedings.—Where a judgment-debtor impeaches the validity of an execution sale, not on the ground of fraud in the *publishing* and *conducting* of the sale, but on the ground of fraud in execution proceedings which *preceded and led up to* the sale, the question, as between the parties, is one falling within this Section and not under O. 21 R. 90.¹

Note 51

1. ('11) 34 Mad 417 (418).
(10) 7 Ind Cas 457 (458, 459) : 34 Bom 546.

(95) 1905 All W N 55 (56).
(98) 20 All 254 (256, 258).
(34) AIR 1934 Nag 21 (27) : 31 Nag L R 67.

(Application by judgment-debtor to set aside sale—Application made against decree-holder and auction-purchaser not made party—Application is one under this Section.)

(13) 21 Ind Cas 570 (571) : 16 Oudh Cas 255.

(95) 8 Oudh Cas 254 (256).
(31) AIR 1931 Pat 97 (98).
2. See ('37) AIR 1937 All 407 (409, 410).

Note 52

1. ('10) 7 Ind Cas 11 (14) (All).

(96) 23 Cal 639 (641).
(20) AIR 1920 Lah 164 (164).
(16) AIR 1916 Mad 792 (793) : 38 Mad 221.

(86) 9 Mad 80 (83).
(99) 12 C P L R 82 (83, 84, 85).
2. ('14) AIR 1914 P C 72 (73) : 42 Cal 244 : 41 Ind App 267 (P C).

(92) 6 Cal W N 478 (477) : 29 Cal 395 : 29 Ind App 99 (P C).
(01) 28 Cal 475 (478, 479) (P C).

Note 53

1. ('11) 10 Ind Cas 625 (625) (Cal).
(17) AIR 1917 Low Bur 80 (81).

(06) 28 All 681 (682, 683).
(05) 27 All 702 (703).

(02) 24 All 239 (241).

(01) 23 All 478 (480).

(09) 4 Ind Cas 253 (254) : 33 Bom 698.

(85) 9 Bom 468 (471).

(82) 6 Bom 148 (150).

(16) AIR 1916 Cal 109 (110).

(09) 3 Ind Cas 116 (117) (Cal).

(06) 10 Cal W N 180 (183) : 33 Cal 84.

(02) 6 Cal W N 288 (285).

(02) 6 Cal W N 279 (281). (Fraud alleged to be on the part of the auction-purchaser.)

(01) 28 Cal 116 (118).

(1900) 4 Cal W N 538 (540).

(99) 26 Cal 589 (542).

(99) 3 Cal W N 399 (400) : 26 Cal 324.

(99) 3 Cal W N cclxxxiii. (Notes of Cases.)

(98) 2 Cal W N 691 (693).

(92) 19 Cal 683 (689) : 19 Ind App 166 (P C).

(90) 17 Cal 769 (772, 777) (P B).

(84) 10 Cal 410 (412).

(30) AIR 1930 Mad 489 (489). (Omission to serve notice of sale proclamation.)

(80) 2 Mad 264 (270).

(18) AIR 1918 Oudh 379 (385).

(21) AIR 1921 Pat 54 (57).

(19) AIR 1919 Pat 396 (398).

[See also ('36) 40 Cal W N 428. (Mortgage decree—Execution sale—Suit for declaration of invalidity on ground of wrongful and fraudulent inclusion of properties not comprised in the mortgage—Suit not maintainable.)
(05) 1 Cal L Jour 476 (480, 481) : 32 Cal 1957 (FB).

54. Fraud anterior to sale.— See Note 53 above.

55. Fraud in publishing and conducting the sale.— As has been seen in Note 51 *ante*, the question of setting aside an execution sale on any ground is, as between the parties, one falling under this Section. This would therefore include an application to set aside a sale for fraud in publishing and conducting the sale.¹ The question, however, whether such an application falls within the terms of O. 21 R. 90 is important because, if it does, the Court cannot, except under the conditions specified in that Rule, set aside the sale. (See Note 51.) It is also important for the purpose of determining whether it is a *decree* or only an *appealable order*. For, if it is one covered by O. 21 R. 90, it is only an appealable order though it may fall under Section 47 also, inasmuch as Section 2 clause (2) enacts that the word "decree" includes the determination of any question within Section 47 but does not include any adjudication *from which appeal* lies as an appeal from an order. The word "fraud" was absent in Section 311 of the old Code corresponding to O. 21 R. 90 of the present Code, and, in the absence thereof, it was held that an application to set aside a sale on the ground of fraud could only come under Section 244 (now Section 47) and not under Section 311.² Under the present Code, however, O. 21 R. 90 covers such cases³ though the provisions of the new Code cannot retrospectively affect the character of an order passed under the old Code and take it out of the Section.⁴

An application to set aside a sale on grounds not within O. 21 R. 90 and 91 falls, as has been seen in Note 51 *ante*, under Section 47 only and the order on such application is appealable as a decree.⁵ See Notes under O. 21 R. 90, Note 10.

56. Other grounds for setting aside sale.— See Notes 57 to 71, *infra*.

57. Property not saleable.— See Note 45 above.

58. Reversal of decree.— As has been seen in Note 51 *ante*, the question between the parties of *setting aside the sale* on any ground (including the ground of reversal or variation of the decree) is one in execution falling within this Section. As to whether a claim for restitution of properties taken in execution of such a decree is one in execution of the decree or not, see Notes 30 and 33 of Section 144 *infra*.

59. Amendment of decree after sale.— See Notes 39 and 58 above and Notes 4, 13, 30 and 33 to Section 144 *infra*.

60. Ex parte decree set aside after sale.— Where a property is sold in execution of an *ex parte* decree and purchased by the decree-holder and the decree is subsequently set aside under O. 9 R. 13, an application under this Section and not a suit is the remedy to set aside the sale.¹ See Note 51 *ante*.

(138) AIR 1938 Lah 690 (691). (Application under O. 21 R. 89 fraudulently removed and Court not passing orders thereon — Question of fraud cannot be agitated in a separate suit.)

Note 55

1. (31) AIR 1931 Pat 97 (98).
1a. (05) 2 All J Four 469 (470) : 27 All 702.

(04) 31 Cal 385 (390).
(99) 26 Cal 539 (540, 544, 545).

(89) 26 Cal 324 (326, 331).
(92) 19 Cal 341 (344, 345).

(91) 18 Cal 139 (143).
(82) 5 Mad 217 (219).

2. (11) 9 Ind Cas 135 (135, 136) (Cal).

(29) AIR 1929 Nag 130 (131) : 25 Nag L.R. 58.
(28) AIR 1928 All 354 (354).

(09) 1 Ind Cas 744 (744) : 31 All 364.

1. (1900) 27 Cal 810 (813, 814).

Note 60

[See also (24) AIR 1924 Mad 778 (779).]

without attachment—Second appeal lies.]

sale for want of jurisdiction to sell property

(36) AIR 1936 Lah 573 (574). (Order setting aside

aside sale on the ground of its being null and void.)

(37) AIR 1937 All 407 (410). (Application to set

(19) AIR 1919 Pat 396 (398).

attachment and sale.)

4. (94) 7 C P L R 14 (15). (Irregularity in

3. (12) 16 Ind Cas 690 (691) (Cal).

[See (28) AIR 1928 Lah 444 (444).]

(31) AIR 1931 Rang 179 (180).

61. Want of notice under O. 21 Rr. 16, 22 and 66.—An objection against a sale in execution of a decree on the ground that no notice was served on the judgment-debtor under O. 21 R. 22,¹ or under Rule 66,² and an application to set it aside on that ground is one falling under the Section. Where, however, such notice is not necessary the question cannot be considered to be one under the Section.³ The question of the irregularity or illegality of a notice under O. 21 R. 16, and its effect upon execution proceedings and sale is, as between the parties, one that must be determined under this Section.⁴

62. Purchase by decree-holder without permission.—A judgment-debtor seeking to set aside a sale of his land on the ground that the decree-holder has purchased it without permission to bid, must proceed only under this Section and not by a suit.¹

63. Setting aside sale on deposit.—Under the old Code, an order under Section 310 A (O. 21 R. 89) was not appealable as an order and it was held that a question of setting aside a sale on deposit of the decree amount was, as between the parties, one under Section 244 (now Section 47) of the Code, and open to second appeal.¹ Under the present Code, however, such an order is only an *appealable order* and, though it may be one under Section 47 also, is not a decree open to second appeal.² See Note 55 above.

64. Judgment-debtor having no saleable interest.—Order 21 R. 91 enacts that a *purchaser* at the execution sale can apply to have the sale set aside on the ground that the judgment-debtor had no saleable interest in the property sold. Obviously, such an application is not one between parties to the suit and does not lie under Section 47.¹ A *judgment-debtor* seeking to set aside the sale on the ground that

- (90) AIR 1920 Bom 12 (12) : 44 Bom 702.
(19) AIR 1919 Bom 175 (176) : 43 Bom 285.
(107) 6 Cal L Jour 102 (104).
(99) 3 Cal W N 6 (7).
(98) 25 Cal 175 (177, 178).
Note 61
1. (26) AIR 1926 Cal 539 (540).
(18) AIR 1918 Cal 171 (172).
(81) AIR 1981 All 145 (146).
(81) 3 All 424 (426).
(81) AIR 1981 Cal 555 (556) : 58 Cal 825.
(12) 15 Ind Cas 506 (507) : 40 Cal 45.
(11) 9 Ind Cas 584 (585) (Cal).
(10) 5 Ind Cas 390 (393, 394) (Cal).
(98) 21 Cal 19 (22, 23).
(30) AIR 1930 Mad 12 (15).
(24) AIR 1924 Mad 481 (436, 437) : 47 Mad 288 (FB).
(26) AIR 1926 Pat 397 (397).
(24) AIR 1924 Pat 67 (68).
2. (08) 32 Bom 572 (574).
(35) AIR 1935 Mad 438 (439).
(30) AIR 1930 Mad 489 (489).
(25) AIR 1925 Mad 1142 (1142).
(20) AIR 1920 Mad 481 (484).
(19) AIR 1919 Pat 396 (398).
(24) AIR 1924 Rang 124 (124) : 1 Rang 533.
3. (24) AIR 1924 Pat 111 (112) : 2 Pat 916.
4. (20) AIR 1920 Lab 251 (253).
Note 62
1. (22) AIR 1922 P C 336 (338) : 49 Ind App 312 : 1 Pat 733 (P C).
(01) 23 All 478 (480).

- (1900) 22 All 108 (110).
(98) 22 Bom 271 (277).
(87) 11 Bom 588 (590).
(32) AIR 1932 Cal 672 (674) : 36 Cal W N 125 (126, 127) : 59 Cal 956. (Receiver having no special leave to bid.)
(28) A I R 1928 Lab 666 (667).
(12) 17 Ind Cas 126 (126) (Mad).
(98) 16 Mad 287 (289).
(82) 5 Mad 217 (219).
Note 63
1. (07) 29 All 275 (276).
(07) 31 Bom 207 (214).
(01) 25 Bom 418 (422).
(11) 10 Ind Cas 51 (53) (Cal).
(08) 7 Cal L Jour 282 (284).
(01) 28 Cal 73 (76).
(1900) 6 Cal W N 57 (60).
(97) 1 Cal W N 703 (705).
(10) 8 Ind Cas 855 (856) (Mad).
(07) 30 Mad 507 (508).
(98) 21 Mad 416 (417).
(02) 5 Oudh Cas 377 (378).
2. (20) AIR 1920 Bom 60 (60) : 44 Bom 472 (473, 474).
(11) 10 Ind Cas 345 (345) : 38 Cal 339.
(10) 6 Ind Cas 573 (573) (Cal).
(26) AIR 1926 Mad 620 (621). (Doubtful if a second appeal lies from an order under O. 21 R. 89 even if auction-purchaser is the decree-holder.)
Note 64
1. (09) 3 Ind Cas 438 (439) (Cal).

he had no saleable interest cannot do so under O. 21 R. 91. Nor can he, as against the *action-purchaser*, do so under Section 47, as the question is not one between parties to the suit.² As against the decree-holder, however, such an application will clearly fall under Section 47 and a fresh suit will be barred in respect of such relief.³ But where the sale is in execution of a *mortgage decree*, an objection that the judgment-debtor had no saleable interest in the property is really an attack on the decree itself and cannot be gone into by the executing Court.⁴

65. Sale in contravention of the Transfer of Property Act.—A sale of property in contravention of the provisions of Order 34 of this Code can be set aside, as between the parties to the suit, only by an application under this Section and not by a suit.¹

66. Sale in contravention of stay order.—An application to set aside a sale held in contravention of a stay order is as between the parties to the suit one under this Section.¹ But where the original application for stay as well as the order for stay is without jurisdiction, as where an application was made to the original Court after the transfer of the decree to the Collector for execution under Section 68 of the Code, an application to set aside the sale on the ground of its being one in contravention of the stay order is not one under Section 47.²

67. Sale in contravention of injunction order.—Where a judgment-debtor seeks to set aside the sale on the ground that it was held during the pendency of a temporary injunction, his remedy, if any, is by an application under this Section and not by a separate suit.¹ It has been held that where a sale takes place in contravention of an express direction of the Court, the latter has an *inherent* power to set it aside *suo motu*.²

68. Sale not warranted by decree.—The proper procedure to set aside a sale on the ground that it is not warranted by the terms of the decree or that it was held in contravention of the directions contained therein is, as between the parties to the suit, by an application under this Section and not by a suit.¹

69. Sale under time-barred decree.—A separate suit does not lie to set aside a sale in execution of a decree on the ground that at the time of execution it was barred by time; the remedy as between the parties to the suit is by an application under this Section.¹ See also Order 21 Rule 94.

(93) AIR 1933 Lah 570 (573). (To set aside sale on the ground that non-mortgaged properties have been sold before sale of mortgaged properties.)

(83) 1883 All W N 218 (218).

(24) AIR 1924 All 273 (274).

[See also (85) 7 All 641 (644).]

(3) (83) 1883 All W N 218 (218).

(26) AIR 1926 Pat 202 (204): 4 Pat 696.

(29) AIR 1929 Rang 275 (275).

(17) AIR 1917 P C 121 (123): 45 Ind App 54:

41 Mad 403 (PC).

(21) AIR 1921 Bom 285 (287, 288): 45 Bom 174.

(07) 9 Bom L R 462 (466).

(08) 35 Cal 61 (66, 80) (FB).

(06) 33 Cal 283 (286).

(03) 30 Cal 142 (153).

(07) 30 Mad 818 (815).

(1900) 23 Mad 377 (382).

1. (13) 21 Ind Cas 938 (940) (Cal).

Note 69

(28) AIR 1928 Rang 215 (217).

(12) 13 Ind Cas 133 (134) (Mad).

(17) AIR 1917 Mad 877 (879).

(28) AIR 1928 Mad 140 (141).

(75) 24 Subh W R 452 (452).

1. (25) AIR 1925 All 551 (552).

Note 68

(33) AIR 1933 Mad 399 (400, 401).

2. (31) AIR 1931 Lah 344 (344): 12 Lah 602.

Note 67

2. (28) AIR 1928 Bom 189 (190): 52 Bom 290.

(24) AIR 1924 All 698 (699).

1. (26) AIR 1926 All 457 (459).

Note 66

(05) 8 Oudh Cas 327 (337).

(99) 22 Mad 347 (349).

70. Sale without jurisdiction.—Even where the sale is held without jurisdiction, as where, at the time of the sale the judgment-debtor is dead,¹ or the property is outside the territorial jurisdiction of the Court,² a party seeking to set aside the sale on that ground must do so under this Section.

71. Other grounds for setting aside sale.—A judgment-debtor may seek to set aside an execution sale on grounds other than the ones set out above in Notes 54 to 70. The following are some of the cases in which only an *application* under this Section lies and not a separate suit—

- (a) Where the receiver of an insolvent's estate seeks to set aside an execution sale on the ground of a prior adjudication of the debtor.¹
- (b) An objection by the judgment-debtor to the sale founded on a misdescription of the terms of the decree in the execution application.²
- (c) An objection by the judgment-debtor that the execution sale was void on the ground that the auction-purchaser, the liquidator of the decree-holder company, was not competent to bid for, and purchase, any property as liquidator under law.³
- (d) Where the decree-holder seeks to set aside a sale on the ground of material irregularity in that the permission granted to him to bid has been modified behind his back.⁴
- (e) Where the sale is sought to be set aside on the ground of failure of the purchaser to make the deposit of 25 per cent. required under O. 21 R. 84.⁵
- (f) Where it is sought to be set aside on the ground that the decree has been satisfied before the sale.⁶
- (g) Where the decree-holder seeks to set aside the sale on the ground that the decree-holder's own property was sold by mistake instead of that of the judgment-debtor.⁷⁻⁹ See also Note 6 to O. 21 R. 64.
- (h) Where the sale is sought to be set aside on the ground that the petition to set aside the sale was compromised behind the applicant's back and in fraud of his rights,⁹ or by the judgment-debtor's son without authority.¹⁰
- (i) Where a receiver appointed under O. 40 R. 1 purchases the property in court-sale in the capacity of decree-holder without obtaining *special* leave for that purpose, even though he has obtained leave under O. 21 R. 72.¹¹

71a. Miscellaneous.—Apart from the particular classes of questions relating to the execution, discharge or satisfaction of the decree, discussed in Notes 29 to 71

- (711) 9 Ind Cas 66 (67) (Cal). (Failure to pay the amount makes the sale void.)
6. (1900) 22 All 86 (88). (Suit by decree-holder and judgment-debtor against auction-purchaser.)
- (94) 16 All 5 (8).
- (711) 12 Ind Cas 911 (912); 36 Bom 156.
- (718) 21 Ind Cas 988 (942) (Cal).
- (711) 9 Ind Cas 452 (452) (Low Bur).
- [See also (97) 21 Bom 468 (464). Bona fide purchaser—Sale cannot be set aside.]
- (710) 87 Cal 107 (116). (Bona fide purchaser—Sale cannot be set aside on ground of irregularity of decree if the same is not certified to Court.)
- 7-8. (728) AIR 1928 Cal 866 (867).
9. (709) 3 Ind Cas 116 (117) (Cal).
10. (702) 24 All 209 (210, 211).
11. (732) AIR 1932 Cal 672 (674); 69 Cal 355.
1. (717) AIR 1917 Mad 924 (925).
- (735) AIR 1935 Cal 508 (504) : 62 Cal 457. (The receiver is the representative of both the insolvent and his creditor.)
2. (798) 8 Mad L Jour 115 (116).
3. (728) AIR 1928 Lah 666 (667).
4. (725) AIR 1925 Oudh 381 (382).
5. (789) 16 Cal 33 (36, 39).

Note 71

- (790) 17 Cal 699 (704) (FB).
2. (724) AIR 1924 All 261 (262, 263) : 46 All 153.
- (790) 12 All 440 (446) (FB).
1. (715) AIR 1915 Cal 268 (271).

Note 70

- (773) 20 Suth W R 5 (6).
- (770) 13 Suth W R 273 (274, 275).

- supra*, the following have also been held to be questions coming within the Section—
1. A question as to the legality of the procedure or the jurisdiction of the executing Court to order a sale.¹
 2. An order deciding whether a decree is time-barred or not.²
 3. An order directing execution to issue or refusing to execute a decree.³
 4. An order recognising, or refusing to recognise, an assignment of a decree.⁴
 5. The determination of a question in execution as to who is the legal representative of a party to the suit.⁵ (See also Note 27.)
 6. An order on an application for transfer of a decree.⁶
 7. An order directing mortgaged properties to be sold in a particular order.⁷
 8. All questions regarding liability to attachment and sale.⁸

Note 71a

1. (29) AIR 1929 Lah 449 (452). (Objection regard-
(80) AIR 1930 Mad 414 (415). (Objection regard-
(20) AIR 1920 Lah 448 (444).
(20) AIR 1920 Oudh 21 (22).
(28) AIR 1928 Rang 40 (41); 5 Rang 775. (Refu-
sal of the transmitting Court to decide executi-
bility of decree and leaving it to the executing
Court.)
2. (24) AIR 1924 Pat 683 (685, 686).
(29) AIR 1929 All 287 (287); 51 All 640.
(13) 21 Ind Cas 938 (940) (Cal).
(14) AIR 1914 Lah 415 (416); 1918 Pun Re No.
110.
(36) AIR 1936 Mad 801 (801).
(27) AIR 1927 Mad 842 (843).
3. (15) AIR 1915 Cal 238 (239).
(15) AIR 1915 Mad 197 (198); 12 Ind Cas 664
(666); 37 Mad 29.
(15) AIR 1915, P C 88 (89) (PC). (Disallowing
judgment-debtors' objections to execution.)
(14) AIR 1914 All 288 (289). (Do.)
(88) 1888 All W N 245 (246). (Do.)
(01) 28 Cal 81 (83) (Do.)
(83) 9 Cal 872 (874). (Do.)
(18) 19 Ind Cas 921 (922) (Lah). (Do.)
(16) AIR 1916 Upp Bur 1 (2); 2 Upp Bur Rul
119. (Order refusing to execute.)
(27) AIR 1927 All 574 (575). (Do.)
(08) 25 All 443 (445).
(87) 1887 All W N 19 (20); 9 All 229. (Refusal to
execute for the amount claimed.)
(83) 5 All 212 (213, 214). (Order requiring succe-
sion certificate before execution.)
(83) 7 Bom 301 (302). (Refusal of an order under
O. 21 R. 21.)
(37) AIR 1937 Cal 425 (426). (Order directing
execution to proceed.)
(09) 1 Ind Cas 284 (284, 285) (Cal).
(29) AIR 1929 Lah 390 (390). (Order holding that
amount due under an installment decree did not
fall due under a default clause.)
(24) AIR 1924 Lah 604 (604, 605). (Refusal to
execute against the person of the judgment-
debtor.)
(20) AIR 1920 Lah 117 (118).
(35) AIR 1935 Mad 647 (648).
(08) 31 Mad 406 (408).
(94) 17 Mad 394 (395). (An order under O. 21 R. 15
- allowing one of several decree-holders to apply
for execution.)
(26) AIR 1926 Pat 202 (203); 4 Pat 696. (On the
ground that property comprised in the decree
not saleable.)
(22) AIR 1922 Pat 59 (60).
(36) AIR 1936 Pesh 46 (47). (Order refusing exe-
cution and directing the filing of a fresh appli-
cation.)
(17) AIR 1917 Low Bur 179 (179); 8 Low Bur
Rul 300. (Refusal to execute a decree against a
partner obtained against a firm.)
4. (02) 25 Mad 545 (545).
(16) AIR 1916 Cal 471 (472).
(1900) 27 Cal 670 (672).
(22) AIR 1922 Lah 396 (397).
(38) AIR 1938 Mad 78 (79).
(17) AIR 1917 Mad 605 (606, 607).
(17) AIR 1917 Mad 298 (294); 40 Mad 299. (Order
recognizing assignment and allowing execution
is a decree.)
(15) AIR 1915 Mad 1138 (1140).
(10) 6 Ind Cas 199 (199) (Mad).
(02) 25 Mad 383 (385).
(25) AIR 1925 Pat 449 (450); 4 Pat 120.
[See (68) 10 South W R 144 (145).]
[But see (35) AIR 1935 Lah 609 (610). (Rever-
sing AIR 1934 Lah 328).]
(29) AIR 1929 Lah 51 (52).]
5. (25) AIR 1925 All 578 (579); 47 All 365.
(26) 98 Ind Cas 783 (783) (Mad).
6. (04) 8 Cal W N 575 (577).
[But see (10) 8 Ind Cas 168 (171); 35 Bom 108.
(26) AIR 1926 Mad 365 (366).
(24) AIR 1924 Mad 365 (366).
(08) 7 Cal L Jour 270 (272).
(78) 4 Cal L Rep 27 (28).
(25) AIR 1925 Pat 484 (485).
8. (05) 9 Cal W N 972 (972).
(34) AIR 1934 Nag 82 (82, 83); 30 Nag L R 135.
(76) 1 All 668 (669, 675); 5 Ind App 87 (PC).
(Appeal from order misconstruing a decree lies.)
(09) 1 Ind Cas 78 (78) (All). (Order under S. 63.)
(33) AIR 1933 Bom 185 (186).
(17) AIR 1917 Cal 182 (182). (Order under S. 63.)
(14) AIR 1914 Cal 828 (829); 41 Cal 418.
(97) 24 Cal 473 (487, 489).
(20) AIR 1920 Lah 117 (118).
(26) AIR 1926 Oudh 193 (194).
(17) AIR 1917 Oudh 96 (99).

19. A question as to discharge of a receiver.¹⁹
20. Enquiry regarding substituted share of judgment-debtor's property or accretions to his property.²⁰
21. Questions relating to the enforcement of security or relating to orders requiring security under O. 41 R. 5.²¹
22. As to questions under O. 21 R. 71 and Section 73, see those Sections.
23. As to application by decree-holder purchaser for refund of purchase money where the sale is set aside in a separate suit, see Note 4 to O. 21 R. 93.
24. Questions as to the absence of or irregularity in the attachment of the property to be sold.^{21a}
25. Question relating to payments by instalments under O. 20 R. 11 as amended in Madras, Nagpur and Rangoon.^{21b}
26. Question whether an instalment decree is executable in its entirety by reason of default in payments.^{21c}

The following have been held to be *questions not relating to execution, discharge or satisfaction of the decree*—

1. An order made by a Court exercising a power given to it by a provision in a scheme framed in a scheme suit.²²
2. Questions relating to the rights of a third party subrogated to the rights of a mortgagee decree-holder by payment at the instance of the mortgagor.²³
3. A mortgagor's right to possession as against the mortgagee who is entitled under a decree to be in possession till his debt is paid off.²⁴
4. An objection by a prior mortgagee to the sale of the mortgaged property in execution of puisne mortgagee's decree.²⁵
5. The enforcement of a right under a decree which merely *declares* it.²⁶

19. ('18) AIR 1918 Pat 60 (61) : 3 Pat L Jour 518. (Receiver appointed during execution proceedings.)

('80) 5 Bom 45 (48). (Receiver for management of estate appointed by a decree.)

20. ('22) AIR 1922 P C 54 (55) : 1 Pat 378 : 49 Ind App 139 (PC).

('17) AIR 1917 Pat 253 (257) : 2 Pat L Jour 496.

('25) AIR 1925 P C 86 (88) : 52 Ind App 137 : 49 Bom 283 (PC). (Accretions.)

('29) AIR 1929 Oudh 263 (264, 265).

('17) AIR 1917 Pat 126(127,128) : 3 Pat L Jour 339.

21. ('18) AIR 1918 Mad 442 (442) : 41 Mad 327.

('30) AIR 1930 Pat 108 (109, 110) : 8 Pat 801 : (AIR 1919 P C 55, Foll.)

('82) 8 Cal 477 (478).

('34) AIR 1934 Rang 231 (232). (Obiter.)

21a. ('30) AIR 1930 Mad 414 (415).

21b. ('26) AIR 1926 Rang 192 (192) : 4 Rang 247.

('32) AIR 1932 Rang 54 (55).

21c. ('29) AIR 1929 Lah 390 (391).

22. ('25) AIR 1925 P C 155 (156) (PC).

('26) AIR 1926 Bom 130 (130).

('26) AIR 1926 Bom 167 (167). (Power exercised by District Judge as persona designata.)

('27) AIR 1927 Mad 1110 (1110).

[See ('38) AIR 1938 Rang 363 (364). (Orders passed merely for carrying out a scheme are orders in execution and appealable under S. 47.—AIR 1925 P C 155, Distinguished.)]

[But see ('14) AIR 1914 Low Bur 226 (228).]

23. ('25) AIR 1925 Mad 129 (130, 131).

('05) 27 All 400 (402).

('05) 27 All 325 (332, 333) : 32 Ind App 128 (PC).

('22) AIR 1922 Lah 358 (360).

[See ('32) AIR 1932 All 49 (50). (Questions as to priority of mortgages more for suits than for execution proceedings.)]

[See also ('09) 1 Ind Cas 744 (744) : 31 All 364.]]

[But see ('10) 5 Ind Cas 142 (143) : 37 Cal 282.

(But the rights of a prior mortgagee-defendant getting subrogated must be decided in execution.)]

24. ('16) AIR 1916 Cal 43 (44). (Mortgagee in possession in pursuance of a decree for ejectment—Suit for redemption not barred by S. 47.)

('98) 20 All 506 (510).

('04) 6 Bom L R 1100 (1101).

('75) 12 Bom H O R 160 (162).

25. ('27) AIR 1927 Mad 431 (432).

('25) AIR 1925 Nag 185 (185, 186).

26. ('14) AIR 1914 All 103 (103, 104). (Declaration that defendant must vacate when plaintiff desires.)

('28) AIR 1928 Bom 365 (366).

('36) 164 Ind Cas 921 (925) (Cal).

[See also ('06) 28 All 72 (73). (Decree-holder making construction in excess of decree—Application for demolition under S. 47 does not lie.)

('05) 2 All L Jour 573 (575). (Do.)]

See also the undermentioned cases.²⁷

27. ('11) 9 Ind Cas 828 (829) (Lah). (Order of Court staying issue of warrant of attachment on judgment-debtor's representation that he would pay the amount within a particular time.)
- ('39) AIR 1939 Pat 248 (249). (Partition decree among co-sharers giving plaintiff right to realize certain rents—Another co-sharer collecting it—Separate suit for such rent is not barred.)
- ('69) 13 Moo Ind App 69 (76) (P C). (Claim for damages in respect of property purchased.)
- ('37) AIR 1937 All-635 (636). (Decision of a claim in accordance with O. 38 R. 8 is not one under S. 47.)
- ('29) AIR 1929 All 666 (666). (Extending time fixed by a decree.)
- ('14) AIR 1914 All 440 (441). (Suit for declaration of title under a prior decree for pre-emption.)
- (1900) 1900 All W N 135 (136). (Decree for possession—Judgment-debtor not allowed to set up claim for maintenance in execution proceedings.)
- ('95) 17 All 243 (244). (Order striking off execution but maintaining attachment.)
- ('39) AIR 1939 Bom 182 (189). (An order refusing to direct the value of the property to be stated in the sale proclamation under O. 21 R. 66 is not a decree under S. 47 and is not appealable.)
- ('31) AIR 1931 Bom 295 (296, 297). (Extraneous terms forming consideration for a compromise decree—Executable.)
- ('39) AIR 1939 Cal 334 (395). (Court receiving notice, after sale, under the Bengal Agricultural Debtors Act—Question whether sale should be set aside is one under S. 47.)
- ('37) AIR 1937 Cal 211 (212) : 1 L R (1937) 1 Cal 781. (An objection by the judgment-debtor that a scheme sanctioned by the Court under S. 153 of the Companies Act has superseded the decree which has, therefore, become incapable of execution, relates to the execution or discharge of the decree and consequently comes within S. 47.)
- ('36) 164 Ind Cas 802 (803) (Cal). (Where the execution proceedings taken in the Civil Court in pursuance of an award under the Co-operative Societies Act are set aside, and the Court passes an order under S. 151, Civil P. O., remitting the award to the arbitrator for rectification of certain errors therein, the order is not one falling under S. 47.)
- ('38) AIR 1938 Cal 668 (672): 60 Cal 801. (Trusts—Creditor of trustee—Right of subrogation to trustee's right of indemnity can be decided in suit by creditor against trustee, but not in execution.)
- ('25) AIR 1925 Cal 286 (288). (Enforcement of provisions in a compromise decree extraneous to the subject-matter of suit is by separate suit though such provisions form consideration for compromise.)
- ('19) AIR 1919 Cal 806 (807). (Order merely allowing a payment directed by the decree.)
- ('13) 19 Ind Cas 904 (905) (Cal). (Order allowing decree-holder to withdraw execution proceedings.)
- ('12) 16 Ind Cas 543 (545) (Cal). (Application by minor after majority to set aside sale on the ground of negligence of guardian.)
- ('09) 7 Cal L Jour 436 (438). (Refusal to grant sale certificate.)
- ('06) 4 Cal L Jour 211 (219). (Question whether a person has acquired a valid title in sale.)
- (1900) 4 Cal W N 39 (40). (Order on an application for review of an order dismissing an execution case for non-payment of process fees.)
- ('23) AIR 1923 Pat 180 (183). (Do.)
- ('99) 26 Cal 529 (531). (Order amending a sale certificate.)
- ('97) 20 Mad 487 (489). (Do.)
- ('39) AIR 1938 Lah 214 (215, 216). (Application for temporary alienation of judgment-debtor's land—Mortgage created and mortgagee given possession though he had not paid the money—Decree recorded as fully satisfied by mortgage—Subsequent suit by decree-holder against mortgagee for the money not barred, as question was not one relating to execution, discharge or satisfaction of decree.)
- ('38) AIR 1938 Lah 4 (5). (Amendment of decree under Ss. 151 and 152.)
- ('27) AIR 1927 Lah 337 (337). (Order setting aside confirmation of sale.)
- ('24) AIR 1924 Lah 405 (407). (Infringement of rights declared by a decree—S. 47 does not apply.)
- ('18) AIR 1918 Lah 63 (63): 1918 Pun Re No. 43. (Order amending a decree.)
- ('14) AIR 1914 Lah 24 (25): 1914 Pun Re No. 12. (Suit against prior mortgagee for redemption and for possession against mortgagor decreed in favour of subsequent mortgagee—Subsequent suit for possession against mortgagor on the ground that redemption money had been paid not barred—S. 47.)
- ('07) 1907 Pun Re No. 5, page 30. (S. 47 bars a regular suit where question relating to execution is raised bona fide.)
- ('38) AIR 1938 Mad 307 (313). (Decree in partition suit not engrossed on proper non-judicial stamp—Decree-holder applying to executing Court for having decree engrossed on proper stamp—Order of executing Court is not one under S. 47.)
- ('36) AIR 1936 Mad 733 (742, 743). (Question of paramount title cannot be raised in proceedings for execution of mortgage decree.)
- ('28) AIR 1928 Mad 296 (297). (Application by plaintiff for payment of money deposited by petitioner when applying for setting aside ex parte decree.)
- ('22) AIR 1922 Mad 63 (63). (Decree-holder selling his own property by bona fide mistake—Remedy is by separate suit.)
- ('18) AIR 1918 Mad 914 (915). (Refusal of an application for cheque.)
- ('08) 31 Mad 37 (39, 40). (Claim for damages in respect of property purchased.)
- ('30) AIR 1930 Nag 199 (200) : 26 Nag L R 187. (Landlord acquiring the interest of judgment-debtor under S. 6, C. P. Tenancy Act, was held not to represent the judgment-debtor within the meaning of S. 47.)
- ('23) AIR 1923 Nag 327 (328). (Whether crops passed in a pre-emption decree which was silent about this.)

72. "Shall be determined by the Court executing the decree and not by a separate suit." — All objections that can be raised in execution under this Section "shall be determined by the Court executing the decree and not by a separate suit."¹ The words "by a separate suit" have given rise to a conflict of decisions as to whether the bar of suit applies only where the questions are raised by a party *as plaintiff* in a suit, or whether it applies to such questions raised in *defence* to a suit as well. The High Court of Calcutta has held that the Section bars a plea in *defence* also on the ground that the words "shall be determined by the Court executing the decree" give *exclusive jurisdiction* over the matter to the Court executing the decree, and cannot be merely construed to mean that the executing Court must determine it *if it is raised* in the course of execution proceedings.² But it has been also held by that High Court that where the defendant has been kept out of knowledge of the execution proceedings, until after the suit has been brought, by the fraud of the decree-holder, he could raise such objections by way of defence to the suit.^{2a}

The High Court of Madras has, on the other hand, held that the bar is not applicable to pleas in defence.³ It has followed the undermentioned case of the Calcutta High Court⁴ which held that the words "by a separate suit" cannot be taken to mean "in a separate suit." In view of the fact, however, that the said case of the Calcutta High Court has been overruled by a later Full Bench of that Court,⁵ the Madras decisions will have to be reconsidered.

It has been held that a plea that a suit is barred under this Section cannot be raised for the first time in appeal when it has not been raised in the first Court.⁶

73. "Determined," meaning of. — The word "determined" shows that the questions contemplated by the Section are to be *finally* disposed of and the effect of the word is therefore to give the Court executing the decree jurisdiction to dispose of finally such questions by granting appropriate relief.¹

74. "Court executing the decree," meaning of. — "The Court executing the decree" means only the Court executing the decree *at the time when the*

('29) AIR 1929 Oudh 309 (310). (Application for withdrawal of money in Court was treated as application for execution.)

('39) AIR 1939 Pat 242 (243). (Decree-holder attaching surplus profits of ghatwal estate raising objections to certain items in the estimate of receipts and expenditure of the estate — Order passed on objections is appealable.)

('28) AIR 1928 Pat 44 (44, 45). (Question of contribution as between defendants in a mortgage suit.)

('38) AIR 1938 Rang 292 (293). (Application under O. 21 R. 22 falls under this Section.)

Note 72

1. ('15) AIR 1915 P C 88 (89) (P C).

('33) AIR 1933 Mad 825 (833) : 57 Mad 49. (Section is mandatory—Court has no discretion to refer parties to a suit in respect of a matter falling under the Section.)

('71) 3 N W P H C R 62 (63).

('31) AIR 1931 Bom 114 (118).

('20) AIR 1920 Cal 537 (538).

('01) 28 Cal 492 (495, 496).

('02) 1902 Pun Re No. 8 page 30.

('33) AIR 1933 Mad 340 (341). (Party to suit cannot evade this rule by joining with a stranger.)

('33) AIR 1933 Mad 166 (167) : 56 Mad 447. (When once the Court finds that resort to S. 47 is the proper remedy it has no option but to decide; it cannot refer the parties to a suit.)

('31) AIR 1931 Rang 117 (121) : 9 Rang 305 (FB).

2. ('29) AIR 1929 Cal 374 (379) : 57 Cal 403 (FB).

(Overruling 24 Cal 355; 26 Cal 946; 7 C W N 67; 4 Ind Cas 168; AIR 1922 Cal 311. (The decision in AIR 1929 Cal 247 to the contrary must also be considered to be no longer law.)

('27) AIR 1927 Cal 106 (108) : 53 Cal 837.

('32) AIR 1932 All 49 (49).

('31) AIR 1931 Nag 27 (28, 29).

[See also ('11) 10 Ind Cas 90 (93) (Cal).

('10) 7 Ind Cas 457 (458) (Bom). (Judgment-debtor not allowed to raise objection to sale by way of defence to suit.)]

2a. ('32) AIR 1932 Cal 825 (827) : 59 Cal 1242.

('29) AIR 1929 Cal 247 (249) : 56 Cal 467.

3. ('21) AIR 1921 Mad 279 (280).

('09) 1 Ind Cas 221 (222, 226) : 32 Mad 242.

('09) 1 Ind Cas 193 (194) (Mad).

4. ('97) 24 Cal 355 (357).

5. ('29) AIR 1929 Cal 374 (379) : 57 Cal 403 (FB).

6. ('36) 161 Ind Cas 43 (45) (Nag).

Note 73

1. ('14) AIR 1914 Mad 91 (93).

application is made. Therefore, it does not include the Court which has executed the decree and has thereby become *functus officio*,¹ or an Appellate Court.² A Collector executing a decree transferred to him is not a "Court executing a decree" within the meaning of this Section.³ The Court which sends the decree to the Collector remains "the Court executing the decree" and hence a question coming under this Section can be entertained by such Court even after the decree has been transferred to the Collector for execution.⁴ The words "the Court executing the decree" do not restrict the applicability of the Section to proceedings initiated by the decree-holder. The Section also applies to proceedings initiated by the judgment-debtor.⁵ See also Note 2 to Section 70, *infra*.

75. Powers of the executing Court. — See Notes to Section 38 generally.

76. Power to construe decree. — Where there is no ambiguity in the terms of a decree the Court is bound to interpret it according to its plain meaning and cannot ignore its terms or assume mistake on the part of the parties.¹ Where, however, there is any *ambiguity* in the decree, the executing Court may, and should, construe the decree in order to ascertain its precise meaning² and, for this purpose, it may refer to the judgment and the pleadings in the case.³ In construing an appellate decree, the pleadings and the decree of the *trial* Court may be referred to,⁴ but not the statements in the judgment of the first Court which are not based on pleadings.⁵ See also Note 9 to Section 38, *ante*.

77. Rules of construction of decree. — There is no general rule for construing decrees; each case depends on itself.¹ The following general principles may, however, be found useful in interpreting decrees —

1. A decree should be construed in accordance with law.² Where, therefore,

Note 74

1. ('84) 10 Cal 588 (540).
(1900) 23 Mad 377 (380). (Includes applications made by the judgment-debtor.)
(71) 6 Mad II C R 304 (306).
2. ('15) AIR 1915 Mad 41 (41).
(05) 29 Bom 71 (73).
3. ('25) AIR 1925 All 146 (149) : 47 All 217.
(38) AIR 1938 Oudh 188 (189).
4. ('38) AIR 1938 Oudh 188 (189).
5. (1900) 23 Mad 377 (380, 382).

Note 76

1. ('10) 6 Ind Cas 75 (76) (All).
(16) AIR 1916 All 207 (208).
(23) 77 Ind Cas 167 (168, 169) (Cal).
(18) AIR 1918 Cal 245 (246).
(17) AIR 1917 Cal 288 (289).
- (30) AIR 1930 Lah 589 (591). (Wording of the decree clear—Decree cannot be interpreted in the light of the reasoning or phraseology in the judgment.)
(25) AIR 1925 Lah 470 (471).
(24) AIR 1924 Lah 696 (698).
- (18) AIR 1918 Mad 1287 (1292) : 40 Mad 259 (FB).
2. ('30) AIR 1930 Mad 688 (690) : 53 Mad 750.
(24) AIR 1924 All 690 (690).
(07) 9 Bom L R 1361 (1362).
(87) 16 Bom 659 (661) (F B).
- (84) 10 Cal 1092 (1094). (But where terms of decree are uncertain, any inquiry or evidence in execution to ascertain the same is barred.)

- (30) AIR 1930 Mad 688 (690) : 53 Mad 750.
- (30) AIR 1930 Oudh 302 (303). (The question whether a decree is or is not a purely declaratory decree can only be decided by examination of the decree itself.)
(98) 1 Oudh Cas 22 (27).
3. ('21) AIR 1921 Cal 699 (700).
(31) AIR 1931 Cal 511 (513).
(31) AIR 1931 Mad 328 (331) : 54 Mad 532.
(35) AIR 1935 Oudh 39 (40, 41) : 10 Luck 416.
(30) AIR 1930 Oudh 366 (367).
(30) AIR 1930 Pat 536 (538) : 9 Pat 499.
(29) AIR 1929 Pat 746 (747).
(21) AIR 1921 Pat 360 (362).
4. ('20) AIR 1920 Pat 192 (194).
5. ('12) 14 Ind Cas 130 (131) (Oudh).

Note 77

1. ('19) AIR 1919 All 297 (298) : 41 All 473.
2. ('11) 12 Ind Cas 123 (126) : 35 Mad 560.
(21) 65 Ind Cas 224 (224) (Pat).
(24) AIR 1924 P C 133 (135) : 51 Ind App 236 : 48 Bom 404 (PC). (Decree for possession on payment of a certain amount within a time fixed—Deposit in Court by a mortgagee from the plaintiff—Deposit enures to the benefit of all parties interested in the fulfilment of the condition imposed by the decree.)
- (24) AIR 1924 Cal 778 (778) : 51 Cal 320. (Decree for value of bills of exchange stated in sterling—Decretal amount in rupees is to be calculated as per rate of exchange on the date the bills matured.)

the judgment admits of two meanings, it is wrong to construe it in a way which violates both law and equity.³

2. Where the decree is consistent with either of two inconsistent views, that interpretation which is in conformity with the *judgment* should be adopted.⁴

3. A construction which may, in future, result in a multiplicity of suits, should be avoided.⁵

4. A decree must be construed in a fair and reasonable way so as to accelerate its execution⁶ and the benefit of the doubt ought to go to the judgment-debtor.⁷

5. In cases of conflicting descriptions of property in the decree, applicable to two different sets of facts, that which is certain, stable, and the least likely to have been mistaken, must prevail.⁸

6. The interpretation to be put upon a consent decree ought to be the same as that to be placed on the original agreement between the parties.⁹

6a. Similarly a decree passed on the basis of an award should be construed in the light of the award.^{9a}

7. Where a decree is passed in favour of A conditional on his paying into Court a certain sum of money "within 30 days of the decree becoming final," a payment made within the time extended by Section 12 of the Limitation Act, but after the expiry of 30 days from the decree, is within time.¹⁰ Similarly, where the decree directs A to pay a certain sum to another within a certain time as a condition precedent to recovery of possession, the payment made within the same period from the date of the *appellate* decree is valid.¹¹

8. A direction that the defendant "do pay a certain sum of money" imposes *prima facie* a personal liability on the defendant,¹² though, no doubt, the words are not conclusive of the question.^{12a}

9. A decree must be construed as a whole.¹³

78. Power to go behind decree. — See Note 8 to Section 38 and Note 29 *ante*.

('21) AIR 1921 Lah 42 (43) : 2 Lah 155. (Possession to be given in case of default—Option not limited to first default.)

('23) AIR 1923 Oudh 241 (241) : 26 Oudh Cas 59. (When under a decree, the contractual rate of interest ceases to be payable at a given date and the court rate is substituted for it therefrom up to the date of realization, the court rate will be chargeable on the whole amount due with interest at the contractual rate up to that given date.)

('21) AIR 1921 Oudh 108 (109, 110) : 24 Oudh Cas 209. (Where a decree awarded mesne profits but did not specify that they were future profits the decree must be intended to give with possession those mesne profits claimable by law up to the time of possession.)

('12) 16 Ind Cas 866 (866) (Oudh). (Do.)

('36) AIR 1936 Pat 303 (305). (Decree against puisne mortgagee in suit by prior mortgagee not to be interpreted to be a personal decree against the puisne mortgagee.)

3. ('21) 60 Ind Cas 345 (346) (Lah).

4. ('10) 5 Ind Cas 496 (496) : 32 All 321.

('13) 20 Ind Cas 827 (828) (Mad).

('23) AIR 1923 Cal 704 (704).

('17) AIR 1917 Cal 288 (289).

5. ('22) AIR 1922 Oudh 34 (36).

('30) AIR 1930 Oudh 302 (303).

6. ('20) AIR 1920 Pat 192 (193).

('33) AIR 1933 Cal 329 (331) : 60 Cal 794. (Court will lean against a construction which renders a decree inexecutable.)

[See also ('31) AIR 1931 Cal 476 (478).]

7. ('21) AIR 1921 Oudh 138 (138).

8. ('14) AIR 1914 Oudh 280 (281) : 17 Oudh Cas 256.

9. ('11) 9 Ind Cas 875 (880) (Mad).

9a. ('33) AIR 1933 Lah 505 (506).

('31) AIR 1931 Cal 511 (513).

10. ('17) AIR 1917 All 325 (325) : 39 All 193.

11. ('14) AIR 1914 Bom 132 (134) : 39 Bom 175.

12. ('11) 12 Ind Cas 689 (690) (Mad).

('11) 12 Ind Cas 184 (185) (Mad).

('29) AIR 1929 Mad 105 (108, 109) : 52 Mad 263. (Costs decreed against Official Receiver—Personally liable.)

12a. ('11) 12 Ind Cas 689 (689) (Mad).

('34) AIR 1934 Oudh 45 (47). (Benefit of doubt to be given to judgment-debtor.)

13. ('29) AIR 1929 Sind 98 (101) : 23 Sind LR 375.

mistake in the initiation of proceedings² and to avoid a valid claim being defeated on technical pleas.^{2a} See also the undermentioned case.^{2b} But it is not intended to save litigants from the trouble of choosing the proper forum and filing a plaint or an execution petition when it is discovered, in time, what is the proper forum and there is no further question about the matter.^{2c} A proceeding cannot, however, be treated *both* as a suit as well as an application.³

The power under this Section is *discretionary* and may be exercised according to the circumstances of each case.⁴ But two essential conditions must be satisfied before the Court can exercise its discretion and treat a suit as an application —

1. The Court in which the suit is brought must have *jurisdiction to execute the decree*,⁵ and

(12) 13 Ind Cas 204 (205) (Mad).
 ('10) 6 Ind Cas 776 (776) (Mad).
 ('09) 1 Ind Cas 380 (381) (Mad).
 ('23) AIR 1923 Nag 94 (95).
 ('30) AIR 1930 Oudh 468 (470).
 ('38) AIR 1938 Pat 216 (220).
 ('36) AIR 1936 Pat 303 (305).
 ('16) AIR 1916 Pat 299 (300) : 1 Pat L Jour 43.
 [See also ('03) 5 Bom L R 1036 (1041).]
 2. ('15) AIR 1915 Mad 226 (227).
 ('31) AIR 1931 Mad 588 (590).
 2a. ('23) AIR 1923 Nag 94 (95).
 2b. ('36) AIR 1936 Bom 227(231): 60 Bom 516.
 2c. ('31) AIR 1931 Mad 270 (271).
 3. ('15) AIR 1915 Mad 226 (227).
 4. *In the following cases suits were in the discretion of the Court allowed to be treated as proceedings :—*
 ('07) 29 All 348 (350, 351).
 (1900) 22 All 121 (123).
 ('38) AIR 1938 Cal 113 (115) : 1 L R (1938) 1 Cal 280.
 ('35) AIR 1935 Cal 15 (17). (Suit for setting aside court sale in respect of properties not included in the mortgage.)
 ('27) AIR 1927 Cal 614 (615): 54 Cal 419. (Purchaser in execution of mortgage-decree — Title questioned—Application under S. 47 and not suit is the remedy—Suit can be treated as a proceeding.)
 ('05) 32 Cal 332 (333).
 ('19) AIR 1919 Lah 430 (431, 432).
 ('07) 1907 Pun Re No. 5, p. 30.
 ('32) 35 Mad L W 103 (104). (Dismissal of prior execution petition is no bar for treating suit as proceeding.)
 ('30) AIR 1930 Mad 12 (13, 14).
 ('16) AIR 1916 Mad 429 (429).
 ('14) AIR 1914 Mad 91 (92).
 ('10) 6 Ind Cas 776 (776) (Mad). (Where a suit is barred under S. 244, Civil P. C., the plaint may be treated as an application under that Section.)
 ('09) 1 Ind Cas 380 (381) (Mad). (Plaint covering a question under S. 47, Civil P. C., may be treated as an execution petition.)
 ('22) AIR 1922 Nag 198 (199). (Suit for restitution which is barred under S. 144.)
 [See ('16) AIR 1916 Pat 299 (300): 1 Pat L Jour 43.]

In the following cases, a proceeding was allowed to be treated as a suit :—

(26) AIR 1926 All 387 (388): 48 All 862. (Decree against a minor—Objection by the minor that the decree was not binding on him in execution proceedings by an application — Proceeding on the objection may be treated as suit.)
 ('12) 16 Ind Cas 543 (545) (Cal). (Do.)
 ('38) AIR 1938 Lah 177 (178). (Partition proceedings—Award declaring rights of parties without giving possession—Decree on award — Application for execution claiming possession with alternative prayer to treat application as a suit.)
 ('13) 18 Ind Cas 700 (700) (Lah).
 ('31) AIR 1931 Mad 81 (83).
 ('25) AIR 1925 Pat 16 (17): 3 Pat 344. (Proceedings in execution between rival assignees of decree regarded by Court as suit.)
In the following cases the Court refused to act under the Section:—
 ('13) 19 Ind Cas 622 (623, 624): 35 All 243.
 ('09) 3 Ind Cas 495 (496) (All).
 ('04) 1 All L Jour 61 (63).
 (1900) 1900 All W N 196 (197).
 ('19) AIR 1919 Cal 674 (676): 46 Cal 103.
 ('24) AIR 1924 Mad 707 (708).
 ('09) 4 Ind Cas 723 (724): 32 Mad 425.
 ('31) AIR 1931 Oudh 45 (46): 6 Luck 452.
 ('15) AIR 1915 Oudh 134 (135, 136).
 5. ('10) 7 Ind Cas 55 (59) (Cal).
 ('34) AIR 1934 All 699 (700). (Party to suit in Small Cause Court objecting to attachment of property in execution of decree in same Court—Objection dismissed and declaratory suit filed in Munsif's Court — Munsif's Court cannot treat suit as application under S. 47 and suit must be dismissed.)
 ('16) AIR 1916 All 184 (186).
 ('14) AIR 1914 Cal 691 (692).
 ('95) 22 Cal 483 (486).
 ('26) AIR 1926 Lah 165 (166): 7 Lah 1.
 ('35) AIR 1935 Mad 923 (925).
 ('20) AIR 1920 Mad 206 (207).
 ('09) 4 Ind Cas 723 (724) : 32 Mad 425.
 ('05) 28 Mad 64 (66).
 ('99) 22 Mad 347 (349).
 ('22) AIR 1922 Nag 189 (191).
 ('21) AIR 1921 Nag 130 (131).
 ('18) AIR 1918 Nag 102 (103).
 ('95) 8 C P L R 3 (4).

2. the application should not have been *barred by limitation* at the date of the institution of the suit.⁶

The power exercisable under this sub-section may not only be exercised by the original Court, but also by the Appellate Court, subject, however, to the same two conditions, namely, that the original Court had jurisdiction to execute the decree⁷ and that the suit was filed within the limitation period prescribed for applying under this Section.⁸

The discretion given under this sub-section must be exercised when the plaint or application is filed, and after the procedure has once been determined at that stage (subject to the usual control of an appellate or revisional Court) it cannot thereafter be altered.^{9a} Hence, it has been held that where a claim suit has been filed and has proceeded to its conclusion, a Court in which an application for execution is subsequently filed cannot treat such suit as an *application* to take a step-in-aid of execution for the purpose of saving limitation in respect of the subsequent execution application.^{9b}

Where an application falling under this Section is dismissed on the merits and the applicant then brings a suit for the same relief, the suit cannot be converted into an application under this Section, on its being contended that such suit is barred by this Section. The remedy of the aggrieved party was to have appealed against the decision dismissing his prior application.^{9c}

Where a proceeding in execution is treated, under this Section, as a suit, the judgment-debtor who objects to the execution of the decree is in the position of a plaintiff and therefore he has to pay the court-fee due to the Government in respect of the suit.⁹

83. Objection as to limitation, when to be considered. — An objection as to limitation may be taken at any stage of the execution proceedings if the facts upon which the objection is based are patent upon the face of the record.¹

See also Note 23 to Section 11.

84. Appeal. — Where an order amounts to a determination of a question between the parties and relating to the execution, discharge or satisfaction of the decree, it will be a decree within the meaning of Section 2 cl. (2) and is appealable as such under Section 96.¹ As to whether *every* such order is appealable, see Note 86,

('11) 10 Ind Cas 991 (992) : (1910) 1 Upp Bur Rul 66.

6. (1900) 22 All 376 (377).

('11) 11 Ind Cas 987 (989) : 35 Bom 452.

('27) AIR 1927 Cal 106 (108) : 53 Cal 837.

('11) 10 Ind Cas 417 (420) (Cal).

('37) AIR 1937 Mad 580 (580).

('25) AIR 1925 Mad 1198 (1200).

('18) AIR 1918 Mad 180 (182).

('17) AIR 1917 Mad 453 (453).

('30) AIR 1930 Oudh 468 (470). (Plaint treated as an execution application and as an application to take a step-in-aid.)

[See ('38) AIR 1938 Nag 534 (536).

[But see ('21) AIR 1921 Bom 285 (289) : 45 Bom 174. (Suit was treated as application to set aside sale and application was held time barred.)]

7. ('95) 22 Cal 483 (485, 486).

[See ('05) 32 Cal 332 (336).]

8. (1900) 22 All 376 (377).

('27) AIR 1927 Cal 411 (411, 412) : 54 Cal 524.

('27) AIR 1927 Cal 106 (108) : 53 Cal 837.

('05) 28 Mad 64 (66).

8a. ('38) AIR 1938 Nag 534 (536).

8b. ('38) AIR 1938 Nag 534 (536).

8c. ('35) AIR 1935 Mad 923 (925).

9. ('34) AIR 1934 Pat 9 (11).

Note 83

1. ('16) AIR 1916 Pat 331 (333).

('35) AIR 1935 Cal 230 (231).

Note 84

1. ('12) 13 Ind Cas 365 (367) (Cal).

('33) AIR 1933 All 732 (733) : 55 All 983. (Order dismissing execution application is appealable.)

('36) AIR 1936 All 479 (480). (A decision that certain person is representative of the judgment-debtor is appealable.)

('35) AIR 1935 All 183 (184).

The question of the right to appeal under this Section does not depend upon who happens to be the appellant but upon the question whether or not the case falls within the Section; thus, if the conditions of the Section are satisfied, the auction-purchaser also will have a right to appeal.²

Where a decree of a Small Cause Court is sent for execution to a Court exercising original jurisdiction and an order is passed under this Section, such an order is appealable.³ But no *second appeal* will lie against an order in execution under this Section, where the suit is of a nature cognisable by a Court of Small Causes.⁴ In the case of arbitration proceedings, the award must be considered to be a decree in a suit

(39) AIR 1933 All 201 (202) : 55 All 235. (Decree for possession—Decision on question between decree-holder and transferee pendente lite from judgment-debtor as to right to possession is a decree.)

(38) AIR 1933 All 57 (59) : 54 All 1081. (Decision on question under O. 21 R. 98 between plaintiff and exonerated defendant appealable as a decree.)

(39) AIR 1932 All 49 (49). (Even if order is not strictly within S. 47 if Judge purports to act under this Section, it would be appealable.)

(34) AIR 1924 Mad 518 (519). (Do.)

(35) 28 Mad 127 (129). (Do.)

(35) AIR 1925 All 551 (552).

(38) AIR 1938 Cal 236 (237).

(39) AIR 1939 Cal 334 (335). (Order purporting to be one under S. 151 but one which ought to be made under S. 47—Appeal lies.)

(37) AIR 1937 Cal 259 (259) : I L R (1937) 2 Cal 127. (Order dismissing execution petition for failure to comply with directions of Court—Second appeal lies.)

(39) AIR 1925 Cal 318 (319).

(18) AIR 1918 Cal 551 (552). (Such an order passed even on review is appealable as a decree.)

(10) 5 Ind Cas 483 (484) (Cal). (Do.)

(15) AIR 1915 Cal 187 (198).

(18) 20 Ind Cas 874 (875, 876) (Cal). (Question of agreement to give time to judgment-debtor for delivery of possession after court-sale.)

(10) 8 Ind Cas 4 (5) (Cal).

(10) 7 Ind Cas 769 (771) (Cal).

(07) 8 South W R 398 (398).

(39) 41 Pun L R 186 (187). (Appeal lies from an order transferring decree to another Court for execution, as the order is one relating to the execution though it is itself not an order executing the decree.)

(36) AIR 1936 Lah 725 (727). (Though application purports to be under S. 151, the order is under this Section and appeal lies.)

(29) AIR 1929 Lah 884 (885). (If the order is under S. 151 it is not appealable.)

(14) AIR 1914 Lah 9 (11) : 20 Ind Cas 203 (205) : 1914 Pun Re No. 10. (Do.)

(18) 19 Ind Cas 439 (439) (Lah). (Do.)

(29) AIR 1929 Pat 391 (392). (Do.)

(27) AIR 1927 Lah 651 (652). (Executing Court—No power to amend decree—If it amends, appeal under S. 47 lies.)

(07) 2 Mad L Tim 307 (307). (Do.)

(15) AIR 1915 Lah 100 (102). (However, if the decree is one under S. 9, Specific Relief Act, no

appeal lies.)

(37) AIR 1937 Mad 509 (511) : I L R (1937) Mad 534. (Even though matter does not fall under this Section, if the order purports to be made under this Section appeal lies.)

(36) AIR 1936 Mad 812 (814). (Order refusing application of judgment-debtor to raise attachment is appealable—The fact that order is passed on a separate application by judgment-debtor and not on the execution petition itself does not make any difference.)

(36) AIR 1936 Mad 696 (698). (Though purporting to have been passed under S. 151.)

(35) AIR 1935 Mad 340 (341). (Order recording satisfaction of decree is appealable—Such order cannot be set aside by executing Court.)

(27) AIR 1927 Mad 842 (843).

(18) 19 Ind Cas 448 (448) (Mad). (Substance of the order must be looked at if provision of law quoted is not decisive.)

(34) AIR 1934 Nag 201 (203) : 13 Nag L R 240. (Question not between parties or representatives—No appeal lies.)

(02) 15 C P L R 69 (72).

(91) 4 C P L R 132 (133).

(36) AIR 1936 Oudh 50 (51) : 11 Luck 519. (Decree discharged as satisfied—Discharge amounts to a decree.)

(29) AIR 1929 Pat 472 (472).

(29) AIR 1929 Pat 141 (142) : 8 Pat 717.

(37) AIR 1937 Pesh 3 (4). (Order by trial Court refusing to allow costs directed to be paid by Privy Council, has force of decree and is appealable.)

(28) AIR 1928 Rang 40 (41) : 5 Rang 775. (Refusal to decide objections as to executability—Decree appealable.)

(93-1900) 1893-1900 Low Bur Rul 375.

[But see (77) 2 Bom 553 (556, 557). (Case under Code of 1859. Order as to amount of mesne profits not a decree—Not good law now.)]

2. (99) 26 Cal 539 (541, 542).

3. (06) 11 Cal W N 861 (862).

(17) AIR 1917 All 304 (304) : 39 All 357. (Small Cause Court having ceased to exist.)

4. (11) 10 Ind Cas 412 (413) (Cal).

(1900) 27 Cal 484 (487).

(21) AIR 1921 All 55 (55) : 43 All 403.

(07) 30 Mad 212 (213).

(37) AIR 1937 Pat 349 (351).

and therefore an appeal would lie against an order in execution of an award.⁵ Where a decree is obtained in a suit brought under Section 9 of the Specific Relief Act and an order is passed in proceedings in execution of that decree, no appeal lies against that order.^{6a} The reason is that Section 9 of that Act provides that "no appeal shall lie from any order or decree passed in any suit under this Section" and applications for execution of decrees are proceedings in suit.

Where a judgment-debtor or a party to the suit objects to the attachment and sale of his properties in execution, or in other words prefers a claim, an order deciding such a claim falls within this Section and is appealable as a decree under Section 96 read with Section 2 clause (2).⁶ The words '*as if he was a party to the suit*' in O. 21, R. 58 show that a claim by a party to the suit is not within the scope of that Rule. Even if the matter comes within O. 21 R. 58, still a right of appeal under Section 96 cannot be taken away by any provision, such as O. 21 R. 63, which is not contained in the body of the Code. (Compare the words "provided in the body of this Code" in Section 96 with the words "provided in this Code" in Sections 141, 146 and 148.)

Section 2 clause (2) excludes from the definition of decree any adjudication from which an appeal lies as an appeal from an order. Thus an order appointing a receiver in execution under O. 40 R. 1 is appealable under O. 43 R. 1 (s) and is not a decree appealable under Section 96.⁷ As to appeals from orders passed under O. 21, Rr. 89, 90 and 91, see those Rules.

Appeals from orders under this Section are expressly excepted from the provisions of Article 1 of Schedule I of the Court-fees Act by notifications of the various Local Governments under Section 35 of the Court-fees Act and consequently *ad valorem* fee is not payable in respect of such appeals.⁸ It has been held that an order

5. ('21) AIR 1921 Sind 182 (183) : 16 Sind L R 245.

('29) AIR 1929 Lah 228 (229).

('34) AIR 1934 Lah 49 (50). (Proceedings for enforcement of award are governed by S. 47—Appeal lies from order rejecting application for enforcement.)

5a. ('18) AIR 1918 Cal 925 (926) : 45 Cal 519.

('32) AIR 1932 Lah 416 (416) : 13 Lah 798.

('08) AIR 1928 Lah 589 (589).

('08) 26 Mad 498 (499).

6. ('16) AIR 1916 Cal 814 (814).

('21) AIR 1921 Cal 242 (244).

('12) 16 Ind Cas 385 (386) (Cal).

('32) AIR 1932 Lah 376 (376). (Even though claim is wrongly described as one under O. 21, R. 58.)

('24) AIR 1924 Lah 589 (590). (Do.)

('27) AIR 1927 Lah 895 (896).

('35) AIR 1935 Mad 923 (924). (Even if Court treats the application as one under O. 21 R. 58 and refers claimant to a suit, appeal is the remedy and not a suit.)

('34) AIR 1934 Mad 435 (435) : 57 Mad 822. (Joint claim by party to suit and by stranger—Appeal by party and suit under O. 21 R. 63 by stranger.)

('21) AIR 1921 Mad 627 (628). (Question under O. 21 R. 97.)

('21) AIR 1921 Mad 612 (614, 615). (Question under O. 21 R. 100, fought out by parties to the suit—Appealable.)

('20) AIR 1920 Mad 126 (128) : 48 Mad 696. (Same principle applies to claims under O. 21, R. 103.)

('16) AIR 1916 Mad 727 (727). (Objection by judgment-debtor to sale.)

('13) 21 Ind Cas 748 (749) (Mad).

('94) 17 Mad 399 (400).

('29) AIR 1929 Oudh 21 (21). (Claim by a party must be decided on the merits and not rejected without enquiry.)

('36) AIR 1936 Pat 268 (270).

('31) AIR 1931 Pat 97 (98).

('31) AIR 1931 Rang 314 (316). (Though it is misdescribed as one under O. 21 R. 58.)

[See ('17) AIR 1917 Bom 133 (134) : 42 Bom 10.]

[But see ('20) AIR 1920 Mad 206 (207). (Obiter).]

7. ('29) AIR 1929 Mad 20 (21).

[But see ('28) 1928 Mad W N 390 (390). (Order appointing receiver in execution—Second Appeal lies.)]

8. ('30) AIR 1930 Lah 24 (25). (S. 35 of the Court-fees Act was amended by Act 38 of 1920 by which Local Governments were empowered to issue notifications.)

('37) AIR 1937 Cal 152 (155) : 1 L R (1937) 1 Cal 637. (By notification of Government of India in force in Bengal the fee chargeable on appeals from orders under S. 47 was limited to amount chargeable under Art. 11 of Sch. II, Court-fees Act.)

('36) AIR 1936 Rang 352 (353).

[See also ('38) AIR 1938 Bom 320 (321).]

under O. 21 R. 50 clauses 2 and 3 is not an order under this Section and that on an appeal from such an order *ad valorem* court-fee is payable.^{8a} The Court can require a person appealing from an order under this Section to give security for the costs of the appeal.⁹

See also the undermentioned cases.¹⁰

85. Forum of appeal.—The value of the original suit in which the execution is taken out determines the *forum* of appeal in respect of an order passed in execution proceedings. The actual value of the subject-matter in dispute involved in the order is not the criterion.¹ See Note 18 to Section 96 as to the value of appeal for the purposes of jurisdiction.

86. Interlocutory orders in execution proceedings.—The phrase “determination of any question within Section 47” in Section 2 cl. (2) does not make every decision of any question within this Section, a decree. In order to be appealable as a decree, the decision must also have the essential characteristics of a decree as defined in that Section, that is, it must also be the formal expression of an adjudication conclusively determining the *rights* of the parties. If not, the order is merely an *interlocutory* one and is not appealable as a decree.¹ Otherwise “every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable; and far greater latitude would be given

8a. ('89) AIR 1939 Sind 161 (163) (F B). (AIR 1929 Bom 386, Foll.)

9. (1900) 24 Bom 314 (316).

10. ('87) AIR 1937 Pat 380 (381). (Question whether appeal lies against order of Subordinate Court can arise only if order is passed by the Subordinate Court suo motu as a Court of execution and not when order is passed on a direction from the Appellate Court.)

('84) AIR 1934 Pesh 43 (44). (Decree removing Mahant from office—Application for appointing Committee to appoint Mahant—Order thereon—Appeal held not to lie.)

('87) AIR 1937 Pesh 3 (4). (S. 47 applies to execution of decrees of Privy Council — Copy of judgment passed by Court executing decree and presented with memo of appeal should be stamped with a stamp of Re. 1 under Art. 7, Court-Fees Act.)

Note 85

1. ('15) AIR 1915 All 349 (349).

('25) AIR 1925 Cal 212 (212).

('19) AIR 1919 Lah 275 (276): 1919 Pun Re No. 44.

Note 86

1. ('24) AIR 1924 All 808 (811) : 46 All 733.

('33) AIR 1933 Mad 500 (500). (Order overruling preliminary objections by judgment-debtor.)

('11) 11 Ind Cas 545 (545) : 38 Cal 717 : 6 Low Bur Rul 26 : 38 Ind App 126 (P O). (Order refusing leave to bid to a decree-holder under O. 21, R. 72 is only administrative order.)

('35) AIR 1935 All 502 (503). (Order striking off objection for default.)

('32) AIR 1932 All 136 (137).

('31) AIR 1931 All 765 (765). (Order of District Judge approving appointment of a trustee made by committee under a scheme decree — Not a decree.)

31) AIR 1931 All 129 (130, 131). (Order directing

execution against one set of defendants in the first instance—Not a decree.)

('30) AIR 1930 All 638 (639).

('29) AIR 1929 All 390 (391, 392). (Ex parte order under O. 21 R. 50 (2) granting leave to execute — Not a decree.)

('29) AIR 1929 Bom 386 (388) : 53 Bom 839. (Do.)

('29) AIR 1929 All 85 (85). (Order refusing stay of sale.)

('24) AIR 1924 Lah 671 (672). (Do.)

('24) AIR 1924 Mad 234 (235). (Do.)

('27) AIR 1927 All 208 (209).

('26) AIR 1926 All 401 (401).

('26) AIR 1926 All 268 (268, 269) : 48 All 260.

('25) AIR 1925 All 588 (589) : 47 All 543. (Order directing enquiry into mesne profits.)

('24) AIR 1924 All 794 (795). (Order refusing to restore an execution application dismissed for default.)

('28) AIR 1928 Oudh 329 (330). (Do.)

('12) 15 Ind Cas 50 (51) : 34 All 530. (Order holding that fresh attachment is not necessary.)

('90) 1890 All W N 85 (86). (Order for recovery of deficiency of price against defaulting purchaser — Not a decree—Not appealable.)

('87) 9 All 500 (503, 504). (Order allowing a payment directed by the decree to be made.)

('19) AIR 1919 Cal 806 (807). (Do.)

('31) AIR 1931 Bom 391 (393, 396) : 55 Bom 414. (Scheme decree with liberty to apply for modification—Order on such application—Not appealable.)

('31) AIR 1931 Bom 388 (390). (Order of District Judge as persona designata under a scheme — Not appealable.)

('84) 8 Bom 287 (295).

('31) AIR 1931 Cal 574 (576) : 58 Cal 808. (Order under O. 21 R. 99 is not one under S. 47.)

('25) AIR 1925 Cal 679 (680, 681). (Order solely relating to jurisdiction.)

of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended.”² But though an order may be interlocutory, if it is one which in *substance* determines a question relating to execution between the decree-holder and the judgment-debtor as, for instance, where it has the effect of reviving an application for execution which was dismissed for default of the decree-holder, especially when a fresh application would be barred by limitation, it will be appealable as a decree.³ The decision that the executing Court had power to hear the objection application of the judgment-debtor under Section 47 is an order which determines a very important and substantial right and hence is appealable as a decree.⁴ As regards the appealability of an order fixing the value of property for the purposes of sale, see O. 21 R. 66. As regards appeals against orders granting or refusing stay of execution, see Note 44, *ante*.

86a. Parties to proceedings under Section. — The auction-purchaser is not a necessary party to a proceeding under this Section as between the parties to the suit; nor is his non-joinder in an appeal from an order in such proceedings fatal to it.¹

87. Revision. — An order which is appealable under this Section^{1a} or in which there is no question of jurisdiction involved, is not open to revision.¹ In the case of an order not open to appeal, a revision may lie if the conditions of Section 115 are satisfied.²

- (‘19) AIR 1919 Pat 383 (383): 4 Pat L Jour 461. (Do.)
 (‘19) AIR 1919 Cal 471 (472). (Order accepting security under O. 41 R. 5.)
 (‘31) AIR 1931 Mad 38 (38) : 54 Mad 237. (Do.)
 (‘12) 13 Ind Cas 170 (170) (Cal).
 (1900) 7 Cal L Jour 436 (437, 438). (Order refusing grant of sale certificate to decree-holder auction-purchaser.)
 (‘91) 18 Cal 469 (472). (Order on a preliminary point of law.)
 (‘20) AIR 1920 Lah 117 (118). (Do.)
 (‘73) 19 Suth W R 90 (91). (Relating to procedure.)
 (‘29) AIR 1929 Lah 815 (816). (Do.)
 (‘30) AIR 1930 Lah 20 (22) : 11 Lah 93. (An order restoring an execution application which had been dismissed for default.)
 (‘32) AIR 1932 Lah 120 (121). (Order accepting or refusing to accept security, not appealable.)
 (‘29) AIR 1929 Lah 391 (392). (Administrative order not appealable.)
 (‘27) AIR 1927 Lah 527 (528). (Order rejecting security and ordering execution to continue.)
 (‘27) AIR 1927 Lah 337 (337). (Order setting aside sale after confirmation—S. 47 does not apply.)
 (‘86) 1886 Pun Re No. 55, p. 116.
 (‘36) AIR 1936 Mad 623 (624). (Order allowing amendment to execution petition is not a decree.)
 (‘33) AIR 1933 Mad 500 (500).
 (‘30) AIR 1930 Mad 918 (918, 921) : 54 Mad 315. (Order filling up vacancy in the office of trustee appointed under a scheme—Not covered by S. 47.)
 (‘29) AIR 1929 Mad 718 (720). (Order under O. 21 R. 22 for arrest and notice at the same time.)
 (‘36) AIR 1936 Oudh 369 (370). (Order accepting security tendered by judgment-debtor and directing stay of execution.)
 (‘38) AIR 1938 Pat 216 (220).
 (‘37) AIR 1937 Rang 157 (159). (Final decree for sale in mortgage suit — Order by District Court

in execution directing sale of properties outside district — Order is not appealable as it does not affect the question as to the liability of the properties to be sold.)

(‘27) AIR 1927 Rang 317 (317) : 5 Rang 534 : 5 Rang 641. (Order requiring security before drawing out money.)

(‘25) AIR 1925 Rang 271 (273) : 3 Rang 132.

[See (‘02) 29 Cal 622 (625). (Order determining principle for ascertainment of mesne profits held not interlocutory.)]

[But see (‘32) AIR 1932 All 85 (89) : 53 All 391. (Order prescribing the order of sale of mortgaged properties falls under S. 47—Appealable.)

(‘16) AIR 1916 Cal 471 (472). (Question as to benami transfer of decree governed by the Section.)]

2. (‘97) 24 Cal 725 (739) (F B). (Per Banerji, J.)
 (‘14) AIR 1914 Cal 149 (149) : 20 Ind Cas 72 (72) : 41 Cal 160.

(‘11) 12 Ind Cas 745 (749, 750) (Cal).

(‘11) 10 Ind Cas 371 (371, 372) (Cal).

(‘09) 2 Ind Cas 338 (341) : 36 Cal 422. (The propriety of such interlocutory orders can be attacked in the appeal from the final order.)

3. (‘20) AIR 1920 Cal 534 (535).

4. (‘39) AIR 1939 Lah 177 (178).

Note 86a

1. (‘39) AIR 1939 Nag 183 (186).

Note 87

1a. (‘29) AIR 1929 Pat 141 (142) : 8 Pat 717.

1. (1900) 2 Bom L R 887 (888).

(‘33) AIR 1933 Bom 185 (186).

(‘36) AIR 1936 All 479 (480).

(‘31) AIR 1931 All 765 (766).

(‘05) 32 Cal 572 (575). (Only an error of law.)

(‘32) AIR 1932 Lah 96 (97). (Order under S. 73—

No revision—Practice of Lahore High Court.)

2. (‘28) AIR 1928 Lah 811 (812).

of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended.”² But though an order may be interlocutory, if it is one which in *substance* determines a question relating to execution between the decree-holder and the judgment-debtor as, for instance, where it has the effect of reviving an application for execution which was dismissed for default of the decree-holder, especially when a fresh application would be barred by limitation, it will be appealable as a decree.³ The decision that the executing Court had power to hear the objection application of the judgment-debtor under Section 47 is an order which determines a very important and substantial right and hence is appealable as a decree.⁴ As regards the appealability of an order fixing the value of property for the purposes of sale, see O. 21 R. 66. As regards appeals against orders granting or refusing stay of execution, see Note 44, *ante*.

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- (‘33) AIR 1933 Mad 500 (500).
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 - (‘36) AIR 1936 All 479 (480).
 - (‘31) AIR 1931 All 765 (766).
 - (‘05) 32 Cal 572 (575). (Only an error of law.)
 - (‘32) AIR 1932 Lah 96 (97). (Order under S. 73—No revision—Practice of Lahore High Court.)
 2. (‘28) AIR 1928 Lah 811 (812).

LIMIT OF TIME FOR EXECUTION

48. [S. 230, paras. 3 and 4.] (1) Where an application to execute a decree⁴ not being a decree granting an injunction² has been made,⁵ no order for the execution of the same decree shall be made upon

Execution barred in certain cases.

any fresh application presented after the expiration of twelve years⁶ from —

- (a) the date of the decree sought to be executed,¹⁰ or,
- (b) where the decree or any subsequent order¹¹ directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods,¹² the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed —

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force,¹⁵ prevented the execution of the decree at some time within twelve years immediately before the date of the application : or

(b) to limit or otherwise affect the operation of article 180 of the second Schedule to the Indian Limitation Act, 1877.²

[1877, S. 230 paras. 3 and 4 and S. 231; 1859, S. 207.]

Synopsis

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|---|--|
| <ol style="list-style-type: none"> 1. Legislative changes. 2. Object, applicability and scope of the Section. 3. Retrospective operation of the Section. 4. "Application to execute a decree." 5. "Has been made." 6. Fresh application presented after the expiration of twelve years. 7. "Fresh application" as contra-distinguished from "continuation of previous application." 8. Successive applications for execution of decrees of Courts other than Chartered High Courts. | <ol style="list-style-type: none"> 9. Applicability of the Section to Chartered High Courts — Sub-section 2 (b). 10. "Date of the decree sought to be executed." 11. Subsequent order, meaning of. 12. "At a certain date or at recurring periods." 13. Exclusion of time during minority or other disability of decree-holder. See Note 21 to Section 6 of the Authors' Commentaries on the Limitation Act. 14. Deduction of time for other causes. 15. "By fraud or force." 16. Appeal from orders under the Section. 17. Plea of bar under the Section, when to be raised. |
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Other Topics

Combined mortgage decree—See Note 10 Pts. (5) and (6).
Continuation of application—Step-in-aid of execution. See Notes 7 and 8.
Decree directing mesne profits to be ascertained in execution. See Note 10 F. N. 3.
Decree not being a decree for injunction. See Note 1 Pt. (6).
Dekkhan Agriculturists' Relief Act, 17 of 1879. See Note 14.
Direction for recovery from one party on failure of another. See Note 12 Pt. (8).

Execution. See Note 10 F. N. 3.
Execution by Collector. See Note 14.
Limitation Act, Sections 4 and 15. See Note 14 Pts. (1) and (2).
Maintenance decree. See Note 12 Pt. (4).
Terminus a quo for limitation. See Note 10.
To limit or otherwise affect Art. 180 of Limitation Act. See Note 2.
Where decree is transferred for execution. See Section 38.

1. Legislative changes. — This Section corresponds to paragraphs 3 and 4 of Section 230 of the Code of 1882 with the following alterations:—

- (i) The old Section applied only to decrees for payment of money or delivery of other property. The present Section is made applicable to all decrees of any kind whatsoever, except decrees granting injunction. See Note 2 below.
- (ii) The words "under the Section and granted" occurring after the word "made" in the old Section have been omitted, with the result that the present Section applies under whatever Code the previous application may have been made and whether such application was granted or not. See Note 2 below.
- (iii) For the words "no subsequent application to execute the same decree shall be granted after" have been substituted the words "no order for execution of the same decree shall be made upon any fresh application presented after." See Notes 6 and 7 below.
- (iv) The words "or of the decree in appeal (if any) affirming the same" have been omitted as superfluous and tending to confusion. See Note 10 below.
- (v) The words "or at recurring periods" have been newly added in sub-section (1) clause (b). See Note 12 below.
- (vi) Sub-section (2) clause (b) was newly added. See Note 9 below.

Article 180 of the second Schedule of the Indian Limitation Act, 1877, corresponds to Article 183 of the Indian Limitation Act, IX of 1908, Schedule I.

2. Object, applicability and scope of the Section. — A decree-holder is entitled, as of right, to execute his decree and for that purpose may make any number of applications in succession.¹ He cannot be refused execution unless his application is barred by the principles of *res judicata* or by Article 182 of the Limitation Act, 1908. This Section imposes a further restriction on the rights of the decree-holder by fixing a *maximum limit of time* for execution and by enacting that no order for execution shall be made upon an application presented after the expiry of twelve years from certain specified dates.² The effect of the Section is not to supersede the law of

Section 48 — Note 2

1. ('95) 17 All 106 (111, 112): 22 Ind App 44 (PC).
2. ('24) AIR 1924 All 263 (265): 46 All 73.
- ('22) AIR 1922 Mad 268 (268): 45 Mad 785.
- ('26) AIR 1926 All 93 (94): 48 All 121.
- ('24) AIR 1924 Mad 163 (167): 47 Mad 120.

Under the Code of 1877, S. 230, there was a provision for an application to be made after the 12 years, if the same was made within 3 years

of the passing of that Code. But only one such application could be made within those three years:

- ('81) 1881 All W N 58 (58). (Meaning of "after the passing of the Code" in S. 230 of 1877 Code.)
- ('82) 1882 All W N 2 (2). (Do.)
- ('83) 7 Bom 214 (216). (Do.)
- ('85) 1885 All W N 193 (193).
- ('80) 5 Bom 245 (246).

limitation but only to fix the *outside period* after which, *execution* of a decree, though not barred by the Limitation Act, may not be granted.³ The object of this Section is to prevent execution proceedings being kept pending indefinitely to the harassment of judgment-debtors and to require sufficient diligence on the part of the decree-holders.^{3a}

Section 230 of the old Code referred only to decree for the *payment of money or delivery of other property*, and it was consequently held that it did not apply to *mortgage* decrees.⁴ There was also a conflict of opinion as to the application of the Section to cases where a decree was passed personally against *A* for payment of money, and in default, for sale of *B*'s (surety's) property.⁵ The omission of the words, "for the payment of money or delivery of other property" in the present Section makes it clear that it applies to *all* decrees of any kind except a decree granting injunction.⁶

Before the execution of a decree can be held to be barred under the Section, it must be shown that the decree was, in all parts, ripe for execution on the date from which the twelve years' period is to be computed.^{6a} Where a decree-holder applies for execution and a fresh application therefor in the future is likely to be barred under the provisions of this Section, the Court should allow the decree-holder to exhaust all lawful means of realising his decree in the pending application, before finally dismissing it.⁷ But the salutary rule enacted in this Section should not be permitted to be evaded as, for example, by striking off an execution petition and continuing the attachment so as to enable the decree-holder to apply for execution after the twelve years' period under the pretext of continuing a pending application.⁸

The Section only requires that the *application* should be presented within twelve years. The *order* on such application may be made even after the expiry of the specified period.⁹

('87) 11 Bom 524 (526).

('86) 12 Cal 559 (561).

('77) 2 Mad 218 (218).

('81) 7 Cal 556 (559).

[See ('84) 6 All 189 (192).]

[See also ('82) 1882 All W N 111 (111).]

3. ('32) AIR 1932 Oudh 220 (221).

('89) 1889 Pun Re No. 109, page 380.

('93) 1893 All W N 124 (125).

('88) 1888 Pun Re. No. 27, page 73.

('32) AIR 1932 Oudh 69 (71) : 8 Oudh W N 1186 (1191). (Section in effect lays down limitation for

execution of decree under S. 78 (2), Provincial Insolvency Act.)

('91) 1891 Pun Re No. 9, page 81.

('15) AIR 1915 Bom 40 (41) : 39 Bom 256. (Execution may be barred under this Section, though the application may not be barred by res judicata or Art. 182, Limitation Act.)

[See ('05) 1905 Upp Bur Rul C P C 26.]

3a. ('28) AIR 1928 Mad 1154 (1156).

4. (13) 18 Ind Cas 455 (457) (Cal).

('98) 25 Cal 580 (583, 584).

('05) 28 Mad 224 (226).

(1900) 22 All 401 (403). (Even though the judgment-debtor was personally liable for the deficiency.)

('05) 28 Mad 473 (478). (FB). (Do.)

('03) 25 All 541 (543, 544).

('94) 16 All 418 (419, 420).

('93) 1893 All W N 184 (184).

('98) 1898 All W N 114 (115). (Decree against legal

representative out of assets.—Decree for money.)

('08) 1908 Pun L R No. 121, page 369 (369). (Decree for money by sale of specific property — Decree for money under this Section.)

[But see ('04) 31 Cal 792 (796). (Where a combined decree (mortgage as well as a personal decree for balance) under Ss. 88 and 90, Act IV of 1882, is passed though wrongly and the decree-holder proceeds to execute it for the balance after the property has been sold, this Section will apply—25 All 541 Dissented from.)]

5. ('12) 16 Ind Cas 190 (191) : 34 All 636. (Applies.)

('12) 13 Ind Cas 187 (187, 188) (All). (No.)

6. ('15) AIR 1915 Mad 407 (410). (Decree directing execution of conveyance.)

('15) AIR 1915 Bom 40 (41) : 39 Bom 256. (Compromise decree.)

6a. ('20) AIR 1920 Nag 40 (41).

[See also ('08) 5 All L Jour 403 (404). (Such as decree ordering sale of share in a non-existing village.)]

7. ('26) AIR 1926 Lah 544 (544).

8. ('10) 8 Ind Cas 727 (728) (Oudh).

[See also ('28) AIR 1928 Mad 1154 (1155).]

9. ('37) AIR 1937 Mad 113 (113).

('83) 6 Mad 359 (361).

('34) AIR 1934 Lah 610 (611, 612).

('10) 5 Ind Cas 474 (475) (Mad). (Also an application presented in time but corrected at the Court's direction and re-presented after time is not defective in any way and is not barred.)

This Section does not apply to decrees of Presidency Small Cause Courts and such decrees, though transferred for execution to the City Civil Court, are nonetheless not governed by the Section.¹⁰

The Section bars only the *execution of the decree* after the specified period. The rights of the decree-holder in other respects are not in any way affected by its provisions.¹¹

3. Retrospective operation of the Section. — It has already been observed in Note 3 to the Preamble that no one has a vested right in *procedure*. The right to execute a decree is only a right of *procedure* and not a *vested* right¹ and the law governing an application to execute a decree will be the law of procedure in force at the time of the *application* and not the law in force when the decree was passed.² Thus, where a mortgage decree is passed under the old Code but an application is presented for execution of that decree more than twelve years after the date of the decree and after the present Code came into force, the application will be barred though Section 230 of the old Code did not apply to mortgage decrees.³

4. "Application to execute a decree." — An application to execute a decree means an application under O. 21 R. 11 or otherwise by "which proceedings in execution are *commenced* and not merely an *incidental* application."¹ It should be an application in accordance with law, asking for a relief granted by the decree and for obtaining it in the mode admitted by law.² An application to the Court passing a decree to *transfer* it for execution to another Court is not such an application.³ But where a decree gives reliefs of different characters, there is nothing in the Code preventing separate and successive applications for execution as regards each of such reliefs.⁴

5. "Has been made." — As to the distinction between the present Section and old Section 230 in this respect, see Note 2 above. The words "under this Section and granted" which occurred after the word "made" in the old Section gave rise to

('26) AIR 1926 All 331 (331, 332):

[See ('30) AIR 1930 Mad 995 (998): 54 Mad 306.]

10. ('11) 11 Ind Cas 635 (637) : 36 Mad 108.

11. ('10) 5 Ind Cas 92 (93): 33 Mad 429. (Mortgage of a mortgage decree after 12 years — Mortgagee can sue decree-holder for recovery of moneys realised by him.)

('24) AIR 1924 Mad 163 (165, 167) : 47 Mad 120. (It does not mean that a decree more than 12 years old is not provable in insolvency proceedings.)

Note 3

1. ('13) 21 Ind Cas 113 (114, 115) (Cal). (The right to execute a decree is not a substantive right.)

('17) AIR 1917 Pat 485 (486). (No vested right in the procedure prescribed in that Code was acquired by the decree-holder.)

[But see ('10) 32 All 499 (502). (The right to enforce execution of decree is a substantive right.)]

2. ('26) AIR 1926 All 93 (94) : 48 All 121.

('81) 3 Mad 98 (101).

Section 230 of the Code of 1882 was held in the following cases not to revive decrees dead under the Code of 1877 :

('84) 6 All 388 (390).

('86) 8 All 419 (427).

3. ('21) AIR 1921 Bom 40 (49) : 45 Bom 365.

('13) 21 Ind Cas 923 (924) (Cal).

('17) AIR 1917 Pat 493 (494).

('13) 19 Ind Cas 391 (392) : 40 Cal 704.

('15) AIR 1915 Nag 103 (106) : 11 Nag L R 25.

('17) AIR 1917 Mad 315 (316).

('24) AIR 1924 All 696 (696).

('25) AIR 1925 Bom 326 (326).

('13) 19 Ind Cas 899 (900) (Cal).

[See however ('19) AIR 1919 Cal 1003 (1004). (The mere fact of coming into force of the new Code pending a suit on a mortgage under the Transfer of Property Act does not make the new S. 48 applicable to proceedings in execution of the decree in that suit.)]

Note 4

1. ('77) 3 Cal 235 (242) (FB).

('78) 2 Mad 1 (4).

('98) 1898 Pun Re No. 40, page 138.

2. ('89) 13 Bom 237 (239).

3. ('29) AIR 1929 Mad 745 (745).

('12) 14 Ind Cas 277 (277) (All).

('26) AIR 1926 All 660 (660).

('86) 1886 All W N 137 (137).

('98) 20 All 78 (79).

('10) 8 Ind Cas 168 (171) : 35 Bom 103.

('12) 14 Ind Cas 172 (173) : 34 All 396.

('89) 16 Cal 744 (746).

4. ('91) 18 Cal 515 (518).

As a general rule where the previous application has been suspended or stayed or dismissed for no fault of the decree-holder and the second application is similar in scope and character to the previous one, the second application will be deemed to be an *ancillary one in continuation* of the previous one.⁵ Where the *character* of the second application is different from that of the former, as for instance, where the relief claimed in the second application is against properties or persons different from those in the previous application, the second application will be deemed to be a "fresh application"

5. ('37) AIR 1937 Nag 92 (93) : I L R (1937) Nag 522.
- ('37) AIR 1937 Pat 43 (44). (Execution sale set aside—Next application for sale.)
- ('36) AIR 1936 Lah 843 (844). (Temporary release of attached property in pursuance of judgment-debtor's objections—Objections overruled in appeal—Re-attachment of the same property—Continuation of previous proceedings.)
- ('35) AIR 1935 Lah 911 (912). (Proceedings interrupted by claim suit.)
- ('24) AIR 1924 Pat 367 (369, 370).
- ('34) AIR 1934 Pat 532 (533). (Previous application for execution not proceeded with because of claim made and allowed—Subsequent application after the removal of the bar is one in continuation of the first.)
- ('34) AIR 1934 All 481 (487, 489, 493) : 56 All 791 (F B). (Execution petition for the sale of some of the mortgaged properties by transfer to Collector with a statement that in case of deficiency the other mortgaged properties may be sold—First prayer granted but no orders on second—Subsequent application for second relief is only a continuation of the first application.)
- ('31) AIR 1931 Bom 492 (494).
- ('22) AIR 1922 Mad 3 (5). (The theory of continuation applies only where the previous application has been interrupted by reason of circumstances over which the decree-holder has no control.)
- ('12) 14 Ind Cas 172 (173) : 34 All 396. (To render an application one in continuation of another application, it is necessary that the two applications should be of the same nature.)
- ('14) AIR 1914 Oudh 430 (432) : 17 Oudh Cas 169.
- ('18) AIR 1918 Pat 296 (297) : 3 Pat L Jour 103.
- ('11) 11 Ind Cas 48 (49) (Cal).
- ('13) 18 Ind Cas 841 (843) (Cal).
- ('09) 3 Ind Cas 940 (940) (Mad). (That the order "proceedings closed" did not amount to dismissal.)
- ('30) AIR 1930 Lah 647 (651). (On an application records consigned to the record room pending appeal—Nature of order is a question of intention.)
- ('84) 10 Cal 416 (423). (Striking off.)
- ('92) 16 Bom 294 (302, 303). (Application struck off not necessarily cancelled.)
- ('16) AIR 1916 All 24 (24). (Injunction.)
- ('26) AIR 1926 All 331 (332). (Applications by decree-holder to the Court executing the decree to go on from where the previous proceedings have been arrested and to complete the execution are to be considered as merely ancillary and therefore not barred by the Section.)
- ('98) 1898 All W N 137 (138) (Do.)
- ('12) 16 Ind Cas 541 (542) (Cal). (Judgment-debtor declared insolvent.)
- ('13) 20 Ind Cas 244 (245) (Cal). (Injunction.)
- ('09) 1 Ind Cas 341 (343) (Cal). (Execution saleset aside—Further application for execution is in continuation of previous one.)
- ('85) 1885 All W N 269 (269). (Postponement of execution to enable debtor to raise money—Subsequent application for execution held to be linked to the prior one.)
- ('88) 1888 All W N 295 (296). (First application made in May, 1883, struck off without either granting or refusing it.)
- ('05) 2 All L Jour 276 (277). (Former application never finally disposed of.)
- ('13) 21 Ind Cas 923 (924) (Cal).
- ('15) AIR 1915 Mad 407 (411). (Disposal of previous application not known.)
- ('08) 31 Mad 71 (74). (Conditions under which prior execution petition will be treated as pending.)
- ('10) 7 Ind Cas 707 (708) (All). (Obstruction by judgment-debtor—Application after removal of obstruction.)
- ('11) 10 Ind Cas 359 (360) (Cal).
- ('10) 6 Ind Cas 490 (490) (Lah). (First application struck off on judgment-debtor not being found—Second application for arrest held to be a continuation of the prior one.)
- ('99) 21 All 155 (158). (Do.)
- ('31) AIR 1931 Lah 125 (126). (Dismissal for decree-holder's default—Not a continuation.)
- See also the following cases to a similar effect under the old Code :*
- ('08) 30 All 499 (503, 504).
- ('09) 1909 Pun Re No. 45, page 148.
- ('83) 5 All 459 (461).
- ('98) 21 Mad 261 (263).
- ('83) 5 All 243 (244, 245).
- ('81) 5 Bom 29 (35).
- ('86) 8 All 545 (548).
- ('01) 23 All 13 (20).
- ('87) 14 Cal 385 (387).
- ('79) 4 Cal 415 (416, 417).
- ('06) 28 All 651 (654).
- ('86) 12 Cal 161 (164, 165).
- ('77) 1 All 355 (360) (F B).
- ('82) 9 Cal L Rep 297 (300).
- ('84) 6 All 23 (24).
- ('94) 21 Cal 387 (391).
- ('95) 17 All 425 (427).
- ('95) 17 All 243 (244).
- ('05) 27 All 334 (338) : 32 Ind App 102 (P C).
- ('01) 1901 All W N 117 (117).

within the meaning of this Section.⁶ Similarly, where the proceedings under the prior application have *come to an end*, the second application cannot be taken to be one in continuation of the prior application.^{6a}

Where an application made within twelve years of the specified date is found to be defective, an amendment thereof after twelve years is not necessarily *ultra vires* of the powers of the Court. But a decree-holder who is not diligent should not in the absence of special and sufficient grounds be allowed to circumvent the provisions of this Section by way of amendment. Where the decree-holder applied on the last day of limitation for the arrest and attachment of *moveable* property of the judgment-debtor and thereafter sought to amend it by adding a prayer for the attachment of *immovable* property, it was held that the result of allowing the amendment would be to circumvent the provisions of this Section and that it should not therefore be allowed.^{6b} Where an amendment is allowed, the question whether it will operate so as to make the application a proper one for the purposes of the Section on the date on which it was made, depends upon the circumstances of each case.⁷ If the defect is not a fundamental one, it will have such operation.⁸ If it is a fundamental one, the amendment will not operate to save limitation under this Section.⁹

A Court executing a decree, while rejecting an application for execution, is not competent to order that a fresh application may be filed within a certain time when such an application would be barred by the Section.¹⁰

8. Successive applications for execution of decrees of Courts other than Chartered High Courts. — See Note 2 above. As has been observed in that Note, this Section only fixes the *maximum* limit of time for execution of a decree and subject to such outside limit, a final order on a previous execution application or an application to take some step-in-aid of execution will afford a fresh starting point of limitation.¹

6. ('36) AIR 1936 Pesh 209 (210).
 ('29) AIR 1929 P C 209 (212) (P C).
 ('96) 18 All 9 (11). (First application for attachment—Second for arrest.)
 ('12) 13 Ind Cas 929 (929) (All). (First application for arrest—Second for attachment.)
 ('31) AIR 1931 All 31 (32). (Do.)
 ('02) 1902 Pun L R No. 112.
 ('10) 5 Ind Cas 815 (816) : 1910 Pun Re No. 17. (First application against moveables — Second against immovables.)
 ('28) AIR 1928 Cal 241 (243). (First application for rateable distribution—Second application for attachment and sale.)
 ('81) 7 Cal 556 (558, 559). (Substitution of new properties.)
 ('31) AIR 1931 All 184 (134) : 53 All 419. (Do.)
 ('24) AIR 1924 Cal 131 (132) : 50 Cal 743. (Adding of new properties.)
 ('26) AIR 1926 All 93 (95) : 48 All 121.
 ('18) AIR 1918 Mad 449 (449). (Prior application for sale of hypothecated property—Second application for sale of other properties.)
 6a. ('12) 13 Ind Cas 160 (160) (Mad).
 [See also ('93) 1893 All W N 124 (125).
 ('13) 20 Ind Cas 563 (564) (Lah).]
 6b. ('36) AIR 1936 Mad 623 (624).
 7. ('28) AIR 1928 Mad 1154 (1155, 1156).
 8. ('35) AIR 1935 Mad 161 (163). (Execution application filed bona fide against wrong legal

representative within time—Amendment allowed but after 12 years' time—Amendment takes effect from date of original representation.)

- ('15) AIR 1915 Mad 1042 (1043).
 ('05) 1905 Pun Re No. 27. (Amendment as to particulars.)
 [See also ('30) AIR 1930 Oudh 65 (66) : 5 Luck 458. (Application returned for not filing process-fee with the application—Amendment is retrospective.)]
 9. ('15) AIR 1915 Mad 1042 (1043).
 ('90) 17 Cal 631 (636, 637, 638 and 641) (FB).
 ('28) AIR 1928 Lah 808 (811). (Application to file a supplementary list of properties.)
 ('27) AIR 1927 Mad 347 (347). (Amendment by adding other items of property.)
 ('05) 15 Mad L Jour 243 (244). (An application for arrest of judgment-debtor if subsequently amended by a prayer for execution against his properties is a fresh application.)
 ('02) 1902 Pun L R No. 112. (Do.)
 ('03) 26 Mad 101 (103). (Petition when filed unverified.)
 ('29) AIR 1929 Pat 407 (409) : 8 Pat 462. (Amendment by substituting immovables properties in place of moveables cannot be made.)
 10. ('09) 4 Ind Cas 958 (959) (Lah).

Note 8

1. See Article 182 (5) of the Limitation Act, as amended by Act IX of 1927.

As to what are "steps-in-aid of execution," see the Limitation Act, Article 182 and also the undermentioned cases.²

9. Applicability of the Section to Chartered High Courts—Sub-section 2 (b) — Sub-section 2 (b) is new. It was held under the old Code that, in view of the provision in Article 180 of the Limitation Act, 1877, for a revivor of the decrees of Chartered High Courts in the exercise of *ordinary original civil jurisdiction* and of orders of His Majesty in Council, Section 230 did not apply to Chartered High Courts in the exercise of *ordinary original civil jurisdiction*.¹ Sub-section 2 (b) has been added to give legislative recognition to that view. In the case of such decrees and orders, therefore, any number of applications for execution can be made and cannot be refused² unless they are barred on the principle of *res judicata*³ or under Article 183 of the Limitation Act, 1908. Article 183 of the Limitation Act, 1908, does not however apply to decrees of Chartered High Courts in the exercise of *appellate jurisdiction*.⁴

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|--|---|
| 2. ('84) 7 Mad 306 (307). | ('10) 5 Ind Cas 758 (758) (Mad). |
| ('91) 15 Bom 405 (407). | ('29) AIR 1929 Bom 279 (288). |
| ('98) 22 Bom 722 (726). | ('10) 8 Ind Cas 833 (834) (Cal). |
| ('95) 22 Cal 375 (377). | ('12) 17 Ind Cas 30 (30) : 36 Bom 638. |
| ('98) 2 Cal W N cclxxi (Note). | ('10) 5 Ind Cas 147 (148) (Cal). |
| ('18) 18 Ind Cas 97 (98) : 16 Oudh Cas 70. | ('83) 5 All 344 (345). |
| ('18) 19 Ind Cas 664 (665) : 35 All 389. | ('98) 25 Cal 594 (601) (FB). |
| ('98) 20 Cal 755 (757). | ('94) 21 Cal 23 (26). |
| ('94) 1894 Pun Re No. 27. | ('94) 16 All 75 (77). |
| ('97) 24 Cal 778 (780, 784). | ('96) 23 Cal 817 (821). |
| ('11) 9 Ind Cas 800 (801) (All). | (1900) 27 Cal 285 (288). |
| ('13) 21 Ind Cas 782 (783) (Mad). | ('82) 5 Mad 141 (142). |
| ('91) 15 Bom 242 (244). | ('96) 19 Mad 67 (70). |
| ('91) 15 Bom 245 (247). | ('97) 19 All 71 (72). |
| ('99) 26 Cal 888 (890). | (1900) 27 Cal 210 (212, 215). |
| ('88) 6 Mad 250 (251). | ('09) 2 Ind Cas 88 (88) (All). |
| ('94) 17 Mad 76 (77). | ('09) 31 All 309 (312). |
| ('15) AIR 1915 Mad 1042 (1043). | ('99) 23 Bom 478 (483). |
| ('08) 31 Mad 234 (235). | ('85) 7 All 898 (899). |
| ('08) 31 Mad 68 (69). | ('89) 16 Cal 747 (748). |
| ('93) 16 Mad 452 (453). | ('91) 13 All 124 (126). |
| ('99) 23 Bom 644 (651). | ('04) 31 Cal 1011 (1013). |
| ('91) 13 All 89 (92). | ('88) 11 Mad 336 (339). |
| ('88) 15 Cal 363 (365). | ('95) 22 Cal 827 (829). |
| ('96) 23 Cal 690 (692). | ('99) 23 Bom 311 (312). |
| ('91) 13 All 211 (213). | ('85) 11 Cal 227 (229). |
| ('12) 14 Ind Cas 468 (469) : 1912 Pun Re No. 60. | ('98) 21 Mad 400 (401). |
| ('15) AIR 1915 Mad 314 (315). | ('83) 9 Cal 730 (731). |
| ('94) 21 Cal 23 (26). | (1900) 22 All 358 (359). |
| ('97) 19 All 477 (479). | ('03) 30 All 179 (180). |
| (1900) 27 Cal 709 (713). | ('97) 19 All 337 (339). |
| ('01) 24 Mad 185 (188). | ('99) 22 Mad 448 (452). |
| ('09) 1 Ind Cas 430 (431) (Cal). | ('98) 20 All 304 (306, 307). |
| ('82) 8 Cal 89 (91). | ('04) 26 All 608 (610). |
| ('84) 10 Cal 549 (550, 551). | ('96) 22 Bom 83 (85). |
| ('94) 17 Mad 165 (166). | ('10) 6 Ind Cas 490 (490) (Lah). |
| ('96) 23 Cal 196 (199). | ('88) 1888 Pun Re No. 27, p. 73. |
| ('98) 22 Bom 340 (343). | ('08) 1908 Pun Re No. 103, p. 480 (FB). |
| ('12) 14 Ind Cas 335 (339) (Lah). | |
| ('01) 24 Mad 188 (194). | |
| ('80) 3 All 320 (321). | |
| ('82) 4 All 60 (62). | |
| ('86) 12 Cal 603 (609). | |
| ('87) 9 All 9 (10). | |
| ('90) 12 All 399 (403, 404). | |
| ('93) 20 Cal 696 (698). | |
| ('14) AIR 1914 Bom 288 (289) : 38 Bom 47. | |

Note 9

1. ('09) 1 Ind Cas 168 (174) : 36 Cal 543.
2. See Art. 183 of the Limitation Act, 1908.
3. See S. 11, Note 23.
4. ('72) 14 Moo Ind App 465 (484) (PC). (Case under Act XIV of 1859.)

10. "Date of the decree sought to be executed." — In the absence of the circumstances specified in sub-section 1 (b) and in the absence of anything postponing the period of execution, the period of twelve years is to be computed from the date of the decree.¹ The date of the decree is the date which it ought to bear under O. 20 R. 7 and not the date when it is actually prepared and signed by the Judge.²

Where there is a preliminary and a final decree in a suit, the two must, for the purposes of this Section, be taken to be a single and indivisible decree and the date from which the time is computed is the date of the *final* decree.³ Where a decree is amended, the date of the amendment will not give a fresh starting point of limitation under this Section.⁴ In the case of a combined mortgage decree which provides that if the nett proceeds of the sale are not sufficient to satisfy the mortgagee's claim the balance be realised from the person and other properties of the mortgagor, the period will run from the date of the decree in respect of *both* remedies.⁵ If, however, after the sale of the mortgaged properties a personal decree for the balance is passed under O. 34 R. 6, time will run in respect of the personal decree from the date thereof.⁶ Where a redemption decree does not mention any date for the payment of the mortgage debt, it must be taken as payable on the date of the decree itself.⁷

The words "or of the decree in appeal confirming the same" have been omitted in this Section as being a mere surplusage. Where there has been an appeal from the original decree, the period under the Section is to be computed from the date of the appellate decree even though the appeal was only from a *portion* of the original decree⁸

('81) 6 Cal 201 (202).

Note 10

1. (1900) 2 Bom L R 199 (200).

('08) 11 Oudh Cas 57 (58, 59).

2. ('97) 1 Cal W N 93 (94).

('18) AIR 1918 Bom 217 (218) : 42 Bom 309.

3. ('16) AIR 1916 Cal 482 (483).

('24) AIR 1924 Cal 131 (132) : 50 Cal 743.

('07) 6 Cal L Jour 462 (465). (Final decree awarding mesne profits.)

('18) AIR 1918 All 254 (255) : 40 All 211. (Direction for enquiry into mesne profits—Assumed to operate as a final decree.)

('97) 19 All 520 (521). (Order absolute under S. 89 of the Transfer of Property Act now equivalent to a final decree.)

[But see ('27) AIR 1927 Mad 842 (844). (Decree directing ascertainment of mesne profits in execution—Time runs from date of decree and not from date of ascertainment.)

('16) AIR 1916 Mad 288 (290) : 39 Mad 544. (Decree-holder will have 12 years from date of order absolute under S. 89 of the Transfer of Property Act—The decree under S. 88 itself could have been executed within 12 years from the date thereof.)

Note:—In both the above cases, the decrees were passed under the old Code. The points are not likely to arise under this Code which provides for a preliminary and a final decree in such cases.

('22) AIR 1922 Bom 95 (95) : 46 Bom 761. (Mortgage decree under Dekkhan Agriculturists' Relief Act — No necessity for decree absolute — Time runs from date of decree.)]

4. ('35) AIR 1935 Lah 292 (294).

('34) AIR 1934 Oudh 465 (469). (AIR 1932 All 351 Followed.)

('18) AIR 1918 Bom 217 (221) : 42 Bom 309.

('32) AIR 1932 All 351 (352) : 54 All 622. (60 Ind Cas 318 dissented.)

[But see ('21) 60 Ind Cas 318 (319) (Pat).

('26) 99 Ind Cas 204 (205) (Oudh).]

5. ('17) AIR 1917 P C 85 (85) (PC).

('15) AIR 1915 Cal 8 (8).

('16) AIR 1916 Mad 972 (974).

('21) AIR 1921 Cal 456 (456, 457).

('25) AIR 1925 Mad 331 (331).

('28) AIR 1928 Cal 668 (668, 669).

('26) AIR 1926 Mad 954 (955) : 50 Mad 5.

In view of the Privy Council ruling in AIR 1917

PC 85, the following decisions are no longer law:

('18) AIR 1918 Mad 1187 (1194) : 40 Mad 989 (FB).

('12) 15 Ind Cas 822 (824) : 36 Bom 368.

[See also ('26) AIR 1926 Mad 20 (28) : 48 Mad 846. (AIR 1918 Mad 1187 (FB) and AIR 1918 Mad 607 were held to be overruled by AIR 1917 P C 85 (PC).)]

6. ('26) AIR 1926 Mad 954 (955) : 50 Mad 5.

('20) AIR 1920 Cal 378 (379).

7. ('89) 13 Bom 567 (570).

('92) 16 Bom 480 (485, 486).

('99) 23 Bom 592 (594).

8. ('03) 26 Mad 91 (93, 95, 96) (F B).

('11) 12 Ind Cas 75 (75) (Mad).

('77) 1 All 508 (509).

('81) 6 Cal 194 (196).

('82) 4 All 274 (276). (It is not necessary that the appeal should be from the original decree in the suit—The appeal may be from decree passed on review.)

and even if the original decree is confirmed in appeal⁹ or is dismissed as not pressed.^{9a} The same principle applies to cases of appeals to the Privy Council.¹⁰ Where, however, an appeal is preferred where no appeal lies,¹¹ or where an appeal is withdrawn¹² or is dismissed for default,¹³ or is rejected for insufficiency of stamp,¹⁴ time will run only from the *original* decree. Where a decree is passed *severally* against two or more defendants and one of the defendants appeals, the period of twelve years as against the other defendants runs from the date of the original decree.¹⁵ In the light of the decision in A.I.R. 1932 Privy Council 165, the above view might require reconsideration.

Where an application to set aside an *ex parte* decree has been rejected, the period for the execution of the *ex parte* decree runs from the date of the decree notwithstanding the pendency of the application.¹⁶

It has been held in the undermentioned case¹⁷ that this Section obviously refers to a decree which is *capable of execution* and that in the case of a decree which is not capable of execution except on the happening of a particular contingency, time will not begin to run until that contingency occurs.

11. Subsequent order, meaning of. — Where a subsequent order directs payment of money or delivery of property at a future date, the period of twelve years will run from such date.¹ Thus, an order under O. 20 R. 11 (2) will be a subsequent order within the meaning of this Section.² According to the High Courts of Allahabad³

('83) 9 Cal 100 (102).

('84) 6 All 14 (16).

('86) 8 All 573 (575).

('89) 16 Cal 598 (602, 603).

('92) 19 Cal 750 (755).

('95) 17 All 103 (105).

('95) 22 Cal 467 (472).

('96) 23 Cal 876 (883).

('98) 22 Bom 500 (505, 508).

('98) 25 Cal 594 (601, 602). (FB).

('99) 23 Mad 60 (67, 69).

('07) 1907 Pun Re No. 32, p. 124.

('12) 16 Ind Cas 370 (372) (Cal).

('05) 27 All 501 (504, 505, 508, 509). (FB).

[See however ('78) 2 Cal L Rep 471 (473). (Appeal by one of the defendants with respect to his share not imperilling the whole decree—Time runs against the non-appealing defendants from the original decree.)]

9. ('11) 12 Ind Cas 75 (75) (Mad).

('94) 18 Bom 203 (205).

('10) 5 Ind Cas 473 (474): 32 All 136. (Dismissing appeal on the ground that it had abated, dissenting from 20 All 124 which was a case under the Limitation Act.)

('95) 19 Bom 258 (260).

('09) 2 Ind Cas 364 (364): 31 All 379. (Though appellate decree is the one to be executed, it does not by implication extend the time fixed by original decree for performance of any condition precedent.)

('08) 31 Mad 28 (31, 32). (Such extension must follow impliedly or expressly from the appellate decree.)

('87) 11 Bom 172 (173). (Such extension is a question of intention of the appellate decree.)

9a. ('38) AIR 1938 Pat 401 (402).

('08) 30 All 385 (386, 387).

10. ('80) 2 All 763 (764, 765).

('81) 7 Cal 620 (622, 627).

11. ('26) AIR 1926 All 440 (442, 443): 48 All 377.

[But see ('21) AIR 1921 All 134 (134): 43 All 405.]

12. ('03) 1903 Pun Re No. 54, p. 266.

13. ('18) AIR 1918 Oudh 446 (449).

14. ('84) 6 All 438 (439).

15. ('26) AIR 1926 Cal 664 (664).

('91) 13 All 1 (15, 16) (F B).

('04) 1 All L Jour 409 (411).

('23) AIR 1923 Bom 400 (400). (Decree against A but not against B — Plaintiff appealing for decree against B also — Appeal dismissed — Time against A runs from original decree.)

16. ('92) 16 Bom 123 (125).

17. ('39) AIR 1939 Bom 75 (78): ILR (1939) Bom 87.

Note 11

1. ('09) 1 Ind Cas 48 (49) (Lah).

2. ('21) AIR 1921 Pat 340 (340).

('17) AIR 1917 Mad 188 (188). (But the application under O. 21 R. 11 must have been made within limitation period of Article 175 — Otherwise order of the Court is without jurisdiction and will not save time—However, see AIR 1923 Lah 381 where it was held that as the parties agreed to such an application which was made beyond limitation, the application was good.)

[See ('24) AIR 1924 Lah 342 (344).]

[See also ('25) 21 Mad L W (Jour S R C) 29 (29) (Per Wallace, J.)]

[But see ('08) 18 Mad L Jour 548 (549). (Order under Sec. 257-A of the old Code (now deleted) held not to be a subsequent order.)]

3. ('18) AIR 1918 All 216 (218): 40 All 198.

('32) AIR 1932 All 273 (279, 282, 285): 54 All 573 (F B).

('83) 1883 All W N 147 (147). (Arrangements for paying off decree in instalments not carried out by order of Court.)

[See also ('91) 1891 All W N 12 (13). (Order made without jurisdiction will not save time.)]

and Patna⁴ and the Chief Court of Oudh,^{4a} a subsequent order must be one passed by the Court which passed a decree *as such* Court and not an order of an *executing* Court. The Bombay High Court⁵ has, on the other hand, held that the order may be of *any competent Court* including a Court of execution. The Calcutta⁶ and Lahore⁷ High Courts and the Courts of the Judicial Commissioner of Nagpur⁸⁻⁹ and Sind^{9a} are also inclined to this latter view.

12. "At a certain date or at recurring periods." — Where a decree does not fix a *definite* date the question whether a sum is payable by a certain date should be ascertained by construction of the decree and if so ascertainable, time runs from that date.¹ An order merely directing a compromise petition for payment by instalments to be filed, is not an order directing payments to be made at a *particular date*.²

Decrees for payment in instalments, annual or monthly,³ and decrees for future maintenance,⁴ are decrees for payment "at recurring periods." Time in the case of such decrees and of decrees for the payment of money at a particular date, runs from the date of default or the expiry of the period as the case may be.⁵ Where an instalment decree provides for the payment of the whole sum in default of any one instalment and either no option is given to the decree-holder or an option is given and exercised by him, time for the execution of the whole decree runs from the date of the *first default*.⁶

In the undermentioned case,^{6a} an instalment decree provided that in default of payment of any instalment, the decree-holder was entitled to realise the whole amount of the decree at once. It was held that such a decree could not be considered to be a decree payable "at a certain date" within the meaning of this Section, and that therefore, after 12 years from the date of the default, only that instalment will be barred in respect of which the default was made.

Where a decree is for delivery of possession of immovable property contingent on the non-payment of annuity, the decree-holder is not bound to execute for

4. ('85) AIR 1935 Pat 380 (381) : 14 Pat 816.

('21) AIR 1921 Pat 340 (340).

('18) AIR 1918 Pat 216 (217).

4a. ('36) AIR 1936 Oudh 266 (266) : 12 Luck 244.

5. ('25) AIR 1925 Bom 503 (504) : 49 Bom 695.

6. ('38) AIR 1938 Cal 25 (30) : I L R (1937) 2 Cal 373.

('29) AIR 1929 Cal 687 (689) : 57 Cal 789.

('85) 11 Cal 143 (145).

[But see ('12) 13 Ind Cas 88 (90) (Cal).]

7. ('26) AIR 1926 Lah 465 (466).

('89) 1889 Pun Re No. 200, page. 706. (Arrangement of parties in execution as to satisfaction of decree—Parties cannot be allowed to turn back upon it.)

[But see ('23) AIR 1923 Lah 678 (678). (Where a Court executing the decree records a compromise the original decree is not altered thereby and the period will still be calculated from the date of the decree.)]

8-9. ('31) AIR 1931 Nag 50 (51) : 27 Nag L R 150.

9a. ('39) AIR 1939 Sind 93 (96).

Note 12

1. ('91) 14 Mad 396 (398).

('89) 1889 Pun Re No. 159.

2. ('89) 16 Cal 16 (18, 19).

('82) 4 All 155 (156).

('32) AIR 1932 All 273 (282) : 54 All 573 (F B).

3. ('92) 1892 Pun Re No. 13, page. 64 (F B).

(Instalment decree—Execution can be taken for instalments not barred.)

('85) 9 Bom 328 (332).

4. ('87) 9 All 33 (34).

('31) AIR 1931 Bom 492 (494). (Amount of maintenance directed to be determined in execution—Time runs from date of such determination.)

('92) 19 Cal 139 (144, 145, 146) (F B).

('94) 16 All 179 (181).

('95) 22 Cal 903 (908).

('10) 6 Ind Cas 826 (829) : 38 Cal 13.

5. ('94) 1894 Pun Re No. 89.

('88) 12 Bom 65 (67). (Right to execute accruing on a particular day—Limitation should be computed from that day.)

('07) 30 Mad 504 (505).

('24) AIR 1924 All 263 (264) : 46 All 73.

6. ('85) 7 All 373 (375). (Decree by instalments.)

('19) AIR 1919 Cal 322 (323).

('25) AIR 1925 Bom 326 (326).

('31) AIR 1931 Bom 263 (264). (Option given and exercised.)

6a. ('36) AIR 1936 Lah 159 (160).-

possession on the occurrence of the first default but might execute it on the occurring of any subsequent default.⁷

Where a decree directs that money be recoverable from a party only on failure to recover the same from another, the period of 12 years runs from the date of decree and not from the time of the failure of the other to make the payment.⁸

13. Exclusion of time during minority or other disability of decree-holder. — See Section 6 Note 21 of the Authors' Commentaries on the Limitation Act.

14. Deduction of time for other causes. — Where the period of twelve years expires on a day when the Court is closed, the application can be presented on the next re-opening day on the broad principle that where the parties are prevented from doing a thing by the act of the Court they are entitled to do it at the first subsequent opportunity.¹

As to whether the Sections of the Limitation Act extending the period of limitation "prescribed" apply to the period of twelve years under this Section, see the Authors' Commentaries on the Limitation Act² and the undermentioned cases.^{2a}

In cases of intervening insolvency of the judgment-debtor the period during which the adjudication lasts will be excluded in computing the period of twelve years under this Section.³

By virtue of Section 48 of the Dekkhan Agriculturists' Relief Act, 1879, the time spent in obtaining the conciliator's certificate can be deducted in computing the period of limitation under this Section.⁴

Where property is under the management of the Collector under Schedule III of the Code, the period of such management can be excluded under Para. 11 (3) of Schedule III in calculating the "period of limitation" applicable to the execution of any decree in respect of any remedy of which the decree-holder has been temporarily deprived. The expression "period of limitation" has been interpreted as including the period fixed by Section 48.⁵ But Para. 11 (3) only applies when the decree has been transferred to the Collector for execution⁶ and only in respect of any remedy of which the decree-holder is temporarily deprived.⁷

The pendency of an appeal by the judgment-debtor is not a ground of suspension of the period prescribed by this Section in the absence of fraud or force.⁸ When a decree is conditional on the redemption of a prior mortgage and the decree-holder redeemed the prior mortgage after twelve years from the date of his decree, the period up to the date of the redemption is not excluded, as nothing prevented him from redeeming it earlier and applying for execution within time.⁹

7. ('94) 16 All 237 (238, 239).

8. ('26) AIR 1926 Mad 20 (23) : 48 Mad 846.

Note 14

1. ('91) 18 Cal 631 (634).

('85) 7 All 107 (108).

('99) 22 Mad 179 (182).

('16) 3 Cal L Jour 339 (343).

2. See Note 3 to S. 4; Note 3 to S. 15; Note 15 to S. 19; Note 10 to S. 20.

2a. ('39) AIR 1939 All 403 (405, 412) (F B).
(Following 1 Cal 226 (P O).)

('39) AIR 1939 Bom 75 (77) : 1 L R (1939) Bom 87. (Dissenting from AIR 1922 Mad 268.)

3. ('39) AIR 1939 Mad 270 (272).

('21) AIR 1921 Cal 456 (457).

('12) 16 Ind Cas 541 (542) (Cal).

('32) AIR 1932 Oudh 69 (71):7 Luck 397. (S. 48 is controlled by S. 78(2), Provincial Insolvency Act.)

4. ('18) AIR 1918 Bom 187 (188) : 42 Bom 367.

5. ('37) 1937 Oudh W N 1116 (1117).

('34) AIR 1934 Oudh 465 (470).

('19) AIR 1919 All 64 (65) : 42 All 118.

('10) 8 Ind Cas 377 (378) : 13 Oudh Cas 303.

[See also ('95) 19 Bom 261 (267, 268). (Remittances by Collector—Step-in-aid.)

6. ('15) AIR 1915 Mad 449 (451).

('16) AIR 1916 Mad 972 (972).

7. ('15) AIR 1915 Nag 103 (106) : 11 Nag L R 25.

8. ('17) AIR 1917 Cal 460 (461).

9. ('13) 18 Ind Cas 897 (897) (All).

8

15. "By fraud or force." — Sub-section (2) (a) of this Section permits the execution of a decree at any time within twelve years after the date on which the judgment-debtor has by fraud or force prevented the execution of a decree in an application properly made for execution. In other words, fraud or force which prevents execution gives a fresh period of twelve years within which the decree may be executed.¹ In order to get the benefit of this sub-section it must be proved that —

(1) there was fraud or force on the part of the judgment-debtor,² and

(2) the decree-holder was thereby prevented from executing the decree.³

The fraud however need not be such as to have continued to prevent execution up to the expiry of the twelve years.⁴ There is a conflict of opinion on the question whether the Court has any discretion to refuse execution even when fraud or force on the part of the judgment-debtor preventing execution is established within twelve years of the application. According to the Calcutta High Court⁵ the Court has such discretion which will be exercised in favour of the decree-holder if he had been *diligent* in proceeding with the execution of the decree from the date of the decree. The Madras High Court is, on the other hand, inclined to the view that no such discretion exists under the Section.⁶ The Oudh Judicial Commissioner's Court has held⁷ that even in the view of the Calcutta High Court stated above, the due diligence required is nothing more than keeping the decree alive under the provisions of the Code. It is submitted with respect that the Madras view is correct. The language of the sub-section makes it clear that sub-section (1) which precludes the Court from ordering execution in the cases specified does not bar an application made after the specified period if the conditions mentioned in sub-section (2) are satisfied. There is nothing to show that the Court has any *discretion* in the matter.

The term "fraud" in the Section should be interpreted in a very liberal sense.⁸ Any improper means resorted to by the judgment-debtor to prevent execution of the decree would amount to such fraud.⁹ The term includes not merely deceit but also circumvention.¹⁰ But mere objections by the judgment-debtor cannot be taken advantage of as "fraud" within the meaning of this Section.¹¹ In the case noted below^{11a} an objection raised to the jurisdiction of the Court was held not to amount to fraud.

Note 15

1. ('99) 22 Mad 320 (322, 323).

('11) 11 Ind Cas 672 (672) : 34 All 20.

('20) AIR 1920 Nag 68 (69).

('10) 8 Ind Cas 805 (805) (Mad.)

2. ('10) 8 Ind Cas 805 (805) (Mad).

('35) AIR 1935 Mad 8 (11) : 58 Mad 311. (Fraud committed by judgment-debtor—Decree-holder can avail of it against legal representative.)

[See also ('32) AIR 1932 All 273 (277, 284) : 54 All 573 (F B).]

3. ('35) AIR 1935 Pat 380 (382) : 14 Pat 816.

('29) AIR 1929 Pat 597 (599).

('98) 8 Mad L Jour 203 (204).

('09) 4 Ind Cas 958 (959) (Lah).

('12) 13 Ind Cas 88 (89) (Cal).

('19) AIR 1919 Mad 197 (198).

[But see ('35) AIR 1935 Mad 8 (11) : 58 Mad 311. (Case law of Madras High Court discussed.)]

4. ('11) 12 Ind Cas 793 (795) : 14 Oudh Cas 238.

('97) 1 Cal W N clxii.

('99) 22 Mad 320 (322, 323).

('19) AIR 1919 Mad 197 (198).

5. ('06) 11 Cal W N 440 (441).

6. ('11) 12 Ind Cas 679 (681) : 35 Mad 670. (Even assuming due diligence is necessary, continuous diligence during all the time prior to the application need not be shown.)

7. ('11) 12 Ind Cas 793 (795) : 14 Oudh Cas 238.

8. ('12) 18 Ind Cas 1008 (1008) (Mad).

('12) 13 Ind Cas 88 (89) (Cal). (The term "fraud" in S. 48 should be interpreted in a wider sense than that in which it is used in English law.)

('31) AIR 1931 All 31 (33).

('11) 12 Ind Cas 679 (680) : 35 Mad 670.

9. ('36) AIR 1936 Lah 843 (845). (Frivolous objection taken by the judgment-debtor was held to amount to fraud.)

('19) 18 Ind Cas 1008 (1008) (Mad).

10. ('36) AIR 1936 Lah 843 (845).

('27) AIR 1927 All 668 (669).

11. ('35) AIR 1935 Pat 380 (382) : 14 Pat 816.

('27) AIR 1927 All 668 (669).

('31) AIR 1931 All 134 (134) : 53 All 419.

11a. ('36) AIR 1936 Lah 843 (845).

But raising a plea based on a false statement would be fraudulent.^{11b} Where there are frequent futile and false objections raised by the judgment-debtor accompanied by his keeping out of the way when warrants of arrest are issued, his conduct may be taken to amount to fraud.¹² In the following instances the conduct of the judgment-debtor has been held to amount to fraud within the meaning of the Section —

- (1) Where he raised frivolous objections in order to delay execution of the decree against him.¹³⁻¹⁴
- (2) Where he wilfully evaded the arrest warrant.¹⁵
- (3) Where, knowing that a warrant of attachment was issued against his moveable property, he locked up his house and so prevented the moveable property therein being attached.¹⁶
- (4) Where he or his heirs made fictitious and fraudulent alienation of property which was subsequently set aside in a regular suit.¹⁷
- (5) Where he kept out of British India so that the decree-holder was not in a position to take out execution against his person.¹⁸

Where the Court merely refused to permit execution against properties of the judgment-debtor in the hands of a receiver but it was open to the decree-holder to proceed against the person and other properties of the judgment-debtor or of the surety and he did not do so within the twelve years, it was held that Section 48 (2) was of no help to the decree-holder.¹⁹

Fraud or force of one judgment-debtor will not extend the time against a co-judgment-debtor who did not resort to it.²⁰

16. Appeal from orders under the Section. — An order granting or refusing execution of a decree under the Section is, it is conceived, a final order amounting to a decree under Section 47 and is therefore appealable.

17. Plea of bar under the Section, when to be raised. — Where notice of petition for attachment in execution is duly served on the judgment-debtor who allows orders to be passed *ex parte*, he cannot ask for a review of the order, nor can he in appeal raise the plea that the execution application is barred by the expiry of the

11b. ('36) AIR 1936 Lah 843 (845). (But mere raising of objections so as to prolong execution proceedings beyond the period of limitation is not necessarily fraud.)

12. ('12) 13 Ind Cas 929 (929) (All).

('83) 6 Mad 365 (367).

('09) 2 Ind Cas 222 (222) (All).

13-14. ('11) 12 Ind Cas 793 (794, 795): 14 Oudh Cas 288. (It is sufficient to show that the judgment-debtor on various occasions within the aforesaid period dishonestly prevented the execution of the decree against him by frivolous devices.)

('34) AIR 1934 Pat 532 (533). (The judgment-debtor fraudulently setting up a claimant to the attached property—Claim set aside by separate suit.)

('22) AIR 1922 All 145 (146): 44 All 319.

('17) AIR 1917 Oudh 69 (71).

[But see ('12) 13 Ind Cas 88 (89) (Cal). (The mere fact that the judgment-debtor objects to

a sale which objection ultimately proves unsuccessful will not amount to fraud.)]

15. ('20) AIR 1920 Mad 492 (493).

('24) AIR 1924 Mad 836 (837).

('12) 13 Ind Cas 929 (929) (All).

16. ('85) 9 Bom 318 (319).

('99) 22 Mad 320 (322, 323).

[But see ('17) AIR 1917 Oudh 159 (160). (Keeping the doors closed is per se no evidence at all of fraudulent conduct on the part of a lady, unless there is anything to show that she deliberately does so or attempts to do so against the executing officer.)]

17. ('82) 4 Mad 292 (294).

18. ('25) AIR 1925 Nag 82 (90): 22 Nag L R 67.

19. ('29) AIR 1929 Pat 597 (599).

20. ('16) AIR 1916 Mad 1 (2): 38 Mad 419.

('31) AIR 1931 Mad 381 (383).

('30) AIR 1930 Sind 218 (219).

twelve years under the Section.¹

Where an executing Court decides that the execution of a decree is not barred, notwithstanding the provisions of this Section, it is merely an erroneous decision and not an illegal exercise of jurisdiction. Therefore, so long as the order is not set aside in appeal or revision, it cannot be attacked in any collateral proceeding on the ground of want of jurisdiction in the executing Court.²

TRANSFEREES AND LEGAL REPRESENTATIVES

Transferee.

49. [S. 233.] Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

[1877, S. 233. See O. 21 R. 16.]

Synopsis

1. Scope and object of the Section.
2. Equity of the judgment-debtor to set off cross-decree.
3. Transferee during pendency of suit by judgment-debtor takes it subject to the result of the suit.
4. Other equities enforceable against the assignee.
5. Assignee's want of knowledge of equity, if affects rule.

Other Topics

Assignment before or during appeal. See Note 3.

Assignee bound by S. 99, T. P. Act. See Note 4.

1. Scope and object of the Section. — This Section may be compared with Section 132 of the Transfer of Property Act, 1882, which is based on the same principle,¹ namely, that the assignee of a claim stands in no better position than the assignor as regards equities existing between the assignor and his debtor at the time of the assignment.^{1a} An attaching decree-holder is an "assignee" of the attached decree within the meaning of O. 21 R. 16 and is, under this Section, subject to the same equities that the judgment-debtor in attached decree had against his decree-holder.² The equity, to which a transfer of a decree is subject, must, however, be one available against the *original decree-holder* and not one available against others.³ A mere *claim* for restitution made by the judgment-debtor against the original decree-holder is not an equity which can be availed of against an assignee from the decree-holder.⁴ The equity which the judgment-debtor seeks to enforce against the transferee must have been existent at the date of the assignment.⁵

Note 17

1. ('29) AIR 1929 Mad 826 (826, 827).

[But see ('38) AIR 1938 All 89 (90). (Objection as to bar not raised on notice of application for execution—Objection to confirmation of sale on the ground that execution was barred by limitation, allowed to be raised.)]

2. ('34) AIR 1934 Cal 282 (283): 61 Cal 234.

Section 49 — Note 1

1. Section 132 of the Transfer of Property Act runs as follows: "The transferee of an actionable

claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of transfer."

1a. ('10) 7 Ind Cas 55 (59, 60) (Cal). (Fraudulent assignment.)

('74) 21 Suth W R 141 (143).

2. ('25) AIR 1925 Cal 102 (103).

3. ('25) AIR 1925 Pat 449 (450): 4 Pat 120.

4. ('33) AIR 1933 Cal 865 (868).

5. ('38) AIR 1938 Bom 253 (255, 256): 1 L R (1938) Bom 263.

2. Equity of the judgment-debtor to set off cross-decree. — A right to set off a cross-decree or cross-claim under O. 21 R. 18 and 19 is an equity which can be enforced against the transferee of the decree;¹ but the decree against which the set-off is asked for must be before the Court for execution² and it is *that* Court that should consider whether the assigned decree is subject to any equities.³ A right to set off a cross-decree is not affected when the assignment of one of them has been found to be fraudulent.⁴

3. Transferee during pendency of suit by judgment-debtor takes it subject to the result of the suit. — An assignee of a decree which, subsequent to the assignment, is confirmed on appeal without the assignee being brought on the record, is nevertheless an "assignee" within O. 21 R. 16 who can execute the appellate decree¹ but a satisfaction entered on the decree under O. 21 R. 18 is binding on him though made subsequent to the assignment to him and before his name is brought on the record.² The right of a judgment-debtor to ask for a stay under O. 21 R. 29, *infra* is an equity which will bind an assignee of the decree.³ Hence, where the decree is assigned during the pendency of a suit by the judgment-debtor against the decree-holder and a decree is passed subsequently in the later suit in favour of the judgment-debtor, the latter will be entitled to a set-off in respect of such decree against the transferee of the decree in the prior suit.⁴

4. Other equities enforceable against the assignee. — In cases coming under Section 99 of the Transfer of Property Act, 1882, a mortgagee who had also a money decree against the mortgagor could not, in execution of the *money* decree, bring the equity of redemption to sale. It was held by the Bombay, Calcutta and Madras High Courts that the assignee of such money decree could not also bring the equity of redemption to sale and thus deprive the mortgagor of his equitable right.¹ The Allahabad High Court, however, held a contrary view.² Section 99 of the Transfer of Property Act, 1882, has now been repealed and re-enacted in O. 34 R. 14 of the Code but with this difference, namely, that the equity of redemption could not be sold now in execution of decrees for the payment of money in satisfaction of *such claims only as arise under the mortgage*. The cases cited above are, therefore, now no longer law.

See Notes to Order 34 Rule 14, *infra*.

5. Assignee's want of knowledge of equity, if affects rule. — An assignment takes effect against the *debtor* only on notice to him and is subject to all

Note 2

1. ('37) AIR 1937 All 351 (352) : I L R (1937) All 553. (This Section is not inconsistent with O. 21 R. 18 and even if it is so, this Section will prevail.)
- ('36) 163 Ind Cas 618 (619).
- ('68) 10 Suth W R 32 (33) (F B).
- ('73) 19 Suth W R 85 (87).
- ('72) 18 Suth W R 442 (443).
- ('89) 16 Cal 619 (622).
- ('24) AIR 1924 Nag 46 (47) : 19 Nag L R 164.
2. ('02) 24 All 481 (482).
3. ('37) AIR 1937 Cal 570 (571).
- ('19) AIR 1919 Mad 424 (426); 42 Mad 338. (Since so to determine is a stage in execution of the decree.)
4. ('67) 7 Suth W R 470 (471).

Note 3

1. ('18) AIR 1918 Mad 279 (280). (Because transfer of decree means transfer of interest in it as finally determined.)
2. ('97) 7 Mad L Jour 227 (229).
3. ('38) AIR 1938 Bom 253 (256) : I L R (1938) Bom 263.
4. ('38) AIR 1938 Bom 253 (256) : I L R (1938) Bom 263.
- ('37) AIR 1937 Rang 316 (317). (Want of notice on assignee's part of the pending suit is not material.)

Note 4

1. ('07) 31 Bom 462 (463, 464). (What law prohibits directly cannot be effected indirectly.)
- ('95) 22 Cal 813 (816). (Otherwise would defeat object of S. 99, T. P. Act, 1882.)
- ('07) 31 Mad 33 (34).
2. ('05) 27 All 450 (452).

equities arising prior to the date of such notice;¹ but it is not necessary that the assignee should have any notice of the equity which the debtor could have asserted against the transferor,² though the case would be very much stronger against the assignee if he had such notice.³

50. [S. 234.] (1) Where a judgment-debtor dies¹⁰ before the decree has been fully satisfied,¹² the holder

Legal representative.

of the decree³ may apply to the Court which passed it to execute the same against the legal representative⁴ of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent⁶ of the property of the deceased⁸ which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

[1877, S. 234; 1859, S. 210. See Order 21 Rule 22.]

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope of the Section. 3. "Holder of the decree." 4. "Legal representative." See O. 22 R. 3. 5. Appeal against order determining legal representative. 6. Extent of liability of legal representative. See Note 13 to Section 52. 7. Legal representative bound by what the deceased judgment-debtor himself would have been bound by. 8. "Property of the deceased." See Section 52 Note 9 and Section 53 Note 6. 9. Official Assignee. See Note 10. 10. "Where a judgment-debtor dies." 11. Decree against deceased defendant. See Note 8 to Section 52. | <ol style="list-style-type: none"> 12. "Before the decree has been fully satisfied." 13. Application to execute against the legal representative. 14. Execution against wrong legal representative or without the legal representative. 15. Decree-holder, if can proceed against property in the possession of third party. 16. Limitation for substitution of legal representative. 17. Successive deaths of judgment-debtor and legal representative. 18. Decree for injunction. 19. Appeals. |
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1. Legislative changes. — Besides some verbal changes, the words "fully satisfied" have been substituted for the words "fully executed" in clause (1) of this Section. See Note 12 below.

2. Scope of the Section. — This Section and Sections 52 and 53 may be usefully read together. Section 52 contemplates cases where the debtor dies *before the decree* and the *decree itself* has been passed against the legal representative. This will

Note 5

1. ('02) 26 Mad 428 (429).
(1886) 26 S C 33, Sutton v. Sutton.
2. ('38) AIR 1938 Bom 253 (256) : I L R (1938) Bom 263.

- (‘37) AIR 1937 Rang 316 (317).
- (‘11) 12 Ind Cas 205 (206) (Low Bur).
- (‘10) 7 Ind Cas 55 (60) (Cal).
3. ('89) 16 Cal 619 (622).

also include cases where the debtor dies *before suit* and the suit itself is instituted against the legal representative. This Section provides for the *execution* of decrees against the legal representatives of a judgment-debtor who dies before the decree has been fully satisfied. Normally, it applies to cases where judgment-debtor dies after the decree. But the Section is wide enough to include the case where the judgment-debtor dies before decree, provided the decree is *valid in spite of his death*, e.g., where under O. 22 R. 6 death occurs after hearing but before judgment, or in the case of Privy Council appeals.¹ Section 53 extends the scope of Sections 50 and 52 to ancestral property in the hands of a descendant which is liable under the Hindu law for payment of debts of the ancestor.

3. "Holder of the decree." — For the definition of "decree-holder," see Section 2 sub-section (3). A person who appears upon the face of the decree as the person in whose favour the decree is passed is entitled to execute it, unless it is shown that some other person has taken his place.¹ The Code does not provide that execution abates by death of decree-holder.² See also O. 22 R. 12 *infra*. For purposes of limitation, an application for execution by any person who, for the time being, is recognised as the proprietor of the estate of a deceased decree-holder is held to be good, though later on it is found that he had no title.³

4. "Legal representative." — See Order 22 Rule 3.

5. Appeal against order determining legal representative. — An order determining the question whether a person is the legal representative of a deceased party is within Section 47 and is appealable as a decree. See Section 47 sub-section (3), and Note 26 to that Section. If, however, the Court does not *decide* the question, the mere placing of the legal representative on the record is not appealable.¹

Where a legal representative is brought on the record in the place of a deceased party, he becomes a party to the suit² and all further questions in execution between him and the opposite party must be decided in execution and not by a separate suit and an appeal will lie from such a decision.³

6. Extent of liability of legal representative. — See Note 13 to Section 52.

7. Legal representative bound by what the deceased judgment-debtor himself would have been bound by. — The liability of the legal representative is co-extensive with that of the deceased judgment-debtor himself, subject, however, to the condition that it does not extend beyond the assets actually received by him *and which have not been duly disposed of*. Thus, where the property could not be proceeded against even when in the hands of the judgment-debtor, as where it is governed by the special provisions of the Dekkhan Agriculturists' Relief Act, it cannot be proceeded against when it comes into the hands of the legal representative.¹ On the other hand,

Section 50 — Note 2

1. ('37) AIR 1937 Pat 321 (322) : 16 Pat 316.
- ('32) AIR 1932 Pat 261 (262, 263, 264) : 11 Pat 445.

Note 3

1. ('91) 18 Cal 639 (641). (Or may order to make over proceeds to any other person.)
2. ('78) 3 Bom 221 (222).
- (1900) 2 Bom L R 887 (888).
3. ('18) AIR 1918 Pat 216 (216, 217).

Note 5

1. ('78) 3 Cal 708 (709, 710).
- ('93) 1893 All W N 106 (107).
- [See ('23) AIR 1923 Pat 149 (150). (Impleading

legal representative without deciding his liability for decree held illegal.)]

2. ('72) 18 Suth W R 185 (188).
- ('84) 7 Mad 255 (257, 258).
3. ('22) AIR 1922 Bom 280 (280).
- (1900) 2 Bom L R 887 (888).

Note 7

1. ('21) AIR 1921 Sind 29 (31, 32, 33, 34) : 15 Sind L R 47.
- [See also ('25) AIR 1925 Nag 449 (450). (By S. 11 (2) of the Central Provinces Act, 1920, no sale of such tenancy is valid except in special circumstances.)]

the legal representative will be bound by the decree passed or the previous proceedings taken, against the judgment-debtor himself.² Thus, where the properties had been attached or charged or mortgaged, or directed to be sold by the decree, in the lifetime of the judgment-debtor, they continue to be liable in the hands of the legal representatives.³ Similarly, where the judgment-debtor was impleaded in the suit as a subsequent mortgagee but did not plead his rights of marshalling, it is not open to his legal representatives, when substituted in execution proceedings, to raise the question again.⁴ A Hindu son or a descendant of a Hindu is liable just like other legal representatives, and cannot question the validity of the decree against the ancestor,⁵ except in one respect, namely, that the decree debt is of an illegal or immoral nature so as not to bind him or his share in the joint family property under the Hindu law. See Section 53, Notes 1 and 3, *infra*.

8. "Property of the deceased." — See Section 52 Note 9 and Section 53, Note 6.

9. Official Assignee. — See Note 10 below.

10. "Where a judgment-debtor dies." — This Section applies only where the judgment-debtor dies.¹ The word "dies" is used in its natural meaning and does not include a *civil death*.^{1a} Consequently, the Section has no application where the judgment-debtor only becomes an insolvent or has only alienated or gifted away his property, or where, in his lifetime, there is a transfer or devolution by operation of law. After property vests in the Official Assignee, no proceedings can affect the property of the deceased insolvent in his hands unless he has been impleaded in the matter adjudicated upon.² Since attachment does not create any interest in the property and prevents only a private alienation, it does not prevail against the Official Assignee or Official Receiver and the decree-holder cannot claim payment of the money realised,³ much more so if the attachment is only prior to judgment.⁴

11. Decree against deceased defendant. — See Note 8 to Section 52.

12. "Before the decree has been fully satisfied." — The word "satisfied" has been substituted in this Code for the word "executed" in the previous Codes. Prior to this Code, there was a conflict of views amongst the High Courts as to the meaning

('69) 12 Suth W R 495 (495). (A decree to give accounts within specified time—No execution till expiry of the period—Death thereafter—Cannot be executed against legal representative.) ('19) AIR 1919 Lah 145 (146) : 1919 Pun Re No. 17 (F B). (A case under Punjab custom.)

2. ('18) AIR 1918 Pat 41 (46) : 4 Pat L Jour 213.

('86) 10 Bom 74 (77).

('89) 21 All 277 (279).

3. ('01) 24 Mad 689 (694).

('09) 31 All 45 (47). (Mortgage decree against widow—Reversioner as her legal representative cannot plead in execution the invalidity of mortgage or decree.)

('99) 21 All 356 (358, 359). (Mortgage decree against Hindu father covering whole family property — Son as legal representative cannot object in execution that his share is not liable.)

4. ('16) AIR 1916 Oudh 288 (288, 289).

5. ('93) 16 Mad 99 (103).

('11) 9 Ind Cas 648 (649) (Mad).

Note 10

1. ('14) AIR 1914 Mad 328 (330) : 38 Mad 1120.

(Property obtained by son on partition—Not "assets" within this Section so long as the father is alive.)

1a. ('35) AIR 1935 Cal 713 (714).

('31) AIR 1931 All 306 (307) : 53 All 529.

[See also ('03) 30 Cal 961 (964). (Transfer of all its properties by one limited company to another—Former company cannot be said to have died.)]

2. ('35) AIR 1935 Mad 907 (907, 908). (Property of a person who is adjudicated an insolvent vests in the Official Receiver from the date on which the person applies for insolvency.)

('29) AIR 1929 Mad 609 (611).

('14) AIR 1914 P C 129 (130, 131) : 42 Cal 72 : 41 Ind App 251 (P C).

[But see ('70) 14 Suth W R 33 (35, 36) (F B). (Not good law: see 29 Cal 428 (F B).]

3. ('85) 8 Mad 554 (556).

('02) 29 Cal 428 (432, 433) (F B).

See also S. 64, Notes 10 and 14.

4. ('84) 10 Cal 150 (157, 158) (F B).

certain powers for the purposes of the Section. Now the executing Court may be the Court which passed the decree or it may be the Court to which it is sent for execution.² The application to execute the decree against the legal representative must under cl. (1) be made to the Court *which passed the decree*.³ The Section, however, does not specify which Court has to *pass orders thereon*. At any rate the Court that passed the decree need only decide one point, viz., whether the decree is executable against the legal representative, and pass orders accordingly.⁴ All further proceedings, inclusive of ordering notice of execution can, where the decree is sent to another Court for execution, be taken by the Court executing the decree.⁵ As to the effect of non-compliance with the rule that the application for substitution should be made to the Court which passed the decree, see Section 42, Note 1 *ante*. See also the case cited below.^{6a} The execution proceedings once commenced can be continued after the death of the judgment-debtor by substitution of the name of his legal representative in place of his name in the application for execution. No fresh or substantive application under O. 21 R. 11 is necessary.⁶

An application under this Section is necessary only when *further* execution is needed or asked for. A separate application merely for substituting a legal representative is not necessary⁷ and no limitation is prescribed for such substitution in execution proceedings which do not abate merely by the death of the parties.⁸ See O. 22 R. 12.

It is not incumbent on a party, to be entitled to apply under O. 9 R. 13 of the Code as the legal representative of the deceased defendant, to be first brought on record under Section 50 before filing an application to set aside the *ex parte* decree.⁹

14. Execution against wrong legal representative or without the legal representative. — It has been seen in Note 63b to Section 11, *ante*, that a decree against one of several representatives will, in the absence of fraud or collusion, bind all the representatives, but that a decree against a *wrong person* as the legal representative does not bind the real representatives. The same principles will apply to execution proceedings taken against legal representatives. Thus, a proceeding taken

2. See Sections 37 and 38 *supra*.

3. ('37) AIR 1937 Pat 239 (241). (A I R 1928 PC 162 relied on).

('84) AIR 1934 Bom 215 (216). (Application to bring on record legal representatives of judgment-debtor is to be made to the Court passing the decree and not to the Court to which decree is sent for execution.)

('05) 28 Mad 466 (471, 472) (F B).

('95) 17 All 431 (432).

('94) 18 Bom 224 (226). (Although notice to party be sent by execution Court.)

('07) 17 Mad L Jour 300 (301). (Order passed by execution Court not void if objection waived by parties.)

('12) 17 Ind Cas 293 (294) (Mad).

('26) AIR 1926 Mad 411 (412).

4. ('05) 28 Mad 466 (470).

('95) 17 All 431 (432). (Execution Court may determine extent of legal representative's liability.)

('26) AIR 1926 Mad 411 (412).

('28) AIR 1928 Rang 40 (42) : 5 Rang 775. (The order permitting execution against the legal representatives can be made *ex parte*.)

5. ('94) 18 Bom 224 (226).

5a. ('38) AIR 1938 Rang 385 (387). (Question as to whether application to add legal representa-

tive of a deceased judgment-debtor should be made to the Court passing decree or to Court which is executing decree is one of procedure and not one of jurisdiction — In case of non-compliance with procedure the defect might be waived.)

6. ('36) AIR 1936 Bom 456 (457).

('09) 4 Ind Cas 839 (841) : 34 Bom 142.

('31) AIR 1931 Mad 303 (312).

('05) 2 Cal L Jour 544 (545).

('30) AIR 1930 Sind 16 (17).

See also Note 4 to Section 146 *infra*.

7. ('36) AIR 1936 Oudh 152 (153) : 11 Luck 500.

('21) AIR 1921 Mad 693 (693). (Execution was unnecessary for 20 years — Decree-holder not barred.)

[See also ('33) AIR 1933 Mad 568 (568, 569).

(Application for execution against legal representative under this Section need not contain a prayer for substitution of the legal representative on the record.)]

8. ('20) AIR 1920 All 171 (172) : 42 All 570.

9. ('25) AIR 1925 Oudh 370 (371) : 27 Oudh Cas 299. (Provisions of S. 146 the same.)

[But see ('05) 28 Mad 361 (362). (Under old Code and not good law now in view of S. 146.)]

against one of several representatives who *prima facie* is entitled to represent the estate of the deceased is binding on all the representatives.¹ But if it is taken against a *wrong person* as such legal representative, it will as a general rule not bind the actual or real legal representatives.² (See also Note 6 to Section 52.) Where, however, in such a case the real representative stands by and allows the proceedings to be taken or continued against a wrong person *who is allowed to be in possession* of the estate of the deceased, he and persons claiming through him will not be allowed to challenge the proceedings subsequently.³

Similarly, where a wrong person is impleaded as a legal representative but the Court decides that he is the true heir and orders execution to proceed, such proceedings cannot be said to be void for want of jurisdiction.⁴

Another class of cases may be noted in this connexion, namely, cases where one person is competent, in law, to represent the interest of others in the estate, as for instance, a Hindu father or manager of a joint Hindu family, or the guardian of a minor, or a Hindu widow; in all these cases the proceedings taken against such persons in their representative capacity are binding on all persons who are represented by the person against whom such proceedings are taken.⁵ But if the proceedings are

Note 14

1. ('79) 4 Cal 342 (345).
('09) 4 Ind Cas 1059 (1060) : 33 Mad 6.
('17) AIR 1917 Mad 979 (980, 981). (Position justified on the analogy of S. 11, Expl. 6.)
('16) AIR 1916 Mad 1022 (1024). (Representation must be without fraud and collusion.)
('25) AIR 1925 Oudh 330 (331, 334, 336, 337) : 28 Oudh Cas 177. (The same law applies to Mahomedans also.)
('03) 30 Cal 1044 (1057 to 1059). (Residuary legatee in possession.)
('89) 12 Mad 90 (91).
('03) 26 Mad 230 (234).
[But see ('79) 4 Cal 142 (156) (F B).
('82) 11 Cal L R 268 (272).]
2. ('05) 32 Cal 296 (315) : 32 Ind App 23 (P C).
('10) 32 All 404 (409).
('10) 6 Ind Cas 627 (629) (Cal).
('11) 12 Ind Cas 915 (918) : 34 All 79.
('85) 9 Bom 86 (93). (But legal representatives must not wilfully put forward 'wrong person' as legal representatives.)
('85) 9 Bom 429 (432). (Decree against widow when minor son ignored — Widow does not represent minor son.)
('97) 21 Bom 424 (451) (F B).
('13) 18 Ind Cas 381 (382) (Bom).
('95) 22 Cal 903 (903).
(1900) 27 Cal 242 (258).
('13) 21 Ind Cas 519 (519) (Cal).
('16) AIR 1916 Cal 661 (662).
('19) AIR 1919 Cal 831 (833).
('22) 70 Ind Cas 886 (887) (Cal).
('88) 11 Mad 408 (410, 411).
('16) AIR 1916 Mad 726 (727).
(1894) 1894 App Cas 437 (442), Mohamadu Mohideen v. Pitchay. (Creditor of deceased debtor cannot sue unless a person intermeddles with estate or proves a will.)
('12) 16 Ind Cas 690 (691, 692) (Cal).
('05) 2 Cal L Jour 484 (486, 487, 483, 483).

- ('09) 2 Ind Cas 818 (819) (Cal). (Case under Probate and Administration Act.)
('02) 4 Bom L R 340 (341).
('17) AIR 1917 Mad 979 (980, 981).
('21) AIR 1921 Bom 385 (388, 389) : 45 Bom 1186. (Sale in absence of and without notice to legal representatives.)
('81) 6 Cal 777 (784, 785). (Where on widow's death a person is impleaded as her legal representative without deciding if he was really so or not.)
3. ('79) 3 Cal L Rep 157 (158).
('79) 4 Cal 342 (345, 346).
[See also ('16) AIR 1916 Mad 1022 (1024). (Wrong representative bona fide sued—Legatee was held bound by decree.)]
4. ('01) 25 Bom 337 (347) : 27 Ind App 216 (P C). (Because Court has jurisdiction to decide wrong as well as right.)
('25) AIR 1925 Oudh 330 (334) : 28 Oudh Cas 177. (Decree against ostensible owner binds true owner.)
('26) AIR 1926 Oudh 613 (614). (25 Bom 337 (P C), Followed.)
5. ('72) 24 Suth W R 109 (109).
('81) 3 All 517 (519). (For limitation purposes.)
('88) 12 Bom 48 (50). (Do).
('88) 12 Bom 101 (103).
('90) 14 Bom 597 (603). (Manager.)
('96) 20 Bom 338 (344, 345). (Principle applies to Mahomedans also.)
('97) 21 Bom 539 (542, 543). (Minor son represented by widow.)
(1900) 24 Bom 135 (147).
('87) 15 Cal 70 (31) : 14 Ind App 157 : 2335 Bom Re No. 1 (P C). (Managing members of joint family.)
('89) 12 Mad 90 (91). (Widow represents minor son.)
('73) 10 Mad 452 (453). (Case under Probate Act.)
('24) AIR 1924 Bom 385 (388, 389). (Widow represents deceased husband through minor son not as representative.)

will be bound by the doctrine of *lis pendens* and the decree can consequently be enforced against him.⁴

19. Appeals. — Orders under this Section are appealable if the conditions of Section 47 are satisfied.¹ See also Note 5 above, and Note 84 to Section 47.

PROCEDURE IN EXECUTION

Powers of Court to
enforce execution.

51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree —

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require:

“Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied, —

- (a) *that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree, —*
 - (i) *is likely to abscond or leave the local limits of the jurisdiction of the Court, or*
 - (ii) *has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property; or*
- (b) *that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or*

4. ('27) AIR 1927 Bom 93 (95): 51 Bom 37.

Note 19

1. ('87) 1887 Pun Re No. 87, p. 183.

('73) 20 Suth W R 280 (282, 283).

('87) 9 All 605 (608).

('90) 12 All 313 (327).

('91) 13 All 290 (294, 295). (Costs by legal representative improperly impleaded.)

('89) 16 Cal 1 (6, 7, 8). (Questions of liability of the

property to be taken in execution in the hands of legal representative are within S. 47.)

('89) 16 Cal 603 (605, 609).

('90) 17 Cal 711 (720, 721) (F B).

('84) 7 Mad 255 (257, 258).

('87) 10 Mad 117 (120).

('03) 26 Mad 501 (501, 502).

('21) AIR 1921 Sind 29 (32): 15 Sind L R 47.

('28) AIR 1928 Rang 40 (41): 5 Rang 775.

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation.—In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

[See O. 21 Rr. 30 to 34, 35, 53, 56 and 64 ; O. 40 R. 1 ; also Ss. 54 and 68 to 72.]

a. Proviso inserted by the Code of Civil Procedure (Amendment) Act, 1936 (XXI of 1936), S. 2.

Synopsis

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| <ol style="list-style-type: none"> 1. Scope of the Section. 1a. "Subject to such conditions and limitations as may be prescribed." 2. Powers of the Court in execution. 3. "By delivery of any property specifically decreed." 4. "By attachment and sale or by sale without attachment of any property." — Clause (b). | <ol style="list-style-type: none"> 5. "By arrest and detention." 5a. Proviso to the Section. 6. "By appointing a receiver." — Clause (d). 7. "In such other manner," etc. 8. "On the application of the decree-holder." 9. Appeal. |
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Other Topics

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|---|---|
| <p>Decision of questions relating to execution. See S. 47.</p> <p>Executing Court, if can go behind decree. See Note 8 to Section 38.</p> <p>Simultaneous execution. See Note 2.</p> <p>Appointment of receiver to collect future maintenance. See Note 6.</p> <p>Power to sell includes power to order temporary alienation. See Note 4.</p> <p>Power to appoint decree-holder himself as receiver. See O. 40 R. 1, Note 11.</p> | <p>Receiver in respect of inalienable property. See Note 6.</p> <p>Receiver in respect of inalienable property where there are other hypotheca which can be sold. See O. 40 R. 1, Notes.</p> <p>Power of receiver to sue in a Court outside the jurisdiction of the Court appointing him. See Note 6; see also O. 40 R. 1 Note 12.</p> <p>Adjustments or agreements of parties relating to execution. See Note 7; see also O. 21 R. 2, Notes.</p> |
|---|---|

1. Scope of the Section. — This Section was newly inserted in the Code on the suggestion of the Advocate-General of Madras.¹ It enumerates in general terms the various modes² in which the Court may, in its discretion, order the execution of a decree according as the nature of the relief granted may require. In the Notes on Clauses the Select Committee observe as follows : "This clause states generally the powers of the Court in regard to execution leaving the details to be determined by rules. It will be observed that the power to direct immediate execution is no longer restricted to one class of suits but that it is now general in terms. Any limitation that may be found necessary will be imposed by rules." The Section accordingly is made to operate "subject to such conditions and limitations as may be prescribed."

1a. "Subject to such conditions and limitations as may be prescribed." — This Section merely enumerates the different modes of execution in general

Section 51 — Note 1

1. ('19) AIR 1919 Oudh 326 (327) : 22 Oudh Cas 194. (Receiver to collect rents—Mortgage decree.)
2. ('36) AIR 1936 Pesh 209 (210). (Methods provided are distinct—Application for execution in one method is distinct from application for execution in another method.)

terms while the conditions and limitations under which alone the respective modes can be availed of are prescribed further on by different provisions. As observed by Sulaiman, C. J., in *Anadilal v. Ram Sarup*,¹ "The Legislature has taken care to preface the Section with the words 'subject to such conditions and limitations as may be prescribed.' It is obvious that there is no wide and unrestricted jurisdiction to order execution in every case in all the ways indicated therein. The jurisdiction has to be exercised subject to such conditions and limitations as may be prescribed by the rules in the following schedule . . . Obviously, all the various modes mentioned in Section 51 are not open to an executing Court in every case; it is to be guided by the procedure laid down in the schedule, and must resort to the method appropriate to each case."

"Prescribed" under Section 2 (16) means "prescribed by rules", and "rules," under Section 2 (18) means "rules and forms" contained in the First Schedule of the Code or framed by the respective superior Courts in different Provinces under Section 122 or Section 125.

2. Powers of the Court in execution. — It is for the *judgment-creditor* to decide in which of the several modes mentioned in the Section he will execute his decree; and the Court has no authority except under the circumstances mentioned in the proviso, to refuse to order execution of the decree in the mode asked for on the ground that the decree-holder should, in the first instance, proceed by another mode.¹ On the same principle, a Court passing a decree against a defendant should not ordinarily place any limitation as to the mode in which it is to be executed.² In fact, a decree may, under the provisions of O. 21 R. 30, be executed *simultaneously* against both the person and the property of the judgment-debtor,^{2a} though the Court has, under O. 21 R. 21, a judicial discretion to refuse to order such simultaneous execution in proper cases. The reason is that, as their Lordships of the Privy Council pointed out in the undermentioned case,³ "the difficulties of a litigant in India begin when he has obtained a decree" and that far too many obstacles are placed in the way of a decree-holder who seeks to execute his decree against the property of the judgment-debtor. It is also an important principle of law that rules of procedure are only handmaids of justice and ought not to be used for obstructing justice. It is accordingly the duty of the Court executing the decree to aid the decree-holder in realising the amount due under his decree, and it should therefore offer him all possible and reasonable facilities for realising the decretal amount in as short a time as possible.⁴ As to simultaneous executions generally, see Note 10 to Section 38 and O. 21 Rr. 21 and 30.

Ordinarily there can be only *complete* execution^{4a} but where it is ineffectual and *invalid*, another execution, valid in law, can be ordered.^{4b} Thus, where a delivery of possession was made after an unconditional order of stay of execution had been passed by the Appellate Court, and consequently became ineffectual, the decree-holder can, after the dismissal of the appeal by the judgment-debtor, again apply for delivery of possession.⁵

Note 1a

1. ('36) AIR 1936 AH 495 (502); 58 AH 249 (FB).

Note 2

1. ('36) AIR 1936 Pat 46 (47).
 ('26) AIR 1926 Lah 110 (110); 6 Lah 545. (Arrest for recovery of money.)
 2. ('15) AIR 1915 Cal 186 (186).
 2a. See Note 4 to O. 21 R. 30.
 [See also ('35) AIR 1935 Pat 136 (131); 17 Pat 245.]

3. ('72) 17 Suth W R 459 (460) (PC).

4. ('36) AIR 1936 Cal 238 (239).

- ('36) AIR 1936 Pat 76 (77). (Court should not postpone or stay execution for unreasonably long time.)

- 4a. ('12) 16 Ind Cas 703 (709) (Cal).

- ('10) 8 Ind Cas 410 (411) (Oriss).

- 4b. ('21) AIR 1921 Pat 211 (217, 232); 19 Pat 670 (FB).

5. ('12) 16 Ind Cas 703 (710) (Cal).

3. "By delivery of any property specifically decreed." — As to the mode of execution of a decree for specific moveable property, see O. 21 R. 31 and that for specific immovable property, see O. 21 Rr. 35 and 36. As to whether, in an order for delivery of any property decreed, the Court can grant an alternative relief by way of damages in default of such delivery, see Note 7 below.

4. "By attachment and sale or by sale without attachment of any property"—Clause (b). — Where the decree itself *directs the sale* of properties, as in the case of mortgage decrees, it is clear that no attachment is necessary for bringing the properties to sale in execution of that decree.¹ But, is an attachment an essential pre-requisite for the validity of sale of property in execution of a *money decree*? In order to answer this question it is necessary to read this Section, which enables a Court to order a sale without attachment, along with O. 21 R. 30, which provides that a money decree may be executed by *attachment and sale* of the judgment-debtor's property, and along with O. 21 R. 64, which provides that the Court may order that any property *attached by it shall be sold*. Under the old Code which contained no provision corresponding to the present Section, there was a conflict of opinion, one class of cases holding that the object of an attachment is to bring the property under the control of the Court with a view to prevent the judgment-debtor from alienating it, and that the absence of attachment is nothing more than an irregularity and does not *ipso facto vitiate* the sale;² and another class of cases holding that an attachment is an essential preliminary to sales in execution of simple decrees for money, and that the absence of attachment makes the *sale de facto void*.³

The present Section 51 now makes it clear that a sale without attachment is not *without jurisdiction* though in view of O. 21 Rr. 30 and 64 it may amount to an *irregularity*. This is the view taken by the High Courts of Lahore,^{3a} Patna,⁴ Madras⁵ and Rangoon.⁶ The High Court of Calcutta⁷ has, on the other hand, held, relying on certain observations of their Lordships of the Privy Council in *Raja Thakur Barmha v. Jiban Ram Marwari*,⁸ that a sale without attachment is *ipso facto void*. The High Court of Bombay also has held in an earlier decision that a property cannot be sold without attachment.⁹ Neither of these decisions, however, adverted to Section 51, nor, it is submitted, does the decision in *Thakur Barmha's case* support the view taken by them.^{9a} The said decisions cannot be accepted as sound. The purpose of attachment being to prevent a judgment-debtor from placing any obstacles in the way of the Court selling the property, it cannot be that the want of it will vitiate a sale *which has actually been effected without any such obstacles*. In a recent decision

Note 4

1. ('29) AIR 1929 Lah 90 (91) : 10 Lah 543.
- ('06) 33 Cal 676 (678).
- ('21) AIR 1921 Pat 320 (321). (Mortgage suit — Compromise decree not expressly providing for attachment—Attachment not necessary.)
2. ('99) 21 All 311 (313).
- ('67) 8 Suth W R 9 (10).
- ('91) 18 Cal 188 (192, 193).
- ('94) 21 Cal 639 (641).
- ('11) 9 Ind Cas 918 (922) (Cal). (Case under the old Code.)
- ('07) 30 Mad 255 (264). (Appointment of receiver means that property is under attachment.)
- ('13) 18 Ind Cas 498 (499) (Mad).
- ('99) 21 All 140. (141, 142).
- [See also ('07) 34 Cal 811 (820, 821) (FB). (Notice under S. 10, Public Demands Recovery Act,

1895 is condition precedent — Plaintiff should recover possession saying sale has not affected his title.)]

3. ('83) 5 All 86 (91) (FB).
- ('88) 10 All 506 (510).
- ('85) 7 All 702 (706, 708).
- ('87) 9 All 136 (138).
- ('92) 16 Bom 91 (101).
- 3a. ('30) AIR 1930 Lah 685 (685, 686).
4. ('23) AIR 1923 Pat 45 (47, 48) : 2 Pat 207.
5. ('26) AIR 1926 Mad 211 (214, 215).
6. ('24) AIR 1924 Rang 124 (126) : 1 Rang 533.
7. ('18) AIR 1918 Cal 1036 (1037).
- [But see ('27) AIR 1927 Cal 847 (847).]
8. ('13) 21 Ind Cas 936 (937) : 41 Cal 590 : 41 Ind App 38 (PO).
9. ('11) 12 Ind Cas 911 (912) : 36 Bom 156.
- 9a. ('26) AIR 1926 Mad 211 (214, 215).

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of the Bombay High Court^{9b} that Court also has held, dissenting from its earlier decision, that a sale in execution without an attachment is *not* a nullity.

Section 51 clause (b) empowering the Court, in general terms, to attach and sell in execution *any property* must be interpreted to mean that the Court has jurisdiction to attach and sell in execution any property which the decree-holder puts forward as the property of his judgment-debtor.¹⁰ If the property does not belong to the judgment-debtor but to a stranger, the latter will not be bound by the sale in any way.¹¹ But it is not void as between the decree-holder, judgment-debtor and the auction-purchaser,¹² and the purchaser can only apply under O. 21 R. 91 to set aside the sale on the ground that the judgment-debtor has no saleable interest in the property sold. The property to be sold must, however, be *saleable property* under Section 60 of the Code.¹³ Thus, lands inalienable according to the provisions of special enactments such as Section 3 of the Bengal Regulation III of 1872,¹⁴ or Section 1 of the Punjab Alienation of Land Act,¹⁵ cannot be sold in execution.

There is a difference of opinion on the question whether the Court can, under this clause, order a temporary alienation of property in execution, such as by mortgaging or leasing it out for a term. There is also a conflict of opinion on the question whether, where a sale is prohibited under a special or local Act, the Court can, by way of execution, grant a mortgage or a lease of the judgment-debtor's property. On the first question it has been held by the High Court of Lahore that Section 72 implies that the Court has authority to order a temporary alienation of the judgment-debtor's property. It has also held that the power to transfer the entire bundle of rights constituting ownership by way of sale includes the lesser power of transferring some of those rights.¹⁶ The High Court of Allahabad has, on the other hand, dissented from the Lahore view and has held that a power to sell does not include a power to grant a lease. As regards Section 72, it has held that that Section circumscribes the Court's powers as regards the granting of leases to the conditions prescribed by it.¹⁷ The Peshawar Judicial Commissioner's Court has held that the Court has power, apart from the provisions of Section 72, to order a temporary alienation of the judgment-debtor's property.^{17a} The Nagpur High Court has held that the Court has no *inherent* power to order temporary alienation, apart from the provisions of Section 72.^{17b}

On the second question, the High Court of Lahore holds that the prohibition of sale does not prevent the Court from mortgaging or leasing the property under this clause and that the provisions of Section 72 do not affect the powers of the Court in this respect.¹⁸ According to the High Court of Allahabad, as has been seen already, the power to grant a lease arises only under Section 72 which applies only when a sale has been ordered, so that, where no sale can be ordered by reason of statutory

9b. ('39) AIR 1939 Bom 277 (278) : 41 Bom L R 463 (468, 469).

10. ('27) AIR 1927 Mad 394 (394, 395) : 50 Mad 639. (It does not mean that the Court can sell properties which before the sale all parties knew did not belong to the judgment-debtor.)

[See also ('22) AIR 1922 Lah 147 (148). (Attachment of land belonging to gaddinashin and entered in the name of the shrine — Attempt to defeat execution by getting property mutated in the name of shrine—Attachment should be ordered as requested by decree-holder.)]

11. ('26) AIR 1926 Oudh 501 (502).

12. ('27) AIR 1927 Mad 394 (394, 395) : 50 Mad 639.

13. See Note 5, Section 60.

14. ('29) AIR 1929 Pat 700 (701) : 9 Pat 368 (FB).

15. ('20) AIR 1920 Lah 456 (459) : 1 Lah 192 (FB).

16. ('30) AIR 1930 Lah 77 (78).

('29) AIR 1929 Lah 195 (195).

('20) AIR 1920 Lah 456 (459) : 1 Lah 192 (FB).

('36) AIR 1936 Lah 696 (698).

17. ('38) AIR 1938 All 290 (291, 292) : 1 L R (1938) All 528 (FB). (AIR 1932 All 571 overruled. [See also ('37) AIR 1937 All 699 (700, 701).])

17a. ('36) AIR 1936 Pesh 90 (91).

('35) AIR 1935 Pesh 113 (114).

17b. ('37) AIR 1937 Nag 41 (42).

18. ('20) AIR 1920 Lah 456 (459) : 1 Lah 192 (FB).

[See also ('36) AIR 1936 Lah 30 (31).]

prohibition, the Court has no power to grant a lease at all.¹⁹

According to the Judicial Commissioner's Court of Peshawar, when a sale is prohibited, all powers, such as those of mortgaging or leasing the property which are derived from the power to sell are also taken away.²⁰

The Nagpur High Court has held that the Court cannot order the attachment of property for the purpose of temporary alienation when such property is not liable to be sold in execution.^{20a}

Where not only a sale but also a temporary alienation is prohibited, it is of course clear that the Court cannot, by way of execution, make an order for temporary alienation.²¹

The word "sale" in the Section includes not only a sale in court auction but also a sale by a nominee of the parties under a consent decree.²²

The fact that immovable property is attached before judgment and the attachment is continued after the decree will not disable the decree-holder from applying for the attachment and sale of the moveable property of the judgment-debtor.²³

5. "By arrest and detention." — Under O. 21 R. 30 a decree for the payment of money, including a decree for the payment of money as an alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor. Under O. 21 R. 31 (1) a decree for specific *moveable* property may be similarly executed by the arrest and detention of the judgment-debtor. But there are some exceptions to this rule. Thus, a decree cannot be executed by arrest and detention where the judgment-debtor is a woman (Section 56) or a minor or legal representative of a deceased person (Sections 50 and 52).¹

As has been seen in Note 2 above, it is for the judgment-creditor to decide in which of the several modes he will execute his decree. Where, therefore, a decree-holder prays for the arrest of the judgment-debtor the Court cannot (except as provided for by the proviso) compel the decree-holder to proceed against his property^{1a} or to accept payment by instalments.²

See also Sections 55 to 59 and O. 21 Rr. 30, 31 (1) and 37 to 40 *infra* which contain further provisions on this mode of execution.

5a. Proviso to the Section. — The proviso to the Section was inserted in the Code by the Code of Civil Procedure Amendment Act of 1936 (21 of 1936), Section 2. The proviso restricts the power of the Court to arrest the judgment-debtor in execution of a money decree and lays down that except in certain specified cases, the judgment-debtor shall not be arrested in execution of such a decree. See the under-mentioned cases¹ decided with reference to the proviso.

19. ('38) AIR 1938 All 290 (291, 292) : I L R (1938) All 528 (FB).

('37) AIR 1937 All 699 (700, 701).

20. ('36) AIR 1936 Pesh 90 (90, 91).

[But see ('35) AIR 1935 Pesh 113 (114).]

20a. ('37) AIR 1937 Nag 41 (43).

21. ('29) AIR 1929 Pat 700 (701): 9 Pat 368 (FB).

22. ('17) AIR 1917 Cal 740 (742): 44 Cal 789.

23. ('36) AIR 1936 Bom 268 (272).

Note 5

1. ('22) AIR 1922 Nag 98 (100, 101): 18 Nag L R 145 (Judgment-debtor a woman.)

1a. ('39) 180 Ind Cas 767 (769) (Pat).

('37) AIR 1937 Oudh 379 (381) : 13 Luck 340.

('36) AIR 1936 Pesh 46 (47).

('35) AIR 1935 Cal 127 (129).

2. ('30) AIR 1930 Lah 220 (221).

Note 5a

1. ('39) 43 Cal W N 427 (429) (In the calculation of the means of the judgment-debtor for the purpose of S. 51 proviso, cl. (b), O. P. Code, the necessary expenses of maintaining the life of the debtor and of his dependants must be taken into account and deducted from his income.)

('39) AIR 1939 Lah 299 (299, 300). (Judgment-debtor being agriculturist, Court while determining question of his capacity to pay decretal amount cannot take into account his agricultural lands and residential houses.)

6. "By appointing a receiver"—Clause (d).—Execution by appointment of a receiver is known as *equitable execution*¹ and is entirely within the *discretion* of the Court.² It is thus an exception to the general rule stated in Note 2 above that it is for the *decree-holder* to choose the mode of execution and that the Court has no power to refuse to order execution in the mode asked for. This mode of execution was being adopted by Courts even under the old Code,³ and this Section only gives legislative sanction to the exercise of such powers. The Section, however, does not confer a general power on the executing Court to appoint a receiver in every case. It merely prescribes a mode of execution of the decree by appointment of a receiver while the conditions and limitations under which such appointment is to be made are prescribed by O. 40 R. 1.^{3a}

There is a difference of opinion as to whether a receiver may be appointed in respect of properties *which cannot be attached and sold*. According to the High Courts of Allahabad,^{3b} Calcutta,⁴ and Lahore^{4a} and the Judicial Commissioners' Courts of Nagpur,⁵ and Peshawar,^{5a} such an appointment can be made, the Nagpur Court taking the view that the appointment of a receiver does not amount to attachment. The High Court of Patna has, on the other hand, held that such an appointment amounts to an *equitable attachment* and that therefore no such appointment can be made in respect of properties not liable to be attached and sold under Section 60.⁶ The Allahabad High Court has held in a recent decision that where the law prohibits the *dispossession* of the judgment-debtor from certain property, a receiver cannot be appointed in respect of such property.^{6a} No receiver can be appointed in respect of a *mere right to future*

('39) AIR 1939 Pat 22 (22). (The onus of proof is on the decree-holder to establish that the judgment-debtor had sufficient means to pay the debt within the meaning of sub-cl. (b) of the proviso.)

('38) AIR 1938 Cal 448 (449). (Fraudulent concealment or transfer of property—What amounts to, within the meaning of the proviso.)

('38) AIR 1938 Lah 692 (693). (Arrest is not possible unless there has been some contumacious conduct on the part of the judgment-debtor and mere inability to pay does not justify arrest.)

('38) AIR 1938 Pesh 17 (18). (Judgment-debtor after decree selling his property but neglecting to pay decretal amount is liable to be detained in civil prison.)

Note 6

1. ('39) AIR 1939 Oudh 116 (118).

('29) AIR 1929 Pat 700 (701) : 9 Pat 368 (FB). (Equitable execution is equitable attachment.)

('33) AIR 1933 All 227 (228). (Application by defendants.)

('30) AIR 1930 Mad 4 (9,10). (Receiver is an officer of the Court—Second defendant appointed.)

('32) AIR 1932 Cal 189 (192) : 59 Cal 205. (Such appointment to be deemed as one under O. 40 R.1.)

('30) AIR 1930 Cal 159 (159). (Affirmed in AIR 1931 P C 160.)

[See also ('24) AIR 1924 Nag 165 (166). (Appointment of a receiver is a mode of execution.)]

2. ('39) AIR 1939 Oudh 116 (118).

('36) AIR 1936 Bom 399 (400).

('13) 21 Ind Cas 283 (286, 287) : 16 Oudh Cas 238. (Property unsaleable for rent and profits.)

('32) AIR 1932 Cal 189 (192) : 59 Cal 205. (Decree-holder cannot ask for appointment as a right.)

('31) AIR 1931 Oudh 307 (308) : 7 Luck 203.

('32) AIR 1932 Mad 193 (195). (Third party in possession—Parties without present right cannot disturb him—Appointment when just and convenient.)

[See also ('33) AIR 1933 Sind 231 (232). (Defendant and property not under Court's jurisdiction and not a subject of suit or execution—Appointment refused.)]

3. ('87) 11 Bom 448 (455). (Under S. 503 of C. P. Code of 1882 to collect attached debt.)

3a. ('37) AIR 1937 All 389 (392, 393) : I L R (1937) All 542.

('37) AIR 1937 Lah 738 (739).

('37) AIR 1937 Oudh 232 (233).

3b. ('34) AIR 1934 All 605 (606). (Money decree against agriculturists in Bundelkhand.)

4. ('12) 14 Ind Cas 227 (228) : 39 Cal 1010. (Income of Ghatwali property is not itself Ghatwali property and is liable to be sold.)

('30) AIR 1930 Cal 159 (160). (Affirmed on appeal in AIR 1931 P C 1e0.)

4a. ('38) AIR 1938 Lah 458 (458).

5. ('15) AIR 1915 Nag 98 (99) : 11 Nag L R 113. (Money decree in lieu of maintenance—Sir land.)

('33) AIR 1933 Nag 266 (267). (AIR 1925 P C 176, Foll.—Inam Jahagir—For share in the Jahagir property profits.)

5a. ('38) AIR 1938 Pesh 30 (31).

6. ('29) AIR 1929 Pat 700 (700, 701) : 9 Pat 368 (FB). (Agricultural lands in Sonthal Parganas.)

6a. ('37) AIR 1937 All 389 (392, 393). (Land not transferable under Agra Tenancy Act.)

maintenance inasmuch as such a right is not *property* at all.⁷ But where the maintenance is *charged on property* or is to *come out of specified properties*, it has been held by the Privy Council that a receiver may be appointed for realising the rents and profits of the properties and for applying them towards the maintenance of the debtor and the balance towards the discharge of the decree debt.⁸

A receiver may be appointed to realise a decree or debt which has been attached in execution proceedings,⁹ or to collect the future rents and profits accruing due from attached properties,¹⁰ or from the estate of a deceased debtor in the hands of his heirs,¹¹ or even in respect of property situate outside the Court's jurisdiction,^{11a} or for realisation of property by prosecuting causes of action arising outside jurisdiction.¹²

Where a receiver has been appointed at the instance of one decree-holder, it is not necessary that every decree-holder should also have a receiver appointed in his own suit in respect of the same property,¹³ though it does not disable him from asking for such relief in proper cases. Thus, a mortgagee decree-holder can ask for the appointment of a receiver though a receiver has already been appointed in a partition suit.¹⁴

7. "In such other manner," etc. — As to the other modes of execution than those specified in clauses (a) to (d), see the following —

Section 54. — Partition of estate or separation of share of such estate to be made by the Collector or any gazetted subordinate of the Collector.

Sections 68 to 72. — Execution of decrees against immovable property in certain cases to be transferred to the Collector.

O. 21 R. 31 (2). — Award of compensation to decree-holder for disobedience of decree to deliver specific moveable property.

O. 21 R. 32. — Enforcement of decree for specific performance, for restitution of conjugal rights or for an injunction.

O. 21 R. 33. — Special procedure for execution of a decree for restitution of conjugal rights.

7. (1893) 1 Q B 551 (558), *Holmes v. Millage*. (Moneys to become payable in consideration of services.)

[See also ('86) AIR 1936 Bom 399 (400). (Receiver cannot be appointed in respect of possible future earnings.)

('33) AIR 1933 Bom 350 (352); 57 Bom 507.]

8. ('25) AIR 1925 P C 176 (176); 47 All 385; 52 Ind App 262 (PC).

('15) AIR 1915 Nag 98 (99); 11 Nag L R 113. (Rents and profits in lieu of maintenance decree to be recovered from *sir* lands.)

('26) AIR 1926 Mad 565 (565); 49 Mad 567. (Recovery of stamp duty from pauper's future maintenance.)

('31) AIR 1931 P C 160 (161); 51 Ind App 215; 59 Cal 1 (PC). (Pension implies periodical payment of money by Government.)

[See also ('35) AIR 1935 Mad 1046 (1047). (Court can direct money collected by receiver in execution to be disbursed for benefit of judgment-debtor.)

('36) AIR 1936 Nag 288 (289); I L R (1937) Nag 534. (Service inam lands—Execution against judgment-debtor — Court can appoint receiver to collect income.)

('33) AIR 1933 Nag 266 (267). (*Berar Inam Rules*, R. 8—Jahagir granted under, for maintenance—Receiver can be appointed to manage jahagir—Suitable allowance to be fixed on amount coming into receiver's hands.)]

9. ('87) 11 Bom 448 (455).

('29) AIR 1929 Bom 279 (280). (Where a decree to be realised has been mortgaged to the plaintiff in the mortgage suit in which receiver is appointed.)

10. ('25) AIR 1925 Rang 318 (319, 320); 3 Rang 235. (Order allowing decree-holder to collect rent set aside—Receiver only can file suit for rent.)

11. ('19) AIR 1919 Oudh 326 (328); 22 Oudh L R 194. (Money decree.)

11a. ('38) AIR 1938 Lah 93 (94); I L R (1938) Lah 305. (Receiver can be appointed in respect of property in native State—But the receiver cannot be directed to take possession of such property—Proper order is to direct the receiver in possession to hand over possession to the receiver.)

('30) AIR 1930 Cal 502 (503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

12. ('21) AIR 1921 Mad 329 (330).

13. ('30) AIR 1930 Mad 4 (5).

14. ('11) 12 Ind Cas 165 (166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

O. 21 R. 34. — Execution of decree for execution of a document or endorsement of a negotiable instrument.

O. 21 R. 53. — Attachment of decrees.

O. 21 R. 56. — Delivery of attached coins or currency notes to the party entitled under the decree.

This clause does not enable a Court to add to, or subtract from, the terms of the decree itself inasmuch as it is a general principle of law that an executing Court cannot go behind the decree but must execute it as it stands.¹ Thus, where a decree in a redemption suit directs delivery of title deeds without any alternative provision for payment of damages in default of doing so, the *executing Court* cannot award such damages, though a separate *suit* may lie therefor.²

As to adjustments or agreements of parties out of Court as to the mode of execution of the decree, see *O. 21 R. 2*.

8. "On the application of the decree-holder." — The Section requires that the Court can act only on the *application of the decree-holder*. The reason for this requirement is that it concerns the parties alone and that the Courts need execute their decrees only if the parties entitled thereto want it.¹ But the application need not necessarily be in writing; it may be *oral*.² Nor need the mode of execution be *specifically expressed* in such application; it may be inferred from the act of the Court executing the decree.³ As regards the appointment of a receiver, it has been held by the High Court of Rangoon that even without an application, the Court can *suo motu* order the appointment of a receiver under Section 94 (d) and *O. 40 R. 1*.⁴ This view is correct. The requirement as to the application in this Section is subject to the conditions and limitations prescribed by the rules—in this case *O. 40 R. 1*—under which the Court can act *suo motu*.

This Section requires that the application must be made by the decree-holder. A *stranger* to the suit or decree cannot apply for execution though there may be a benefit conferred on him by the decree.⁵ Nor can the judgment-debtor apply under this Section, *e. g.*, for the appointment of a receiver.⁶

For definition of "decree-holder," *vide* Section 2 clause (3).

9. Appeal. — This Section must be read with *O. 40 R. 1*, and an order appointing a receiver in execution, if it falls under *O. 40 R. 1*, is appealable as an order under *O. 43 R. 1 (s)*.¹ But if the order of appointment is only a *conditional* one on the furnishing of security and security is not furnished, the order does not take effect at all and no appeal lies.² An order refusing to discharge a receiver is one relating to the

Note 7

1. See Note 8 under Section 38, *ante*.

2. ('22) AIR 1922 Mad 299 (300).

Note 8

1. ('20) AIR 1920 Lah 443 (446). (Court cannot appoint receiver unless asked.)

2. See *O. 21 R. 11 Cl. (2)*.

3. ('20) AIR 1920 Lah 443 (446).

4. ('25) AIR 1925 Rang 318 (320) : 3 Rang 235. (To collect rent in a money decree.)

5. ('17) AIR 1917 Oudh 182 (184, 185). (Compromise decree for allowances—Third person, though allowances fixed for him, not entitled to apply for execution.)

[See however ('32) AIR 1932 Mad 193 (194, 195). (Scheme suit—Board of control created

to call for accounts—Misappropriation and disobedience by trustee—Board of control deemed decree-holder entitled to ask for appointment of receiver.)]

6. ('22) AIR 1922 Pat 369 (371). (Right of decree-holder to sell mortgaged property cannot be defeated.)

[See however ('70) 13 Suth W R 453 (454). (Manager appointed under S. 243 of Act VIII of 1859.)]

Note 9

1. ('27) AIR 1927 Lah 190 (190).

('11) 12 Ind Cas 745 (751) (Cal).

('12) 14 Ind Cas 227 (228): 39 Cal 1010.

('20) AIR 1920 Lah 443 (444).

2. ('11) 12 Ind Cas 745 (751) (Cal).

"execution" of the decree within Section 47 and as such is appealable as a *decree*.³ An order under this Section which does not fall within Section 47 or within O. 43 R. 1 is not appealable.⁴

52. [S. 252.] (1) Where a decree is passed⁴ against a party⁵ as the legal representative³ of a deceased person, and the decree is for the payment of money¹² out of the property of the deceased,⁹ it may be executed by the attachment and sale¹⁴ of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent¹³ of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

[1877, Ss. 252 and 234; 1859, Ss. 203 and 210. See O. 22, Rr. 4, 5 and 12.]

Synopsis

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| 1. Legislative changes. | 9. "Out of the property of the deceased." |
| 2. Scope and object of the Section. | 10. Property in the hands of a third party. |
| 3. "Legal representative." | 11. Insolvency of heirs after decree—Effect. |
| 4. Decree against legal representative, when and how to be passed and its effect. | 12. Decree for payment of money. |
| 5. Decree against some of several legal representatives—Validity and legal effect. | 13. Liability of legal representative under the Section. |
| 6. Decree against wrong legal representative—Effect. | 14. Manner of execution. |
| 7. Decree against executor who has not proved the will—Effect. | 15. Right of legal representative to question the validity of the decree. See Section 50, Note 7. |
| 8. Decree against dead person—Effect. | 16. Appeal. |

Other Topics (Miscellaneous)

"Attachment and sale," meaning of. See Note 14 Pt. (3).
 Burden of proof. See Note 13 Pts. (2) and (3).
 Due application, what is. See Note 13 Pts. (6) and (7).
 Liability of legal representatives of a Hindu or Mahomedan.
 See Note 5 F-N (1); see also Section 11 Note 63b.
 Personal liability of legal representative. See Note 13 Pt. (4).
 "Where no such property remains." See Note 13 Pt. (5).

1. Legislative changes. — The words "in respect of which he has failed so to satisfy the Court" have been substituted for the words "not duly applied by him" in clause (2) of the Section.

2. Scope and object of the Section. — This Section contemplates cases where the debtor dies before the decree and the decree itself has been passed against the

3. ('18) AIR 1918 Pat 60 (61).

4. ('29) AIR 1929 Rang 161 (161); 7 Rang-110.

when the suit is based on the allegation that the defendants are in possession of the assets.⁵

In an early decision of the Calcutta High Court, it was held that where there are several legal representatives of the deceased it is not necessary that their shares should be defined; it is enough if a joint decree is passed against all of them.⁶ But it has been recently held by the Privy Council that in a suit against the heirs of a deceased Mahomedan for a dower debt due by the deceased, the proper form of decree is against each of the heirs of the deceased for that proportion of the plaintiff's joint claim which corresponds to the share of each heir in the estate of the deceased.^{6a} The decree against a legal representative under this Section should direct the defendant to pay the decree debt *out of the assets* of the deceased in his hands.⁷ A decree which does not make such a direction is an erroneous decree.⁸

The decree passed under this Section is a mere money decree and does not create a *charge* on the assets of the deceased. The Section only states the extent to which and the manner in which the debt can be recovered, and in no way provides for reservation of property to satisfy the debt.⁹ Where a person is sued as a representative, a decree cannot be passed against him on the ground that he is a partner since it would alter the nature of the suit.¹⁰

In order that the provisions of this Section may apply, the decree must be against a *person* and not merely against something which is not a person. Thus, a decree merely against the assets of a deceased person without mentioning the name of the legal representative is inexecutable.¹¹

Where a decree is passed against several heirs of a deceased person and the decree-holder realises the entire decretal amount from some of the heirs alone, the latter can sue the other heirs for contribution.¹²

5. Decree against some of several legal representatives — Validity and legal effect. — As has been already mentioned in Note 63b to Section 11, a decree obtained against some only of several heirs of a deceased person is binding on the estate¹ in the absence of fraud or collusion, on the principle of substantial

(72) 18 Suth W R 185 (188) (PC).

(73) 20 Suth W R 280 (282, 283).

(27) AIR 1927 All 459 (460): 49 All 645. (Per Mukerji, J.)

(73) 20 Suth W R 162 (162).

(78) 2 Cal L Rep 189 (191, 192).

(81) 1881 Pun Re No. 11, page 20.

(75) 1875 Pun Re No. 12, page 19.

(81) AIR 1931 Nag 173 (175): 27 Nag L R 247. (120 Ind Cas 383 (Nag) Foll.)

[But see (25) AIR 1925 Nag 380 (381). (Possession of assets may be enquired into either in suit or execution proceedings.)

(27) AIR 1927 All 459 (462): 49 All 645. (Per Ashworth J.)]

5. (70) 14 Suth W R 431 (432). (If possession not proved, suit must be dismissed.)

6. (71) 15 Suth W R 192 (192, 193).

6a. (38) AIR 1938 P C 80 (84): 65 Ind App 119: 32 Sind L R 362 (PC).

7. (08) 18 Mad L Jour 36 (36).

(96) 1896 Bom P J 226 (227).

(1863) Marsh 611.

(10) 6 Ind Cas 397 (397) (Mad).

(17) AIR 1917 Mad 418 (419).

(26) AIR 1926 Oudh 301 (303).

(81) AIR 1931 Sind 141 (143): 25 Sind L R 173.

(70) 2 N W P H O R 449 (450). (Costs also.)

8. (23) AIR 1923 Bom 414 (415). (Such decree can be amended even at a late stage.)

(74) 1874 Pun Re No. 65, page 213.

9. (16) AIR 1916 Mad 645 (645, 646). (Case under Provincial Insolvency Act (8 of 1910), S. 16 (2).)

(83) 9 Cal 406 (409).

10. (09) 2 Ind Cas 146 (148): 34 Bom 244.

11. (34) AIR 1934 Mad 562 (563). (Phrase "out of the estate of the deceased" is merely restrictive—In this case it was held that amendment of the decree was the remedy.)

12. (38) AIR 1938 P C 169 (173, 174): 65 Ind App 219: 13 Luck 494 (PC).

Note 5

1. (05) 32 Cal 296 (313): 32 Ind App 23 (PC). (Mahomedan heirs.)

(82) 8 Cal 370 (373, 374). (Do.)

(83) 9 Cal 508 (510). (Do.)

(90) 14 Bom 597 (602, 603, 604). (Do.)

(79) 5 Cal L Rep 477 (480): 6 Ind App 233 (PC). (Do.)

representation.^{1a} This principle will not, however, apply where all the heirs are impleaded and some of them are subsequently exempted by the plaintiffs from the array of defendants. In such a case the defendant exempted cannot be considered to have been represented by the other defendants.^{1b} (See also Section 50 Note 14.) In the case of *co-administrators* or two or more *legatees*, it has been held that a decree against one only will not bind the estate.²

6. Decree against wrong legal representative — Effect. — Where a creditor selects from among several rival claimants to the estate of his deceased debtor any one whom he *bona fide* believes to have the best *prima facie* title as legal representative and obtains a decree against him, the decree and the consequent execution sale will bind the true heir in the absence of fraud or collusion.¹ This is an exception to the general principle of law that a decree will bind only the parties to it or those claiming through them. But the true legal representative cannot, after the decree, be brought on record *for the purpose of execution* and the deceased debtor's property *in his hands* cannot be attached and sold in that same suit.² If a person who has no sort of right to represent the deceased is made a party to the suit and a decree is obtained against him as representing the deceased, such decree cannot bind the true heir.³ In such a case it cannot be said that the suit was a *bona fide* one.

('86) 11 Bom 361 (364, 365). (Do.)

[See ('89) 12 Mad 356 (365). (Some persons allowed to represent a community — Decree for injunction — No personal liability against persons not co-nominees on the record.)]

In view of the Privy Council decision above referred to, the following cases relating to Mahomedan co-heirs cannot be considered to be good law:—

('79) 4 Cal 142 (153, 155, 156).

('76) 2 Cal 395 (398).

('85) 7 All 822 (826, 845) (F B).

('70) 14 Suth W R 448 (449).

('01) 23 All 263 (264).

('95) 19 Bom 273 (275).

('75) 1 All 57 (59, 60) (F B).

('85) 7 All 716 (719).

('87) 14 Cal 464 (483).

('82) 11 Cal L Rep 268 (271, 272).

('23) AIR 1923 Bom 411 (411, 412): 47 Bom 712.

1a. ('08) 26 Mad 230 (234). (Mahomedan heirs.)

('28) AIR 1928 Mad 1199 (1199). (Do.)

('24) AIR 1924 Bom 420 (421). (Do.)

('87) 12 Bom 101 (103). (Do.)

('95) 20 Bom 338 (345). (Do.)

('89) 12 Mad 90 (91, 92). (Do.)

('94) 21 Cal 311 (317). (Do.)

('92) 20 Cal 453 (463). (Hindu heirs.)

('25) AIR 1925 All 479 (480): 47 All 466 (Do.)

1b. ('32) AIR 1932 All 591 (592, 593): 54 All 796.

[See also ('38) AIR 1938 P C 7 (8): 13 Luck 61: 32 Sind L R 221 (P C). (Suit against sons and grandsons of deceased Hindu — Suit dismissed against grandsons, decreed against sons — Decree cannot be executed against shares of grandsons in property.)]

2. ('17) AIR 1917 Pat 432 (432). (Co-administrators.)

('13) 18 Ind Cas 632 (632, 633) (Mad). (Decree against one only of two legatees.)

Note 6

1. ('33) AIR 1933 Lah 380 (381): 14 Lah 696.

('16) AIR 1916 Mad 1022 (1023, 1024).

('30) AIR 1930 Mad 930 (938): 54 Mad 212. (Binding on legatee also.)

('28) AIR 1928 Mad 243 (243, 245).

(1900) 24 Bom 135 (147, 148).

('72) 17 Suth W R 459 (461) (P C).

(1864) Marsh 614.

('85) 11 Cal 45 (49, 50, 51, 52). (Adopted son also is bound unless he shows some good cause.)

('89) 16 Cal 40 (56, 60, 61): 15 Ind App 195 (PC).

('79) 4 Cal 342 (344, 345, 346).

(1863) 1863 Suth W R Sup 119. (Campbell, J. Dissentient.)

('96) 23 Cal 374 (383, 389).

[See ('39) AIR 1939 Lah 277 (279): 41 Pun L R 147 (149). (Decree against widow as legal representative of deceased husband — Minor son not impleaded in suit is bound by decree.)]

[But see ('13) 18 Ind Cas 381 (382) (Bom). (Submitted wrongly decided.)]

2. ('09) 3 Ind Cas 737 (738): 33 Mad 75.

('32) AIR 1932 Lah 314 (315). (True representative cannot be substituted after period of limitation. See S. 22, Limitation Act.)

('27) AIR 1927 Mad 197 (198, 199).

('16) AIR 1916 Cal 661 (662). (Remedy of decree-holder is either to have decree vacated and proceed with true legal representative or to file a suit on the judgment against the true legal representative.)

('87) 14 Cal 316 (320).

('14) AIR 1914 Cal 28 (29).

3. ('80) 5 Bom 14 (19).

('34) AIR 1934 All 474 (477, 479). (Trespasser in possession — Decree against — Not binding on real heir.)

('33) AIR 1933 Mad 43 (46, 48). (Even in the absence of fraud.)

('69) 12 Suth W R F B 1 (4) (F B).

As regards the cases where the true heir is affected by estoppel the principle stated in Section 50 Note 14 applies here also. See also the undermentioned cases.⁴

7. Decree against executor who has not proved the will — Effect. — An executor appointed by will does not represent the deceased by virtue of the will until he has obtained probate. Therefore, a suit against him by the creditor is not maintainable unless the executor has intermeddled with the estate.¹ In order that the just claims of the creditor in such cases may not be defeated by the executor not taking out probate, the persons who take possession of the estate of the deceased will be treated as the representatives of the deceased. Even if the decree obtained against them cannot be executed against the estate in the hands of the executor when he has taken out probate, it is sufficient to enable the plaintiff to bring a suit against the executor in order to have the decree satisfied.²

8. Decree against dead person—Effect. — A suit against a dead person is not maintainable.¹ If a decree is obtained against a dead person without impleading the legal representative, the decree is a nullity and cannot be executed.² But the decree is not invalid if the defendant dies *after the conclusion* of the hearing but *before the pronouncing of the judgment*.³ See O. 22 R. 6. So also a decree passed by the Privy Council against a respondent who dies pending the appeal is not a nullity.⁴

9. "Out of the property of the deceased." — A decree obtained against the legal representative of a deceased debtor can be executed only against the estate of the

('68) 14 Suth W R 448n (449n).

('82) 4 All 192 (194, 195). (Proper heir who obtained from District Court letters of administration under Indian Succession Act, is not affected by the decree against wrong heirs.)

('71) 8 Bom H C R A C 37 (39).

('85) 9 Bom 86 (91, 93).

('74) 8 Mad H C R 186 (188).

('11) 12 Ind Cas 915 (918, 919) : 34 All 79. (The succeeding person to estate as per Hindu law does not do so as a heir or legal representative but as survivor; hence cannot be said heir to his assets.)

('10) 5 Ind Cas 710 (711) (Cal) (Hindu widow—Decree against, after remarriage, does not bind the true legal representative of deceased husband.)

('14) AIR 1914 Cal 263 (267). (When defendant dies, plaintiff must choose under S. 368 against whom he is to proceed.)

('88) 11 Mad 408 (410, 411). (Submitted decision is correct though the reasoning is wrong.)

4. ('27) AIR 1927 Bom 181 (184) : 51 Bom 125. (On alleged representative's request his name as representative removed. He or persons claiming under him are estopped from further claiming.)

('71) 8 Bom H C R A C 37 (43). (Case of intermeddling.)

('85) 9 Bom 86 (91).

('16) AIR 1916 All 284 (285). (Once the plaintiff confines himself to decree for assets in hand, he cannot in execution claim the property which came in the hands of defendant thereafter.)

('79) 3 Cal L Rep 157 (157, 158).

('25) AIR 1925 Nag 380 (381). (Defendant's failure to deny oral pleading — Inference of admission cannot be drawn.)

Note 7

1. (1894) 1894 A C 497 (442), Mohamadu Mohideen Hadjiar v. Pitchay.

('12) 16 Ind Cas 690 (691) (Cal).

('94) 19 Bom 821 (827).

('09) 2 Ind Cas 818 (819) (Cal). (Order for probate not sufficient.)

2. ('03) 80 Cal 1044 (1057, 1058, 1059).

('79) 4 Cal 342 (345, 346).

('15) AIR 1915 Cal 207 (208).

('91) 14 Mad 454 (457). (4 Cal 342 followed.)

('08) 35 Cal 276 (279, 280). (Administrator—Executor de son tort.)

Note 8

1. ('08) 81 Mad 86 (88, 89).

('25) AIR 1925 Mad 1210 (1210) : 49 Mad 18 (F B). (But in the case of an appeal the defect can be rectified. Overruling AIR 1924 Mad 56.)

2. ('16) AIR 1916 Mad 656 (656) : 38 Mad 682.

('95) 17 All 478 (481, 482).

('79) 3 Cal L Rep 192 (193).

('13) 20 Ind Cas 506 (506) (Cal).

('68) 10 Suth W R 455 (456, 457).

('67) 7 Suth W R 52 (52).

('67) 1867 Pun Re No. 65.

('70) 1870 Pun Re No. 85.

('02) 4 Bom L Rep 340 (341).

('20) AIR 1920 Nag 61 (61, 62) : 16 Nag L R 138.

('70) 14 Suth W R 337 (338). (Principle applies to appellate decrees also.)

('02) 26 Bom 317 (319). (Do.)

3. ('95) 19 Bom 807 (809). (17 Bom 29 followed.)

('99) 21 All 314 (315, 316). (19 Cal 513 (PC) followed.)

('92) 19 Cal 513 (538) : 19 Ind App 103 (P O).

('03) 26 Mad 101 (102).

('97) 21 Bom 314 (317).

4. ('37) AIR 1937 Pat 321 (322) : 16 Pat 316.

latter in his hands.¹ The decree-holder is not entitled to proceed against his separate property.² As to cases of survivorship in Hindu joint families, see Section 53 Note 2. Where the survivor does not inherit as heir of the deceased but gets into the estate in his own *individual right*,^{2a} or where lands are attached to a hereditary office and are inalienable, they have not the character of simple heritable property and do not form part of the assets of the deceased person.³ But, where under a grant for maintenance, a grantee has a heritable but non-transferable interest in the property, it cannot be said that each successive heir has only a life-interest in the property. As the grant is heritable each heir derives his interest by inheritance and the property in his hands forms the assets of the deceased grantee.^{3a}

Rents and profits of immovable property are legal incidents of such property and bear the same character as the property itself. So, where a decree is passed against

Note 9

1. ('08) 18 Mad L Jour 36 (36, 37).
- ('27) AIR 1927 Bom 52 (52, 53). (Order 21 Rule 12 is not applicable in such cases.)
- ('31) AIR 1931 Bom 229 (231, 232). (Hindu law—Son is liable for his father's lawful debts only.)
- ('68) 10 Suth W R 199 (200).
- ('96) 1896 Bom P J 226.
- ('75) 23 Suth W R 265 (266).
- ('78) 2 Cal L Rep 189 (192).
- ('74) 22 Suth W R 388 (388). (The heirs of the deceased are also liable for the papers in custody for which the claim is established against the estate of the deceased.)
- ('74) 22 Suth W R 494 (495). (The heirs are also liable for damages arising out of breaches of contract made by the deceased.)
- ('84) 8 Bom 220 (223). (Although the property may not have come into the sons' possession.)
- (1865) 2 Suth W R 258 (258).
- ('74) 1874 Pun Re No. 65, p. 213.
- ('05) 1905 Pun LR No. 48, p. 185. (A got a decree for possession of lands against X but died before getting possession—X himself, legal representative of A and hence merger of titles—Held lands liable in the hands of X for decree against A.)
- ('29) AIR 1929 Lah 424 (425).
- ('24) AIR 1924 Nag 410 (411) : 21 Nag L R 12. (Son's sons are liable after their separation from grandfather for his debts to the extent of assets.)
- ('87) 11 Bom 528 (532, 533). (Widow's arrears of maintenance are her assets for the cause of debt incurred by her.)
- ('25) AIR 1925 Nag 380 (381). (Can be executed against property obtained even after the decree.)
- ('16) AIR 1916 All 284 (286). (Do.)
2. ('17) AIR 1917 Pat 536 (537).
- ('25) AIR 1925 Oudh 113 (113) : 27 Oudh Cas 234. (Even though passed as a personal decree not executable.)
- ('21) 65 Ind Cas 224 (224) (Pat). (Do.)
- ('76) 25 Suth W R 224 (224). (Judgment-debtor must prove and file the whole inventory of the whole estate descended to him before he can claim exemption on ground that he only received a small asset.)
- ('78) 3 Mad 42 (46).
- ('69) 12 Suth W R 233 (233, 234).
- ('70) 14 Suth W R 362 (362). (Before executing the decree against the heirs personally for the deceased person's assets decree-holder must prove that they have not duly applied the same and that no such property of the deceased can be found as he can sell in execution.)
- ('72) 18 Suth W R 185 (188) (P O).
- ('73) 20 Suth W R 280 (282, 283).
- ('06) 1906 Pun Re No. 123, p. 466.
- (1864) 1864 Suth W R Misc 1 (2). (Even though he be a Hindu son.)
- ('71) 8 Bom H C R A C 245 (248, 249).
- ('31) AIR 1931 All 368 (369). (Widow's maintenance amount after surrender of husband's estate is not liable to a decree against husband's estate.)
- ('97) 4 Cal W N 151 (152). (Where property is seized decree-holder must prove that it belongs to deceased and is not the private property of legal representative.)
- ('88) 1888 All W N 49 (50). (Do.)
- 2a. ('14) AIR 1914 Oudh 208 (208). (Zamindar is not a legal representative of the deceased tenant who leaves no heir and whose estate escheates to zamindar.)
- ('70) 5 Mad H C R 303 (309). (An unsettled Polliam in Madras presidency.)
- ('87) 10 Mad 117 (121). (Malabar Tarwad karnavan.)
3. ('80) 5 Cal 389 (412, 419). (Ghatwalli lands.)
- (1865) 4 Suth W R Misc 5 (6). (Do.)
- ('66) 6 Suth W R 129 (129). (Do.)
- ('67) 7 Suth W R 178 (178, 179). (Do.)
- ('96) 23 Cal 873 (876). (Do.)
- ('82) 9 Cal 187 (206, 208) : 9 Ind App 104 (PC). (Do.)
- ('82) 9 Cal 388 (388). (Do.)
- ('88) 15 Cal 471 (481, 482) : 15 Ind App 18 (PC). (Do.)
- ('84) 10 Cal 677 (684, 685). (Do.)
- ('85) 9 Bom 198 (212, 217, 232) (F B). (Vatan lands.)
- ('25) AIR 1925 Nag 449 (450). (Balance of sale proceeds from occupancy field of the deceased father's estate is not asset in the hands of the son—Money representing such property is also not liable.)
- ('06) 1906 Pun Re No. 123, p. 466.
- ('20) AIR 1920 Pat 468 (468). (But rent income accrued during deceased's lifetime though collected subsequently will be assets.)
- 3a. ('36) AIR 1936 Oudh 76 (79).

the assets of a deceased person in the hands of his heir, the rents and profits accruing since his death form part of his assets.⁴ But in the case of lands attached to a hereditary office and which are inalienable, the income is not liable to attachment under this Section.⁵ A right to a share of offerings in a temple which has been inherited by a person forms part of the assets of the deceased for the purpose of this Section.^{5a}

Where a decree is passed against the assets of the deceased in the hands of the representative and the representative himself dies thereafter, the property in the hands of his heir or legal representative does not cease to be assets of the deceased debtor.⁶

10. Property in the hands of a third party. — When a person is sued as the legal representative of a deceased person for the recovery of a debt due by the deceased, and a decree is passed for money to be paid out of the assets of the deceased in the hands of the representative, the decree is nonetheless a decree against the legal representative. It refers to him as the judgment-debtor, and it follows that such a decree can be executed only against the representative who was made a defendant in the suit or his or her representatives.¹ As has been already mentioned in Section 50, Note 15, a judgment-creditor cannot in execution of his decree follow the assets of the deceased in the hands of transferees in good faith and for valuable consideration,² unless the transfers are affected by the doctrine of *lis pendens*³ or the transferees knew that there were unpaid debts and that the transferor did not intend to apply the sale proceeds to pay them.⁴ Even in such a contingency, the transfer not being a void

4. ('88) AIR 1938 Oudh 45 (45) : 13 Luck 689.

(Overruling AIR 1914 Oudh 233.)

('86) AIR 1936 Lah 286 (286).

('24) AIR 1924 Mad 530 (532, 533, 536, 537) : 47 Mad 411 (F B).

('82) 137 Ind Cas 632 (638) (Oudh.)

('32) AIR 1932 Lah 383 (383).

('17) AIR 1917 Mad 536 (537).

('28) AIR 1928 Oudh 40 (40) : 2 Luck 408.

('21) AIR 1921 Sind 29 (32, 33) : 15 Sind L R 47.

(Income or crops during lifetime of judgment-debtor liable, even though crops not liable as inalienable under Dekkhan Agriculturists Relief Act but not income or crops raised by successor after death of previous holder.)

('04) 8 Cal W N 843 (850, 852). (Accretions.)

('71) 15 Suth W R 285 (285, 286).

[But see ('97) 19 All 235 (236, 237). (Submitted wrongly decided.)]

5. (1865) 4 Suth W R Misc 5 (6). (Ghatwalli lands.)

('66) 6 Suth W R 129 (129). (Do.)

('67) 7 Suth W R 178 (178, 179). (Do.)

('96) 23 Cal 878 (876). (Do.)

('23) AIR 1923 All 169 (169, 170). (Inalienable property.)

('24) AIR 1924 Mad 707 (707). (Impartible estates.)

('13) 21 Ind Cas 272 (273) : 9 Nag L R 137. (Where Government rayab's holding is inalienable under Section 67E of the Central Provinces Land Revenue Act, 1881.)

('16) AIR 1916 Lah 313 (314). (Punjab Colonisation of Government Lands Act (5 of 1912) — Government tenant.)

('70) 5 Mad H C R 303 (310). (Unsettled Pollem

and revenue and income therefrom are not liable in hands of successor.)

('30) AIR 1930 Bom 235 (239). (Section 22, clause (2) Dekkhan Agriculturists Relief Act—Collector cannot be appointed to manage lands of deceased judgment-debtor in the hands of legal representative.)

5a. ('36) AIR 1936 All 131 (134) : 58 All 457.

6. ('14) AIR 1914 Mad 668 (669).

(1900) 22 All 367 (369, 370).

[See also ('88) 1938 Nag L Jour 176 (179).

Note 10

1. ('09) 3 Ind Cas 787 (738) : 33 Mad 75.

('30) AIR 1930 Cal 762 (763) : 58 Cal 170. (The right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit only.)

[See ('84) 10 Cal 860 (864) : 11 Ind App 59 (P C).]

2. (1863) Mar 509, Campbell v. Delaney.

(1865) 2 Suth W R 296 (297).

('69) 12 Suth W R 177 (178). (Obiter.)

('71) 14 Suth W R 239 (241, 244, 245, 246).

(Mahomedan widow's dower is on par with other debts. — A purchaser from the deceased Mahomedan is not bound to enquire into the existence of legal necessity.)

('81) 8 Cal L Rep 447 (448).

('80) 7 Cal L Rep 460 (462, 463).

('75) 3 Ind App 241 (245) (P C).

('79) 4 Cal 402 (408) : 5 Ind App 211 (P O).

('72) 9 Bom H C R 116 (119).

('97) 19 All 504 (505, 506).

('69) 10 Suth W R 199 (201).

3. ('79) 4 Cal 402 (410) : 5 Ind App 211 (P O).

4. ('79) 4 Cal 897 (912, 914)

Whenever a decree is passed against the heir, it must be deemed to be executable only as provided in this Section, though the decree is erroneously passed as a personal decree.^{1a}

It is for the decree-holder to prove in the first instance, that some assets belonging to the estate of the deceased came into the hands of the legal representative^{3a} and then it is for the latter to satisfy the Court as to the extent of the assets received and to account for them.³ He will be bound to account for all sorts of property that he got, such as money, moveables, immovables, accounts, papers, etc. If the defendant fails to satisfy the Court that he has duly applied the property of the deceased, he is personally liable to the extent of the property of which he has failed to satisfy the Court.⁴ But sub-section (2) will apply only when no

- 1a. (75) 24 Subh W R 353 (384).
(21) 65 Ind Cas 224 (224) (Pat).
2. (17) AIR 1917 Mad 536 (538). (Legal representative failing to satisfy the Court that he had duly applied the property of the deceased is personally liable.)
(34) AIR 1934 All 249 (250).
(24) AIR 1924 Mad 466 (467, 469). (No proof of assets—Not liable.)
(66) 8 Mad H C R 161 (164).
(72) 16 Subh W R 185 (188) (P.C.).
(76) 26 Subh W R 224 (224, 225).
(68) 10 Subh W R 199 (200, 201).
(67) 8 Subh W R 160 (161).
(67) 8 Subh W R 198 (196).
(70) 14 Subh W R 362 (362). (The decree-holder must satisfy the Court that no such property of the deceased can be found as can be sold in execution before he can execute the decree against heirs to the extent of property they inherited from the debtor.)
(69) 12 Subh W R 233 (234).
(96) 1896 Bom P J 226.
(78) 8 Mad 42 (46).
(14) AIR 1914 All 280 (281).
(1900) 4 Cal W N 151 (152).
2 Ind Jur (NS) 234. (Brother taking possession, widow having relinquished—Liabilities legal representative.)
(73) 21 Subh W R 117 (118). (Son instead of objecting asked time for payment—Interference is should explain delay in proceeding against assets.)
(78) 20 Subh W R 422 (424). (Decree-holder should explain delay in proceeding against assets.)
(But see (88) 1888 All W N 49 (50).]

3. (39) 181 Ind Cas 721 (725) (Pat).
(37) AIR 1937 Rang 531 (538). (Question to be decided by executing Court and not in regular suit.)
(17) AIR 1917 Mad 536 (538).
(38) AIR 1938 Rang 309 (310).
(38) AIR 1938 Rang 447 (447).
(34) AIR 1934 Lah 106 (107).
(34) AIR 1934 Rang 93 (94).
(11) 12 Ind Cas 253 (253, 255) (Mad).
(24) AIR 1924 Mad 466 (468).
(76) 26 Subh W R 224 (224). (Before judgment-debtors can claim exemption from decree-holder's claim on ground that they have received a small asset from ancestor's estate or otherwise, they should prove and file the whole inventory of it.)

- 3a. (74) 22 Subh W R 358 (358, 359).
4. (39) 181 Ind Cas 721 (725) (Pat). (Section 52 (2) of the Civil Procedure Code simply enacts a rule of procedure in accordance with natural justice, and even in the absence of that Section (and of any provision of law to the contrary) Courts would have been justified in applying the principle embodied in it as a rule of justice, equity and good conscience.)
(38) AIR 1938 Mad 684 (686).
(17) AIR 1917 Mad 536 (538).
(39) AIR 1938 Rang 309 (310). (Question can be gone into in execution itself: AIR 1927 Rang 127 Pol.).
(30) AIR 1930 Lah 204 (204).
(69) 12 Subh W R 517 (517).
(68) 10 Subh W R 199 (200).
(78) 1 Cal L Rep 359 (360, 361).
(30) AIR 1930 Lah 332 (333). (Lapse of time does not absolve judgment-debtor but may affect proof as to due application.)
(96) 1896 Bom P J 226. (This question to be decided only in execution and not in suit.)
(97) 20 Mad 446 (447). (Personal decree can be passed in suit.)
(22) AIR 1922 Oudh 200 (200). (A person who without any right took possession of the property and disposed of a portion of it is liable for personal decree against him for the deceased person's debts.)

- 3a. (74) 22 Subh W R 358 (358, 359).
4. (39) 181 Ind Cas 721 (725) (Pat). (Section 52 (2) of the Civil Procedure Code simply enacts a rule of procedure in accordance with natural justice, and even in the absence of that Section (and of any provision of law to the contrary) Courts would have been justified in applying the principle embodied in it as a rule of justice, equity and good conscience.)
(38) AIR 1938 Mad 684 (686).
(17) AIR 1917 Mad 536 (538).
(39) AIR 1938 Rang 309 (310). (Question can be gone into in execution itself: AIR 1927 Rang 127 Pol.).
(30) AIR 1930 Lah 204 (204).
(69) 12 Subh W R 517 (517).
(68) 10 Subh W R 199 (200).
(78) 1 Cal L Rep 359 (360, 361).
(30) AIR 1930 Lah 332 (333). (Lapse of time does not absolve judgment-debtor but may affect proof as to due application.)
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(17) AIR 1917 Mad 536 (538).
(38) AIR 1938 Rang 309 (310).
(38) AIR 1938 Rang 447 (447).
(34) AIR 1934 Lah 106 (107).
(34) AIR 1934 Rang 93 (94).
(11) 12 Ind Cas 253 (253, 255) (Mad).
(24) AIR 1924 Mad 466 (468).
(76) 26 Subh W R 224 (224). (Before judgment-debtors can claim exemption from decree-holder's claim on ground that they have received a small asset from ancestor's estate or otherwise, they should prove and file the whole inventory of it.)

- 3a. (74) 22 Subh W R 358 (358, 359).
4. (39) 181 Ind Cas 721 (725) (Pat). (Section 52 (2) of the Civil Procedure Code simply enacts a rule of procedure in accordance with natural justice, and even in the absence of that Section (and of any provision of law to the contrary) Courts would have been justified in applying the principle embodied in it as a rule of justice, equity and good conscience.)
(38) AIR 1938 Mad 684 (686).
(17) AIR 1917 Mad 536 (538).
(39) AIR 1938 Rang 309 (310). (Question can be gone into in execution itself: AIR 1927 Rang 127 Pol.).
(30) AIR 1930 Lah 204 (204).
(69) 12 Subh W R 517 (517).
(68) 10 Subh W R 199 (200).
(78) 1 Cal L Rep 359 (360, 361).
(30) AIR 1930 Lah 332 (333). (Lapse of time does not absolve judgment-debtor but may affect proof as to due application.)
(96) 1896 Bom P J 226. (This question to be decided only in execution and not in suit.)
(97) 20 Mad 446 (447). (Personal decree can be passed in suit.)
(22) AIR 1922 Oudh 200 (200). (A person who without any right took possession of the property and disposed of a portion of it is liable for personal decree against him for the deceased person's debts.)

property of the deceased is in the possession of the judgment-debtor.⁵ If payments are not made by the heir rateably to all the creditors, it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors.⁶ In such cases the analogy of Section 323 of the Succession Act (XXXIX of 1925) governing executors and administrators does not apply. Where payments are made by the legal representative to the extent of the full value of the property of the deceased which has come into his hands, the decree cannot be executed even though he may still have in his possession property which originally belonged to the deceased.⁷ This Section does not provide that the representative shall be made answerable as well for what, with diligence on his part, would have come to his hands as for what actually has come to his hands.⁸ In such a case, the creditor may have a remedy by an administration suit or other regular action.⁹

14. Manner of execution. — See Note 13 Foot-notes 1 to 5.

Where the heir pleads in answer to execution that the property attached is his own private property or is otherwise one which is not liable to be proceeded against in execution, the question should be decided in *execution* and not referred to a *separate suit*.¹ The decree-holder is entitled to attach and sell any property of the deceased in the possession of his heirs independently of the fact whether the property in such possession is more than his share or not.² He cannot be delayed till the legal representatives are able to ascertain all the creditors and the extent of their debts or till they effect a partition among themselves or settle their disputes *inter se*, or till probate is obtained, or till the assets are reduced to possession.³

The words "attached and sold" should be taken distributively; so that where income from property in the hands of the legal representative is attached, it is unnecessary to sell it.⁴ A decree-holder is entitled to have the whole of his decree satisfied

(10) 6 Ind Cas 397 (397) (Mad). (Unless assets came to them personal decree cannot be passed.) [But see (70) 18 South W R 36 (36, 37). (Decree-holder may be estopped from proceeding per-sonally.)]

5. (37) AIR 1937 Pesh 80 (80). (30) AIR 1930 Lah 354 (355). (70) 14 South W R 362 (362). 6. (08) 26 Mad 792 (796, 797). (06) 30 Bom 270 (273). (95) 1895 Pun Re No. 68, p. 337. (27) AIR 1927 All 459 (460) : 49 All 645. (May even pay the debt due to himself.)

7. (03) 26 Mad 792 (798). (69) 12 South W R 177 (178). [See (70) 14 South W R 239 (241). (13) 21 Ind Cas 272 (273) : 9 Nag L R 137.] 8. (87) 11 Bom 727 (731, 732). (08) 35 Cal 1100 (1103). 9. (03) 35 Cal 1100 (1103). (84) 8 Bom 220 (222, 223). Note 14

1. (73) 20 South W R 250 (253). (59) 16 Cal 1 (S). (59) 16 Cal 603 (606, 609). (90) 17 Cal 57 (65). (90) 17 Cal 711 (714, 721) (F B). (90) 12 All 73 (73). (56) 10 Mad 117 (121). (10) 34 Bom 516 (552).

(09) 4 Ind Cas 839 (841) : 34 Bom 142. (Nor is a fresh application necessary to decide the question.) (78) 1 Cal L Rep 359 (360). (Do). 2. (25) AIR 1925 Oudh 515 (515, 516, 517). (14) AIR 1914 All 392 (393) : 36 All 439. (99) 22 Mad 194 (195, 196). (Decree-holder's right to execute his decree against legal representative is not affected by S. 104, Probate and Administration Act.) (09) 4 Ind Cas 1059 (1059) : 33 Mad 6. (19) AIR 1919 Sind 49 (50) : 18 Sind L R 138. (Court can however give effect to the equities as between the different legal representatives.) 2a. (25) AIR 1925 Oudh 515 (516). (Will shares inter se are settled.) (09) 4 Ind Cas 1059 (1059) : 33 Mad 6. (Decree-holder not bound to wait till the decision as to who is the true legal representative.) (13) 18 Ind Cas 510 (510, 511) : 6 Low Bur Rule 158. (Will realisation of whole estate and finding out the extent of the assets.) (99) 22 Mad 191 (195, 196). (Time for other disposition of the estate.) (72) 17 South W R 513 (511). (Decree-holder need not wait till executor or administrator distributes in due course.) See also cases cited in Note 7 Foot-note (2) and those in Note 13 Foot-note (6). 3. (24) AIR 1924 Mad 530 (530, 531) : 17 Mad 411 (F B).

out of the assets of the deceased, as far as they go, to the exclusion of other creditors who have not obtained decrees. Section 323 of the Indian Succession Act (XXXIX of 1925) merely lays down a rule of procedure to be followed by the executor or administrator and does not control the operation of this Section.¹

13. Right of legal representative to question the validity of the decree. — See Section 50 Note 7.

16. Appeal. — Such of the orders passed under this Section as satisfy the requirements of Section 47 are decrees and are appealable as such.

See Section 47 Notes 64 and 71a.

53. For the purposes of section 50 and section 52, property

in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

Synopsis

1. Scope, applicability and object of the Section.
2. "Property in the hands of a son or other descendant."
3. "Which is liable under Hindu law for the payment of the debt of a deceased ancestor."
4. "Deceased ancestor."
5. "Decree."
6. "Property of the deceased."
7. "Legal representative."

Other Topics (Miscellaneous)

Enforceability under this Section in execution and not by separate suit. See Note 1.
Inapplicability of the Section to persons other than descendants. See Notes 2 and 3.
Property not liable under this Section. See Notes 3 and 6.

1. Scope, applicability and object of the Section. — This Section is new. It was introduced for the first time in the Code in 1908. Under the Hindu law, an undivided son or other descendant who succeeds to the joint family property on the death of the ancestor, does so by right of *survivorship* and takes the property in his *own right* and not as *heir* of the ancestor.¹ He is not a legal representative of the deceased ancestor as defined in Section 2 clause (11).² But he is liable under the Hindu law by reason of his pious obligation, to pay the debts of his deceased ancestor.

4. (172) 17 Suth W R 513 (514).

(18) 18 Ind Cas 510 (511) : 6 Low Bur Rui 158.

Section 53 — Note 1

1. (94) 16 All 449 (455, 457). (But self-acquired property is taken as heir.)
2. (18) AIR 1918 Bom 165 (166) : 42 Bom 504. (Enforcement of injunction decree refused even under this Section.)

to the extent of the joint family properties in his hands. Under the old Code, the term "legal representative" was not defined, and there was a conflict of decisions as to whether a Hindu undivided son or other descendant could, so far as the ancestral property was concerned, be regarded as the legal representative of the deceased ancestor and whether the said liability could be enforced in *execution*, or only by a *separate suit*, inasmuch as the liability was quite distinct from, and independent of, the contractual liability of the ancestor or of the liability of a legal representative to pay the debts of the deceased out of the property of the deceased in his hands.¹ The High Courts of Madras² and Allahabad³ held that the liability could be enforced only by way of a separate suit. The other High Courts held that it could be enforced in *execution*. It is in order to settle this conflict of views in the procedure to be adopted for enforcing the said liability under Hindu law that this Section has been enacted.⁴

This Section is an explanation to Sections 50 and 52. The latter Sections provide for the remedies of a creditor against the properties of his deceased debtor in the hands of his legal representative. This Section explains the meaning of the words "property of the deceased." It also extends the meaning of the term "legal representative" as defined in Section 2 clause (11) by expressly making the son or other descendant of a Hindu, his legal representative in respect of the joint family property in his hands which is liable under Hindu law, for the satisfaction of the debt of the deceased ancestor.⁵ Reading these Sections together, it is now clear that ancestral property in the hands of a son or other descendant can be proceeded against in *execution* as assets of the

- representative" liberally construed.)
- (10) 5 Ind Cas 146 (147) (Cal.). (Decree was passed against son as legal representative—Stronger case than 31 Cal 642.)
- (10) 6 Ind Cas 582 (583, 589) (Cal.). (Because no hardship is caused to debtors by shorter remedy—31 Cal 642 F B not inconsistent with Privy Council view in 5 Cal 148 and 18 Cal 157.)
- [But see (1900) 6 Cal W N 228 (225).]
8. (37) AIR 1937 Mad 610 (615) : 1 L R (1937) Mad 880 (FB).
- (34) AIR 1934 All 590 (592, 593, 594, 601) (FB). (Pious obligation subsists even where family consists of uncle and nephew.)
- (18) AIR 1918 Bom 165 (166, 167) : 42 Bom 504. (Section is both descriptive and imperative—Criticism in AIR 1924 Mad 571.)
- (24) AIR 1924 Mad 571 (573, 574). (Section not confined to money decrees only.)
- (28) AIR 1928 Pat 148 (147) : 6 Pat 149 451. (Allahabad and Madras view no longer law.)
- (31) AIR 1931 Sind 84 (86, 87) : 25 Sind L R 374. (Property acquired not by survivorship but by partition—Section applies.)
9. (37) AIR 1937 Mad 785 (785). (Reversed on another point by A I R 1939 Mad 552.)
- (36) AIR 1936 Bom 456 (459).
- (23) AIR 1923 Pat 143 (144, 147, 148, 149) : 6 Pat 149 451. (Son's liability is personal.)
- (24) AIR 1924 Mad 571 (573, 574, 575). (Decree in S. 53 is not limited to money decrees.)
- [See (38) AIR 1938 P C 7 (8) : 13 Luck 61 : 32 Sind L R 221 (PC). (Decree against sons and grandsons for debt due by deceased ancestor can be executed against judgment-debtors' interest in the joint family property.)
- brought on record under S. 23-A — "Legal (If the legal representative has been properly reached as assets in the hands of sons.) (07) 34 Cal 642 (647, 648, 651, 653, 657) (FB). proceedings have been taken to enforce the debt in father's lifetime, father's interest cannot be proceeded against.—If no (07) 5 Cal 149 80 (85, 87). (Contra:—If no (06) 33 Cal 676 (677, 678).
- (89) 16 Cal 1 (6, 7).
- O. P. Code.)
- tion as to nature of debt lies under S. 244, old (09) 1 Ind Cas 459 (459, 460) : 33 Bom 39. (Object old O. P. Code—11 Bom 37, followed.)
- ing nature of debt can be decided under S. 244, (96) 20 Bom 386 (389). (Objection as to binding nature of debt can be decided under S. 244, for secured debt also.)
- (99) 21 All 801 (805, 806, 807). (In case of decree 6. (94) 16 All 449 (461).
- (94) 17 Mad 122 (127).
- (04) 14 Mad 149 181 (132).
- 932, 7 Mad 828, 10 Mad 283, 1011.
- (90) 13 Mad 266 (266, 267). (3 Mad 42, 5 Mad further are distinct.)
- ation and obligation created by decree against (88) 11 Mad 413 (415, 416). (Because pious obligation and obligation created by decree against cover debt of record governed by Art. 120.)
5. (04) 27 Mad 243 (250—251) (FB). (Suit to recover debt of record governed by Art. 120.)
- against sons.)
- (Passing of decree gives fresh cause of action (10) 5 Ind Cas 362 (361, 365) : 33 Mad 423. relates to obligations created by decree.)
- (89) 11 Mad 413 (415). (S. 214 of O. P. Code 1882 (85) 8 Mad 376 (378).
4. (82) 5 Mad 223 (225).
- joint debtors not applicable to pious liability.)
3. (99) 21 All 801 (301). (Analogy of liability of

deceased in the hands of such descendant.¹⁰ The descendant can, in such proceedings, show that in fact no pious obligation exists in view of the illegality or immorality or the non-existence of the debt.¹¹ In fact, a separate suit will be barred in respect of that matter by virtue of Section 47.¹²

It has been held by the High Court of Allahabad that this Section, being only a matter of procedure, can be applied even to pending cases, and that an order passed under the old Code can be reversed by the Appellate Court on the ground that Section 53 has been enacted in the meantime.¹³ The Madras High Court has, on the other hand, taken a contrary view.¹⁴ Where, however, in a prior order the decree has been construed to be restricted to the assets of the deceased in the restricted sense of the old Code, it becomes *res judicata*, and, thereafter, the present Section cannot be availed of, to increase the liability and attach it to the ancestral property in the hands of the descendant.¹⁵

There is nothing in this Section to justify the view that a suit for *admissio-trition* will lie where a Hindu father dies leaving no property of his own except his share in joint family property.¹⁶

See also Notes 3 and 4 below.

2. "Property in the hands of a son or other descendant."—The Section

applies only where the joint family property passes by survivorship to a son or other descendant who is liable, under the Hindu law, to pay the ancestor's debts.¹ The only persons who, under the Hindu law, are under a pious obligation to pay their ancestor's debts are the son, the grandson and the great-grandson² and none else. Hence, the Section has no application where the property has passed into the hands of persons other than the ancestor's sons, grandsons and great-grandsons, *ib. q.*, a brother,³ in plaintiff's hands is not liable for attachment⁴ does not lie.)⁵

13. ('09) 4 Ind Cas 492 (498) (All). (No vested interest in procedure.)
14. ('11) 12 Ind Cas 558 (558) (Mad).
15. ('10) 5 Ind Cas 210 (211) (All).
16. ('39) AIR 1939 Mad 552 (553): 1939 Mad WN 498 (494). (Reversing on Letters Patent appeal A I R 1937 Mad 785.)

Note 2

1. ('24) AIR 1924 All 878 (875).
- ('23) AIR 1923 All 539 (540): 45 All 455. (Descendant means lineal descendant.)
- 1a. ('37) AIR 1937 Oudh 327 (328): 18 Luck 241. ('26) AIR 1926 P C 105 (106, 107, 108): 48 All 518: 53 Ind App 204 (PC). (A I R 1924 P C 50 and 19 All 26 (PB) explained.)
- 1b. ('37) AIR 1937 Mad 472 (474). (A decree obtained against a member of a joint family, even if it be for a debt binding on the family, cannot be executed against the shares of other members of the family unless they are the sons of the judgment-debtor.)
- 1c. ('04) 27 Mad 106 (108). (Deceased brother was not sued in a representative capacity.)
- ('16) AIR 1916 Bom 262 (263, 264): 40 Bom 329. (He is not a legal representative.)
- ('04) 31 Cal 224 (227): (Impartible estate—Rule of survivorship applies.)
- ('06) 29 Mad 453 (460). (Brother took impartible estate by survivorship.)

- ('37) AIR 1937 All 559 (560).
- ('36) AIR 1936 Bom 456 (458).
- ('35) AIR 1935 Lah 855 (856): 17 Lah 139.
- ('35) AIR 1935 Pat 275 (280): 14 Pat 782 (PB).
- ('25) AIR 1925 All 471 (472). (A decree for costs against father.)
- ('33) AIR 1933 All 110 (111). (Decree for amount not collected due to negligence—A I R 1928 All 166. Dissented from.)
- ('30) 32 Bom L R 919 (922, 923). (A decree on partnership accounts.)
- ('28) 116 Ind Cas 86 (86) (All). (Suit against father and sons of deceased debtor on promissory liability of joint family property to be decided in execution.)
- ('31) 133 Ind Cas 910 (911) (All).
11. ('15) AIR 1915 All 126 (127): 37 All 214.
- ('23) AIR 1923 All 124 (125). (Decree-holder cannot be asked to prove the debt again.)
- ('23) AIR 1923 Pat 143 (148): 6 Pat L Jour 451.
12. ('15) AIR 1915 P C 88 (89) (PC).
- ('28) AIR 1928 Pat 143 (148): 6 Pat L Jour 451.
- [See ('34) AIR 1934 Oudh 212 (212): 8 Luck 668. ('34) AIR 1934 Pat 143 (148): 6 Pat L Jour 451.]

(Suit for declaration that joint family property

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3. "Which is liable under Hindu law for the payment of the debt of a

however, be mentioned here.

(10) 5 Ind Cas 362 (364, 365).
(188) 11 Mad 373 (374). (Not the Contract Act.)

(735) AIR 1935 Bom 287 (294).
(1935) AIR 1035 T-1-126 (127).
brothers—Pro-note by elder—Decree on—xoun-
ger not implicated—Execution against share of

apply to such a case.]]

(26) AIR 1926 All 157 (158) : 48 All 4. (Interest of son was attached—Father held legal repre-

(19) ALH 1915 Nag 39 (40, 41): 11 Nag L H 49.
3- (177) 2 Bom 479 (480)
(74) 22 Subh W R 56 (58) (P C).

(18) AIR 1918 Mad 361 (337); AIR 1923 Mad 36 (37, 39, 41, 42) : 46 Mad (23) AIR 1923 Mad 36 (37, 39, 41, 42)

(23) AIR 1923 All 539 (540): 45 All 455.
(10) 6 Ind Cas 38 (39, 40) (All).
(15) 19 Ind Cas 202 (202, 203) (All). (Decree for costs against father.)

[See also (91) 18 Cal 157 (1953, 1954).]

6. ('35) AIR 1935 Oudh 510 (515): 11 Luck 449. *harkita* "explained and discussed." (AIR 1935 Oudh 510 (515): 11 Luck 449.)

a son's liability for his father's debts under the Hindu law) (13) 19 Ind Cas 378 (379, 380, 383, 384) (Sind).

(F.B.). (A I R 1926 All 220, overruled.)
(1933) A I R 1933 T a b 857 (858): 15 T a b 50.
illegal or immoral debt—Meaning of vyavaharik.
(1908) 32 B o m 348 (351 352). (Decree for damages

857, followed.)

that under the Section father's share only

1. *Journal of the American Medical Association* 2000;283:2686-2692.

that the father's share should be sold first.⁹

This Section does not affect the rule of Hindu law that the property of a coparcener which has been *attached in execution* of a decree in his lifetime⁹ or which has been validly mortgaged by him¹⁰ can be proceeded against even subsequent to his death. Nor does it affect the provision of Hindu law by which the whole of the family property can be sold in execution of a decree against the father or manager where the latter was sued in a representative capacity.¹¹ Nor again can the holder of a decree against the legal representative take advantage of S. 53 and attach ancestral property in the hands of the legal representative where the decree directs that it shall be realised from such property only as belonged to the deceased personally.¹²

There is a conflict of opinion as to whether in the case of Hindu impartible zamindari estates, the debts of a deceased zamindar are enforceable against the estate in the hands of the successor. See the undermentioned cases.¹³

The Jats and other tribes in the Punjab have power, under the customary law applicable to them, to alienate their properties during their lifetime for necessity; but if they die without exercising such power or before the property is attached in execution,

- (04) 27 Mad 243 (247) (F B).
 (24) AIR 1924 Oudh 393 (398, 394) : 27 Oudh Cas 111.
 (15) 26 Ind Cas 362 (362) (Mad).
 (18) AIR 1918 Bom 13 (16, 19) : 48 Bom 612.
 (25) AIR 1925 Bom 193 (193, 194) : 49 Bom 113.
 (S. 2, Bombay Act 7 of 1866 not contravened.)
 (12) 16 Ind Cas 970 (970) (Cal).
 (81) AIR 1931 Sind 84 (85, 87) : 25 Sind L R 374.
 (Section 53 applies—Property acquired by partition.)
 (30) 127 Ind Cas 507 (508, 509) (Bom).
 [But see (85) AIR 1935 Pat 275 (287) : 14 Pat 732 (F B). (Decree against father after partition—Son's share cannot be proceeded against.)]
 (12) 13 Ind Cas 349 (349, 350) (Cal). (Decree for mesne profits—34 Cal 735, Distinguished.)
 (85) 7 All 731 (732, 733). (Though attachment was defective.)
 (14) AIR 1914 Mad 65 (68, 69). (Debtor undivided brother.)
 (82) 4 Mad 302 (307).
 (11) 9 Ind Cas 286 (286) (Mad).
 (98) 8 Mad L Jour 64 (65, 66).
 (84) 7 Mad 339 (340).
 (93) 20 Cal 895 (898, 899).
 (80) 5 Cal 148 (174) : 6 Ind App 88 (F C).
 (06) 3 All L Jour 128 (129). (5 Cal 148, Followed.)
 (07) 5 Cal L Jour 80 (85, 86, 87).
 (94) 16 All 449 (453, 456). (There was no attachment during father's lifetime—Decree held not executable against sons.)
 (06) 33 Cal 1158 (1162). (Order under S. 280, Civil P. C., 1882, does not put an end to attachment.)
 (14) AIR 1914 Mad 118 (118). (Attachment before decree.)
 (94) 17 Mad 144 (146). (Death before decree—Estate survives and attachment before judgment is of no avail.)
 10. (91) 15 Bom 673 (674, 675).
 after the said Act.)
 not being father—30 Mad 454 is no good law as debt by a manager of a joint Hindu family as debt binding on successors to the same extent Madras Impartible Estates Act—Zamindar's (24) AIR 1924 Mad 511 (511, 512). (Section 4, (74) 21 South W R 420 (421). (No.)
 (11) 12 Ind Cas 915 (918) (All). (No.)
 (09) 3 Ind Cas 907 (908) (All). (No.)
 (81) 3 Mad 42 (45, 46). (No.)
 (06) 29 Mad 453 (460). (No.)
 (04) 31 Cal 224 (227). (No.)
 (02) 6 Cal W N 879 (881). (Yes.)
 "Valia Rajah" as representative of a Kovilagam. (93) 16 Mad 452 (453). (Yes—Decree against Mad 454, Referred.)
 13. (09) 2 Ind Cas 18 (21, 22) (Mad). (Yes—30 Mad 454, Referred.)
 12. (11) 9 Ind Cas 681 (681, 682) (All).
 to be sued as manager—Family property held not liable.)
 (82) 5 Mad 234 (235) (F B). (Father not shown ruled by 15 Cal 70 (F C).
 (08) 16 C P L R 19 (21 to 25).
 (90) 14 Bom 597 (603, 604). (11 Bom 700, Over-question of res judicata.)
 (88) 15 Cal 70 (81, 82) : 14 Ind App 187 (F C).
 (90) 14 Bom 597 (603, 604). (11 Bom 700, Over-question of res judicata.)
 (30) AIR 1930 Mad 206 (207, 208). (Decision on (24) AIR 1924 Mad 571 (573).
 (99) 23 Bom 372 (374, 375).
 All 388 (F C).
 (14) AIR 1914 F C 136 (137) : 41 Ind App 216 : 36 (97) 21 Bom 616 (618, 619).
 (80) 2 All 746 (752).
 not allowed to be raised in execution.)
 Mad 880 (F B). (Plea of partition before decree 11. (37) AIR 1937 Mad 610 (618) : ILR (1937) [See (95) 8 Mad 376 (378).]
 property.)
 L Jour 451. (Decree was for sale of ancestral (28) AIR 1923 Pat 148 (147, 148, 149) : 6 Pat (99) 21 All 301 (305, 306, 307, 308).
 (06) 38 Cal 676 (677, 678).
 (05) 15 Mad L Jour 486 (486).

the estate ceases to be liable in the hands of their sons.¹⁴ They can attack the decree not only on the ground of the illegality or the immorality of the debt, but also on the ground of want of necessity; and this question can be raised even in execution as it relates to the liability of the judgment-debtor's property for the decree.¹⁵

Under Section 5 of the Bombay Hereditary Offices Act (3 of 1874) *watan* property is not saleable to non-watan-dars. Hence watan property in the hands of a descendant is not saleable for debt of the deceased ancestor.¹⁶

4. "Deceased ancestor."—The pious obligation of the son or other descendant under the Hindu law exists whether the ancestor is alive or dead.¹⁷ This Section, however, deals with the obligation *after* the death of the ancestor, and cannot be extended to a case where the ancestor is living.¹⁸ But, independently of this Section, on general principles, if the family continues to be joint at the time when execution is sought, the son's share also in the joint family property can be proceeded against in execution of the decree against the father, even during the lifetime of the father.¹⁹ The reason is that in such a case, the son's share will be property which the father can transfer to pay off his own debts. But, where at the time when execution is sought, partition has taken place between the father and the sons, the shares allotted to the sons at such partition cannot be proceeded against in execution during the lifetime of the father,²⁰ as in such a case, the father will not have any power of alienation over the share of the sons.

There is a conflict of decisions as to whether in a case where partition has taken place but the father is dead at the time of execution, the shares allotted to the sons at such partition can be proceeded against in execution under this Section. One view is that under this Section, such share can be proceeded against in execution,²¹ while the other view is that such share cannot be so proceeded against in execution.²²

14. ('36) AIR 1936 Lah 21 (23) : 17 Lah 183. (Watan of Punjab—Case relating to.)

(36) AIR 1936 Lah 167 (168).

(35) AIR 1935 Lah 855 (856) : 17 Lah 189.

(Among Kharggas of Lyallpur District there is no custom making the property inherited by the son liable for the ancestors' debts.)

(11) 11 Ind Cas 375 (376) (Lah).

(11) 11 Ind Cas 376 (377) (Lah).

(12) 15 Ind Cas 866 (868, 869) (F B) (Lah). (1894 Pun Re No. 24 not followed.)

15. (12) 13 Ind Cas 670 (671) (Lah).

16. (34) AIR 1934 Bom 116 (117, 118, 119) : 58 Bom 218.

(See also ('34) AIR 1934 Bom 119 (120) : 58 Bom 273. (Watan-dar has only life interest in the property and the watan property in the hands of successor is not liable for debts of previous watan-dar.))

Note 4

1. ('24) AIR 1924 P C 50 (55, 56) : 46 All 95 : 51 Ind App 129 (P C).

(101) 28 All 206 (208). (Son's liability arises as soon as father fails to discharge his obligation.)

2. ('36) AIR 1936 Oudh 139 (140) : 11 Luck 523. (14) AIR 1914 Mad 328 (330) : 38 Mad 1120.

3. ('38) AIR 1938 Nag 24 (27) : 1 L R (1938) Nag 136.

(37) AIR 1937 Pat 517 (518).

(35) AIR 1935 All 507 (508).

[See ('37) AIR 1937 Nag 45 (50) : 1 L R (1938) 136.]

(F B). (Debt incurred by father while family was undivided—Subsequent partition—Then decree against father alone—Son's shares cannot be

(F B). (Disputed from.)

(35) AIR 1935 Nag 11 (12). (A I R 1931 Sind 84, 85) AIR 1937 Mad 813 (815, 816).

6. ('37) AIR 1937 Mad 813 (815, 816).

(F B). (Disputed from.)

(35) AIR 1935 Pat 275 (287, 288) : 14 Pat 732

(F B). (Debt incurred by father while family was undivided—Subsequent partition—Then decree against father alone—Son's shares cannot be

5. "Decree." — For definition of "decree," see Section 2 clause (2) *ante*.

The Section applies only if there is a *decree* in respect of the debt sought to be realised out of the property of the deceased.¹ It has been held by the High Court of Madras that the word "decree" in the Section is not limited to *money decrees* passed against the ancestor, but also includes decrees against property. Thus, according to that Court, a decree passed in respect of joint family properties against the father can be executed against the sons after the father's death.² The reason seems to be that, where a descendant has received property which, under Hindu law, would be liable to satisfy the ancestor's debts, if any, the descendant becomes a legal representative of the ancestor for *all* purposes and that *every* decree got against the ancestor, whether money decree or not, can be executed against him. The High Court of Bombay has, on the other hand, held that a decree for injunction against an ancestor could not be executed against the descendants on the ground that they were not the legal representatives of the ancestor and that the object of the Section is not merely descriptive but also limitative.³ The Section has no application to the execution, against legal representatives, of *mortgage* decrees obtained against the ancestor. Where, therefore, a decree passed under Order 34 determines unconditionally that certain property is chargeable and shall be sold, the legal representatives of the judgment-debtor cannot, in execution, raise the plea that the mortgage debt was immoral or illegal.^{3a}

The Section only applies where the decree sought to be executed against a person is *binding* on such person. Thus, where a suit is brought against the sons and grandsons of a deceased Hindu for the recovery of a debt due by the deceased but the suit is dismissed against the grandsons and is decreed only against the sons, the decree will not bind the grandsons and the interest of the latter in the joint family cannot be proceeded against in execution of such decree.^{3b}

A decree passed by the Privy Council against a respondent (who is a Hindu) who dies pending the appeal is not a nullity (See O. 22 R. 4, Note 19) and can be executed against the property coming into the hands of his sons under this Section.^{3c} A decree against a son or other descendant is not a *personal* decree against him but is only one against the assets in his hands.⁴

6. "Property of the deceased." — The words "property of the deceased" do not include the self-acquisitions of the son or other descendant himself.

Illustration

A and his son B form members of a joint Hindu family. B has got his own *self-acquired* or *separate property* over which A has no control. A dies. The separate property of B cannot be proceeded against in execution of a decree against A as "the property of the deceased."¹

The word "property" is used in this Section in its ordinary and general sense. Thus, although lands inherited by the son of an agriculturist cannot be attached under certain special Acts such as the Dekkhan Agriculturists' Relief Act and the Bombay

proceeded against in execution (Per Mohammad Noor and Agarwala JJ. — Per Wort J. contra.)]

Note 5

1. (27) AIR 1927 All 683 (684).

2. (24) AIR 1924 Mad 571 (573, 574, 575).

3. (18) AIR 1918 Bom 165 (166) : 42 Bom 504.

3a. (34) AIR 1934 Lah 438 (439, 441) : 15 Lah

772. (Executing Court must execute the decree as it stands.)

3b. (38) AIR 1938 P O 7 (8) : 13 Luck 61 : 32

Sind L R 221 (P O).

3c. (37) AIR 1937 Pat 321 (322) : 16 Pat 316.

4. (37) AIR 1937 Mad 813 (816). (Son's separate property cannot be proceeded against in execution.) (21) 65 Ind Cas 224 (224) (Pat). (Decree construed in the light of S. 52.) (32) AIR 1932 Pat 12 (13, 14). (Decree in this case was in general terms — Court must find out the basis of decree.) (32) AIR 1932 Bom 522 (523). (The Section settles the question of procedure.)

Note 6

1. (34) AIR 1934 Mad 173 (174) : 57 Mad 440.

Hindu Heirs' Relief Act VII of 1886, yet the rents thereof are assets in the hands of the son.² Similarly, forest dues which have become due after the death of the father and received by the son can be proceeded against under this Section.³ But a gratuity given to the heir of a deceased employee by a railway administration is purely a personal one and cannot be attached as assets of the deceased.⁴ Similarly, the provident fund to the credit of deceased ancestor and paid to his minor son under the Provident Funds Act (XIX of 1925) is, under Section 3 thereof, the property of the son and is not an asset of the ancestor within the meaning of this Section.⁵

7. Legal representative.—For the definition of 'Legal Representative,' see Section 2 clause (11). See also Note 1 above.

54. [S. 265.] Where the decree is for the partition of an undivided estate assessed to the payment of revenue to *the Crown*, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

[1877, S. 265; 1859, S. 225; See Ss. 67 to 72.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1987, for "the Government."

Synopsis

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| 1. Legislative changes.
2. Scope, object and applicability of the Section.
3. "Estate," meaning of.
4. Partition decree, meaning of.
5. "Shall be made by the Collector." | 6. In accordance with law relating to partition.
7. Remedies against the Collector's action.
8. Appeals.
9. Decree for partition, when and how may be passed. |
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Other Topics (Miscellaneous)

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| Applicability of the Section if joint liability to revenue is affected and not otherwise. See Note 2.
Applicability of the Section to lands leased from Government for a term. See Note 3.
Applicability of the Section to ryotwari estates or temporarily settled estates. See Note 3.
Applicability for estates assessed in a lump sum and inapplicability to Burma paddy holdings. See Note 3.
Consent of parties not giving jurisdiction to Civil Court for this Section. See Note 5. | Division of Civil Court to be followed by Collector except to avoid prejudice to revenue. See Note 7.
Division by Collector in cases not properly coming under this Section, valid, if no objection is taken before division. See Note 7, F-N (13).
Inapplicability of the Section to a share or plot short of a co-sharer's share. See Note 8. |
|---|---|

2. ('29) AIR 1929 Bom 233 (234, 235) : 53 Bom 463.
 3. ('30) AIR 1930 Nag 134 (134).
 4. ('28) AIR 1928 Oudh 21 (21, 22) : 26 Oudh Cas 53.
 5. ('34) AIR 1934 Mad 173 (174) : 57 Mad 440.

Inapplicability to a partition of specific land within an estate, whether "perfect" or "imperfect" partition, under Assam Land and Revenue Regulation. See Notes 3, 6 and 7.

Jurisdiction of Civil Court where Collector has no powers as per revenue laws. See Note 7.

Meaning of "assessed to Government revenue." See Note 3.

Meaning of "undivided estate" in this Section. See Note 2.

1. Legislative changes. — The words "or any gazetted subordinate of the Collector deputed by him in this behalf" are new. Other alterations are merely verbal.

2. Scope, object and applicability of the Section. — This Section deals with a case in which a Civil Court can *pass a decree* but cannot itself *execute* it. That has to be effected by the Collector. Sections 68 to 72, *infra* deal with another class of cases in which also the decrees passed by the Civil Court have to be executed only by the Collector. The reason for the provision in this Section restricting the ordinary powers of the Civil Courts to execute their own decrees is two-fold: *firstly* the Revenue Authorities are more conversant, and better qualified to deal with such matters than the Civil Court¹ and *secondly* the interests of the Government with regard to the revenue assessed on the assets would be better safeguarded by the Collector executing the decree than by the Court.² The Section does not apply to decrees other than decrees for partition, or separate possession of a share of an undivided revenue paying estate.³ Nor does it apply even to decrees for partition or separate possession of such estates, save where as a result of partition the revenue might be affected.⁴ Where, therefore, no *separate* allotment of the revenue is asked for and the *joint liability* of the shares for revenue in respect of the whole estate is left unaffected, this Section has no application.⁵ But where a prayer is made for division of revenue in the suit, the Section becomes applicable though the prayer is made, not by the plaintiff, but by a defendant.⁶

The Section applies only to a case where the decree contemplates the partition of the whole of the estate paying revenue to Government. It does not apply where the decree is for separate possession of a share of a portion of an undivided estate.⁷

3. "Estate," meaning of. — The word "estate" must be taken to be used in this Section in its ordinary signification¹ and not in the limited sense in which it may

1. (18) AIR 1918 Bom 206 (207) : 42 Bom 689.
2. (88) 15 Cal 198 (201).
- (38) AIR 1938 Mad 259 (259) : 56 Mad 443.
3. (84) 8 Bom 539 (541). (Decree in a suit for ejectment of tenants from specified land is not a decree for a separate possession of a share against co-shares as contemplated by this Section.)
- (84) 1884 All W N 118 (118) : 2 All 778. (Decree for restoration on redemption of lands held separately.)
- (17) AIR 1917 Low Bur 126 (127) : 8 Low Bur 1388. (Decree in an administration suit.)
- (31) AIR 1931 Cal 98 (94, 95) : 58 Cal 122. ("Monza" not a revenue paying estate.)
4. (88) 10 All 5 (8).
5. (87) 24 Cal 725 (734, 737, 742, 745) (FB).
- (38) AIR 1938 Pesh 101 (103).

Section 54 — Note 2

- (34) AIR 1934 Pat 365 (366) : 13 Pat 637.
- (81) 7 Cal 158 (155).
- (88) 15 Cal 198 (200).
- (89) 16 Cal 203 (205).
- (88) 10 All 5 (7, 8).
- (09) 1 Ind Cas 549 (550) : 36 Cal 726.
- (17) AIR 1917 Pat 637 (638) : 2 Pat 1 Jour 221.
- (18) AIR 1918 Pat 63 (64) : 4 Pat 1 Jour 29.
- (17) AIR 1917 Low Bur 126 (127) : 8 Low Bur 1338.
6. (31) AIR 1931 Cal 93 (94, 95) : 58 Cal 122. [See *also* (34) AIR 1934 Pat 365 (366) : 13 Pat 637. (Partition decree by Civil Court — Collector's partition does not supersede it.)]
7. (33) AIR 1933 Mad 259 (259) : 56 Mad 443.
- (31) AIR 1931 Cal 104 (105).
- Note 3
1. (84) 10 Cal 435 (435, 440).

Nature of partition suits and applicability of bar of "res judicata" to them. See Note 9.

Non-liability of Revenue Officers to draw up a formal decree even where the title is gone into. See Note 6.

Partition at the instance of Hindu widow and the governing principles. See Note 9.

Remedy against Collector's mistake—Application under Section 47 and not separate suit. See Note 7.

Terms of decree binding on Collector. See Note 7.

be used in other Acts.² There is a conflict of opinion as to whether the Section applies to *temporarily settled* estates or only to *permanently settled* estates. The High Court of Madras has held that it applies only to permanently settled estates and not to property temporarily settled, such as property held on *ryotwari* tenure.³ A contrary view has been taken by the Bombay High Court. According to it, the Section applies even to property temporarily settled, such as *sheri* lands or lands held under a lease from Government for a fixed period.⁴ According to the Rangoon High Court, the Section is meant to be applied only to estates assessed to revenue in *one lump sum* for the whole estate and not to estates like the ordinary paddy lands in Burma which are assessed at acre rates.⁵ According to the Allahabad High Court the word "estate" cannot be taken to mean isolated plots of land which fall short of being the share of a co-sharer of a *malhal*.⁶ Where a land is an estate to which the Section applies, the crops attached to the land⁷ and trees growing thereon⁸ will go with the land and can be dealt with by the Collector in the same way as he can deal with the land.

4. Partition decree, meaning of.—A decree for the partition of an undivided estate assessed to the payment of revenue must be drawn up as provided by O. 20 R. 18 clause (1); that is, it should declare rights of the several parties interested in the property but should direct the actual partition to be done by the Collector or gazetted subordinate of the Collector deputed by him in that behalf. It is a joint declaration of the rights of persons interested in the property sought to be partitioned and is a decree, when properly drawn up in favour of each share-holder or set of share-holders having a distinct share.¹ It has been held by the Sind Judicial Commissioner's Court that where the decree gives no such directions as are required by O. 20 R. 18 clause (1), it is incumbent on the plaintiff to have it corrected within the time allowed by law, and if this is not done, he cannot ask the Court to transfer the proceedings to the Collector.² The partition contemplated by this Section is not confined to a mere *division* of the lands but includes also the *delivery* of the shares to the respective allottees, thus completely *carrying out* the partition.³

5. "Shall be made by the Collector."—As has been seen in Note 2, the Civil Courts have, under this Section, jurisdiction to try and decide suits for partition or separate possession of estates of the kind contemplated by the Section but have no power to *execute* the decrees passed in such suits.⁴ Even the initial application for an

2. ('84) 10 Cal 435 (440).

3. ('83) 6 Mad 97 (97).

(('84) 7 Mad 882 (884) (FB).

4. ('92) 16 Bom 528 (532).

5. ('26) AIR 1926 Rang 80 (80) : 5 Rang 206.

6. ('84) 6 All 452 (454).

[See also ('05) 32 Cal 1036 (1049). (Case purely under the Assam Land and Revenue Regulation, I of 1886. See Ss. 96 and 154 as to meaning of "imperfect partition.")]

(('81) AIR 1981 Cal 104 (105). (Only an eighth share in only one of several mouzas comprised in an estate is not an "estate.")]

[But see ('88) 10 All 5 (8). (6 All 452, Distinctioned.)]

7. ('27) AIR 1927 Nag 300 (301).

8. ('01) 23 All 291 (297, 304, 305) (FB).

1. ('78) 3 Cal 551 (552, 553).

Note 4

1. ('92) 16 Bom 528 (532).

(('15) AIR 1915 Oudh 28 (29).

(('88) 15 Cal 198 (200, 201).

(('74) 1874 Bom F J 384 (384).

(('81) 8 Cal L Rep 367 (368).

Note 5

(('20) AIR 1920 Nag 204 (204).

(('27) AIR 1927 Nag 300 (301).

2. ('87) 11 Bom 663 (663).

1a. ('85) AIR 1985 Sind 192 (192).

favour of defendants also.)]

amongst defendants interest is asked for or agreed to, the Court cannot give a decree in

(('90) 12 All 506 (508, 509). (Where no partition

Low Bur Rul 338.

[See also ('17) AIR 1917 Low Bur 126 (127) : 8

(('99) 23 Bom 188 (190). (Mahomedan family.)

(('83) 9 Cal 568 (570).

(('99) 22 Mad 494 (499).

Civil Court itself.² In respect of some orders and acts the jurisdiction of the Civil Courts is expressly excluded.³ As to the Civil Court's power to control the execution, by the Collector, of the decree passed under this Section, see Note 7 above.

9. Decree for partition, when and how may be passed.—For the form of decree to be passed under the Section, see O. 20 R. 18, clause (1).

Where a decree declaring a right to partition has not been given effect to and the decree has, by lapse of time or otherwise, become unenforceable, it is open to the parties, if they still continue joint, to sue afresh for partition.¹ Similarly, where a suit for partition is dismissed for *default*, a fresh suit for partition can be maintained notwithstanding O. 9 R. 8 of the Code.² The reason is that the right to enforce partition is a legal incident of a joint tenancy and as long as such tenancy exists, so long may any one of the joint tenants apply to the Court for partition of the joint property.³ But where the shares *have been separated* as per the Civil Court's decree, the decree is final and cannot be re-opened by a fresh suit.⁴

All interests in estates such as subordinate tenures of a fractional share of an estate⁵ or the estate of a Hindu widow⁶ can be partitioned provided there is no inconvenience caused thereby to the other sharers or persons owning interests in that estate. But the partition should be complete, that is, should embrace *all the properties* in which the plaintiff is interested⁷ and should be effected between *all persons* interested therein.⁸ As has been seen already in Note 4 above, the decree under this Section is a *joint decree* in favour of all the sharers. It follows that for purposes of limitation steps taken by one of them will save limitation in favour of all.⁹ There can, however, be no decree in favour of sharers who do not agree to, or ask for, a partition of their own shares.¹⁰ Nor can there be a decree in favour of any sharer where the plaintiff's suit is itself dismissed.¹¹

Where there is a decree in favour of the plaintiff and none in favour of the defendants, the latter's shares cannot be partitioned in execution of the decree.¹²

- (189) 1859 Pan Re No. 73, p. 279. (Act XXIII of 1871 since superseded by Act XVII of 1887 and rules of the revenue authorities.) (Note: 18 All 309 was overruled by 28 All 291 (F B) on the question of Civil Court's power to decide questions of title where Collector refused to go into that question or disregarded S. 119 of Act XIX of 1873.)
3. (101) 28 All 291 (303) (F B). (Act XIX of 1873, S. 241 (f).)
1. (13) 17 Ind Cas 955 (956): 37 Bom 307.
- (91) 18 All 309 (313, 314).
2. (106) 28 All 627 (628, 629).
3. (106) 28 All 627 (628).
4. (18) AIR 1918 Pat 68 (64) : 4 Pat L Jour 29. (20) AIR 1920 Nag 204 (204). (So also where allotment of shares alone was made by Collector without delivery of possession.)
5. (105) 1 Cal L Jour 40 (42). (Where plaintiff was not jointly interested in the proprietary interests of defendants though defendants interest were so interested.)
- (97) 24 Cal 575 (582, 583) (F B). (Balance of convenience should be considered.)
6. (83) 9 Cal 244 (250). (*Heid*, widow's estate is

- not an estate for life under S. 10, Bengal Act VIII of 1876—But Courts shall see that interests of presumptive reversioners are not affected.)
7. (110) 7 Ind Cas 559 (565); 34 Ind 269. (Except—Certain items of family property conveyed by one coparcener for purposes not binding on the family—The alienee from the other coparcener of his share in the said property may sue for his share in the said items without suing for general partition.)
- (81) 7 Cal 577 (581).
- (86) 12 Cal 566 (569).
- (87) 14 Cal 122 (123).
- (1900) 24 Bom 128 (130, 133).
- (94) 18 Bom 611 (613).
8. (81) 7 Cal 577 (581). (Co-landlords granting leases of their shares to different lessees—In a suit for partition by lessees the landlords must be impleaded.)
9. (178) 3 Cal 551 (552).
10. (190) 12 All 506 (509). (Mahomedan family.) [See (193) 28 Bom 184 (186). (In such cases Court has a discretion.)]
11. (107) 31 Bom 271 (292). (As plaintiff not entitled to any share in the property.)
12. (184) 1884 All W N 215 (216).
- (199) 23 Bom 184 (186, 187).

ARREST AND DETENTION

55. [S. 336.] (1) A judgment-debtor may be arrested³ in execution of a decree at any hour and on any day,⁴ and shall, as soon as practicable,⁵ be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the *Provincial Government* may appoint⁶ for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer door of a dwelling-house shall be broken open⁷ unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that if the room is in the actual occupancy of a woman who is not the judgment-debtor⁸ and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The *Provincial Government* may, by notification in the *Official Gazette*, declare that any person or class of persons whose arrest might be attended with danger or inconvenience⁹ to the public shall not be liable to arrest in execution of a decree otherwise

judgment-debtor unless asked to do so.⁷ An arrest is not accomplished unless the officer touches the person of the judgment-debtor.^{7a}

Where a warrant of arrest has been executed by a person authorised to do so by Nazir, the fact that the endorsement was subsequently made irregularly by the Nazir will not invalidate the arrest.⁸

4. "At any hour and on any day." — An arrest is not illegal because it was made on a Sunday¹ or on a day on which the Court was closed.²

5. "As soon as practicable." — It is the duty of the officer arresting a judgment-debtor to bring him before the Court "as soon as practicable." But this does not mean that, if the Court is closed for the vacation, he should take the judgment-debtor to the Court building or to the Judge of the Court at his private residence. The judgment-debtor should be produced at the next sitting of the Court, and in the meantime, the arresting officer is empowered to confine him even in the decree-holder's house.¹

6. "In any other place which the Provincial Government may appoint." — The imprisonment of the arrested person must be either in the civil prison of the district in which the Court ordering the detention is situated, or in any other place which the Provincial Government may appoint. Where a debtor committed to a particular jail is handed over by the officer arresting him of his own motion, to the officer in charge of a *different* jail, the imprisonment is unlawful and the prisoner is entitled to be discharged.¹

For a list of places appointed by the Provincial Government under this Section, see the undermentioned notifications.²

7. **Breaking open of outer door.** — Under Section 336 of the old Code no outer door of a dwelling-house could be broken open under any circumstances. Under the present Section, the outer door may be broken open if —

(1) such a dwelling house is in the occupancy of the judgment-debtor, and

(2) he *refuses* or in any way *prevents* access thereto.

The object of this change in the law is to prevent vexatious forms of resistance to execution which constantly obstruct decree-holders in the execution of their decrees.¹

8. **Where room is in the occupancy of a woman, not a judgment-debtor.** — The third proviso to sub-section (1) only applies where the room is in the occupancy of a woman who is *herself* the judgment-debtor against whom a warrant of arrest was issued, as, for instance, in execution of a decree for restitution of conjugal rights,¹ the

7. (21) AIR 1921 Cal 79 (79, 80). (Apprising the judgment-debtor of the contents of the warrant is sufficient.)

7a. (30) AIR 1980 Rang 131 (132) : 7 Rang 598. (Or unless there is submission to custody by word or action, (S. 46, Cr. P. Code and English cases relied on.)

8. (84) 6 All 385 (388). (Delegation by Nazir to process-server.)

(95) 22 Cal 759 (761). (Do.)

Note 4

1. (69) 4 Mad H O R App. LXII.

(74) 7 Mad H O R 285 (286). (Lord's Day Act

does not apply to India.)

(68) 10 South W R 350 (351). (Do.)

Note 8

1. See (68) 1 Beng L R 31 (32, 43, 46, 48) (F.B.). (Application for arrest of a *pardanashin* woman in execution of a decree for money.)

on Clauses.

1. See report of the Select Committee — Notes

Note 7

2. Notification No. 217, Burma Gazette, 1897, Part I, p. 256, Fort St. George Gazette, 1903, Part I, p. 646.

Note 5

1. (85) 11 Cal 527 (530).

Note 6

1. (07) 30 Mad 179 (180, 181). (No offence of wrongful confinement.)

Note 5

2. (07) 30 Mad 179 (180).

9. Exemption of persons whose arrest might be attended with danger or inconvenience.—This sub-section is new and is intended to cover the cases of certain persons or classes of persons whose summary arrest might, as in the case of railway servants, be attended with danger or inconvenience to the public.¹ But, where a suit is brought against such persons, the fact that they could not be arrested in execution is no ground for not passing a *decree* against them.²

10. Court's duty to inform judgment-debtor that he may apply to be declared insolvent.—Where a judgment-debtor is arrested and brought before the Court, it is the duty of the Court to inform him that he may apply to be declared insolvent.¹ This, however, is unnecessary where he has *already applied* in insolvency and the application is pending.² The Court has, in such a case, a discretionary power not to put the warrant in force if the judgment-debtor furnishes security for his appearance when called upon.³ Similarly, in a case where the judgment-debtor has already applied in insolvency and his application has been *dismissed* by the Insolvency Court and he is *re-arrested*, the executing Court need not inform him that he may apply to be declared insolvent, or take the other steps indicated in sub-section (3). The reason is that until the order of dismissal of the insolvency application is set aside with the permission of the Insolvency Court the judgment-debtor cannot apply again to be declared an insolvent.⁴

The provisions of sub-section (3) or the mere fact of arrest will not, however, entitle the debtor to be adjudged an insolvent except in conformity with the provisions of the insolvency law.⁵

Under the Codes of 1877 and 1882, the provisions corresponding to this sub-section did not apply to the presidency towns⁶ nor to Provinces which were not notified by the Local Governments.⁷

11. Security bond to be given by the judgment-debtor.—This Section applies only where the judgment-debtor is *under arrest*. Where he is already committed to jail, he can only be discharged under Section 58, *infra*.¹

The judgment-debtor brought under arrest must furnish security—

1. that he will, within one month, apply to be declared insolvent, and

2. ('81) 7 Cal 19 (20, 21) (*Note*)—Before the introduction of S. 245-A of the old Code corresponding to S. 56 of the present Code women could be arrested in execution of decrees for money.)

Note 9

1. See Notes on Classes.
2. Case referred by Cantonment Small Cause Court Judge, Meeran-Meer, ('71) 1871 Pun Re No. 43.

Note 10

1. ('09) 1909 Pun Re No. 16, p. 37.
(78) 2 Mad 9 (10). (Small Causes debtors also were held entitled to apply under the old Code.)
(30) AIR 1930 Lah 736 (736). (Omission to note compliance with Section does not indicate that Court failed to inform judgment-debtor.)
[See ('30) AIR 1930 Cal 555 (556).]
2. ('10) 1910 Pun W R No. 83, p. 202. (Object of the Section being only to give time to apply.)
3. ('98) 22 Bom 731 (738).

Note 11

4. ('11) 9 Ind Gas 121 (121) (Sind).
5. ('13) 25 Mad L Jour 545 (551).
6. The application had to be under Ch. XX of the Code which by S. 360 did not apply to the Presidency Towns. Ch. XX was repealed by the Provincial Insolvency Act III of 1907.
7. For Notifications see Assam Manual of Local Rules and Orders, Edn. 1893, p. 191; Bengal Local Statutory Rules and Orders, Vol. II, p. 70; Bombay List of Local Rules and Orders, Edn. 1896, Vol. I, p. 406; Lower Burma Courts Manual, 1905, para 602, No. 3751, dated 28th September 1877, Judicial Commissioners Civil Circular, 1-43: Madras List of Local Rules and Orders, Edn. 1898, Vol. I, p. 195; N W P and Oudh List of Local Rules and Orders, Edn. 1894, p. 112; Rules and Orders of Civil Court of Punjab, Vol. I, p. 2 (Edn. 2.)
1. ('85) 8 Mad 508 (504).
See also O. 21 R. 40.

clear that the surety is not discharged by the mere filing of the insolvency application by the judgment-debtor, but that his liability continues until a final order is made on the petition in insolvency.³

The surety will be liable (1) if the judgment-debtor fails to apply in time to be declared an insolvent;^{3a} or (2) if he fails to appear whenever called upon to do so.³

Application within one month to be declared an insolvent.—A surety is not discharged by a petition by the judgment-debtor to be declared an insolvent where it is not in proper form and not within the prescribed time.⁴ Where a judgment-debtor presented an insolvency application not in a proper form and not accompanied with the necessary deposit, and the same was returned for amendment but was not re-presented thereafter, the surety was held not discharged from his liability.⁵ Where, however, a surety bond is given undertaking that the judgment-debtor would "continue the insolvency proceedings," the liability continues only up to the adjudication. The fact that after adjudication it is annulled for the default of the insolvent will not render the surety liable under the bond.^{5a} A Court has no jurisdiction to extend the period of one month fixed by the Section. The period being one fixed by law, Section 148 has no application to it.⁶

Appearance whenever called upon.—A security bond under this Section is in the nature of a continuing guarantee and the surety is entitled to produce the judgment-debtor before the Court and request it to absolve him from further liability under the bond.⁷ But the production of the judgment-debtor at a time when it is impossible for the Court or the decree-holder to take any steps to have the judgment-debtor taken into custody does not amount to his appearance when called upon to appear and the surety will not be discharged thereby.⁸ Where the judgment-debtor dies before breach

- (06) 28 All 387 (389). (Execution application against surety after judgment-debtor's application in insolvency is not in accordance with law.) (93) 15 All 183 (184, 185). (The object being only to insure that the judgment-debtor should apply to be declared an insolvent.) (03) 13 All 484 (485). (03) 26 All 866 (867). (Subsequent withdrawal of insolvency petition did not matter.) (92-96) 1892-96 Upp Bur Rul 269. (94) 1894 Pun Re No. 100. 2. (22) AIR 1922 Bom 340 (340) : 46 Bom 702. 2a. (35) AIR 1936 Lah 918 (918). 3. (37) 1937 All N 1165 (1166). (Bond undertaking that judgment-debtor would be present on specified date and that in default surety would produce him—Failure to produce after specified date when called on by Court—Surety liable.) (36) AIR 1936 Rang 168 (170) : 14 Rang 190. (Meaning of "when called upon to appear"—Service of special notice calling upon debtor to appear on any particular occasion not necessary—It is sufficient if his counsel is informed that his presence would be necessary on next date.) (14) AIR 1914 Mad 270 (271). (28) AIR 1928 Lah 974 (975). (Surety undertaking to produce judgment-debtor on date fixed must produce even though decree-holder remains absent.) (27) AIR 1927 Mad 1081 (1081). (10) 12 Cal L Jour 419 (422).
- (25) AIR 1925 Lah 170 (171). (26) AIR 1926 Mad 958 (959). (Liability of surety not extinguished because judgment-debtor has obtained protection order.) [See also (1900) All W N 156 (157). (Bond not making sureties liable for performance of the decree but only for production of the judgment-debtor before the Court. Ss. 253 and 258 of the Code of 1882 held not applicable.) (10) 1910 Pun L R No. 51. (Where he appears on the date in obedience to the order of the Court, surety is not liable.)] 4. (28) AIR 1928 Sind 192 (192). [See (31) AIR 1931 Bom 444 (446). (Where how-ever all the particulars required by S. 18 of the Provincial Insolvency Act, were not complied with but application was bona fide, it was held enough to discharge surety.)] 5. (28) AIR 1928 Sind 192 (192). 5a. (33) AIR 1933 Nag 40 (41, 42) : 29 Nag L R 28. [See also (36) AIR 1936 Mad 963 (963, 964).] 6. (26) AIR 1926 Mad 689 (689, 690). 7. (34) AIR 1934 Lah 962 (962). (29) AIR 1929 Lah 262 (262, 263). 8. (25) AIR 1925 All 344 (345). (Order for stay of execution against judgment-debtor in force—Production of judgment-debtor at that time without notice to decree-holder.) [See also (87) 14 Cal 757 (760). (Voluntary appearance of judgment-debtor for another purpose.)]

of either of the conditions of the bond, the surety is discharged thereby.⁹ But where he dies *after* the breach of any one of the conditions, as for instance where he fails to apply within one month and then dies, the liability of the surety continues and he is not discharged.¹⁰

Under the old Code, the security had to be "that he will appear when called upon" and it was held that this referred to the *particular* execution application in which the judgment-debtor was arrested, so that if that application was dismissed or struck off, the surety was discharged.¹¹ Under the present Section the security must be "that he will appear, when called upon *in any proceeding* upon the application or upon the decree in execution of which he was arrested." This makes it clear that a surety will not be released by the dismissal of the particular execution application,¹² especially where a breach of the conditions of the bond had occurred before the dismissal.¹³ But, where, after the execution of the security bond, the judgment-debtor applied to the Debt Conciliation Board to settle his debts including the debt due to the decree-holder and on production of the certificate showing that such application had been made, the execution case was struck off as intimated and the order was accepted without protest by the decree-holder, it was held that both parties must be considered to have accepted the position that the execution proceedings had come to an end and that the matter would be dealt with, *thereafter*, by the Debt Conciliation Board, i.e., in other words, that the surety bond was regarded as cancelled and it was not thereafter open to the decree-holder, when he had refused to accept the offer made by the judgment-debtor before the Debt Conciliation Board, to ask the Court to realise the security.^{13a}

The non-production of the judgment-debtor owing to illness which renders his attendance physically impossible without risk to health or life is a valid excuse and does not render the surety liable on the bond.¹⁴ Nor can he be proceeded against while the proceedings in insolvency filed by the judgment-debtor are pending and there is no other default.¹⁵ See also the undermentioned cases.^{15a}

9. (14) AIR 1914 Cal 162 (163) : 41 Cal 50. (Death before occasion to appear in Court arrives.)
- (07) 29 All 466 (468). (Death before order on insolvency application was passed.)
- (01) 24 Mad 637 (639). (Death before expiry of specified time to appear.)
10. (24) AIR 1924 Bom 428 (429) : 48 Bom 500. (The fact that a warrant of arrest was issued against the judgment-debtor at that time makes no difference.)
11. (87) 14 Cal 757 (760, 761). [See also (95) 19 Bom 694 (696). (Question as to discharge of surety's liability left to be decided in separate suit.)]
12. (17) AIR 1917 Mad 237 (239) : (1916) 2 Mad W N 273 (275).
- (32) AIR 1932 Lah 492 (493). (Execution dismissed for default of decree-holder.)
- [See also (35) AIR 1935 Lah 918 (919). (Previous execution proceedings against judgment-debtor consigned to the record room—Surety is not discharged.)]
- (34) AIR 1934 Lah 92 (92). (Surety bond held to be in force only during continuance of execution proceedings in absence of indication to contrary.)
13. (39) AIR 1939 Sind 270 (272) : 1 L R 1939 Kar 401 (405).
- (21) AIR 1921 Pat 72 (73). (Surety accepted liability on judgment-debtor failing to produce the judgment-debtor in Court as stipulated.)

- 13a. (37) AIR 1937 Nag 269 (270).
14. (29) AIR 1929 Lah 479 (480).
- (38) AIR 1938 Mad 530 (531). (But illness which would not render the presence of the judgment-debtor physically impossible will not absolve the surety.)
15. (06) 28 All 387 (389). (Execution application if made against surety is not in accordance with law.)
- 15a. (39) AIR 1939 Sind 270 (271) : 1 L R 1939 Kar 401 (403, 404). (The fact that a judgment-debtor for whose appearance a person has stood surety, if that bond provides that he should appear only when ordered by the Court—Case adjourned from time to time—Order for appearance at adjourned hearing is necessarily implied.)
- (35) AIR 1935 Mad 543 (544). (Surety undertaking to produce judgment-debtor in Court in case latter failed to apply for insolvency and on default to pay the decretal amount—*Held*, surety's liability for the decretal amount did not arise merely on failure of judgment-debtor to apply for insolvency within the stipulated period but such liability would arise only on failure to produce the judgment-debtor in Court as stipulated.)

15. Damages for wrongful arrest.—In a suit for damages for wrongful arrest in execution of a decree, the plaintiff must show—

- (a) that the original action out of which the alleged injury arose was decided in his favour,
- (b) that the arrest was procured maliciously and without reasonable and probable cause, and
- (c) that he has suffered some collateral wrong.¹

16. Insolvency, when a protection from arrest.—A judgment-debtor is not protected from arrest by the mere fact of his having *applied* in insolvency whether the debt for which he is sought to be arrested is mentioned in the schedule or not.¹ Even an order of adjudication will not protect the debtor in respect of debts not mentioned in the insolvency petition.² In respect of debts scheduled in the insolvency petition, there is, by the mere fact of adjudication, a qualified protection inasmuch as the debtor cannot be proceeded against *without the leave of the Insolvency Court*.³ Where a *protection order* has been made in favour of the insolvent under Section 31 of the Insolvency Act, the debtor will have an unqualified protection against all proceedings in respect of the scheduled debts.⁴

17. Application for arrest, if a step-in-aid of execution.—An application for the arrest of the judgment-debtor will be an application for execution and will give a fresh starting point of limitation under Article 182 of the Limitation Act.¹ An application by the heirs of the decree-holder will also be a step-in-aid of execution within the meaning of the said Article 182 even though the heirs have not obtained a succession certificate and have not been placed on the record.²

18. Appeal and revision from orders under the Section.—An order against the judgment-debtor or against the surety under this Section is an order falling within Section 47 and is appealable as a decree.¹ So also is an order against a decree-holder refusing simultaneous execution against the person and property of the judgment-debtor.²

As mentioned in Note 13, when a condition of the bond is broken, the option of proceeding against the surety or the judgment-debtor lies with the Court. When the Judge exercises the option in favour of the surety, the matter cannot be subsequently re-opened before him. If he does so, and passes fresh orders, they are passed without jurisdiction and can be set aside in revision.³

(198) 12 Bom 46 (47, 48).]

Note 15

1. (179) 4 Cal 588 (585, 586).

Note 16

1. (110) 1910 Pun W R No. 83, p. 202.

(106) 9 Oudh Cas 42 (46).

2. (189) 16 Cal 85 (88).

3. See Section 28 (2) of the Provincial Insolvency Act.

Act, V of 1920.

(127) AIR 1927 Mad 919 (920) : 50 Mad 977.

4. See Section 31 of the Provincial Insolvency Act, V of 1920.

Note 17

1. See Art. 182 (5) of the Limitation Act.

[See (197) 24 Cal 778 (780, 784). (Even if the application is unsuccessful.)]

2. (193) 20 Cal 755 (757).

(196) 20 Bom 76 (77, 78).

(108) 31 Mad 77 (80).

Note 18

1. (195) 1895 Pun Re No. 69. (Order of imprisonment of judgment-debtor.)

(132) AIR 1932 Bom 77 (78). (For appealability of orders against surety, see Section 145, *infra*.)

2. (183) 7 Bom 301 (302).

3. (137) AIR 1937 Pat 476 (477).

56. [S. 245A.] Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

Prohibition of arrest or detention of women in execution of decree for money.

1. Scope of Section.—Before the Code of 1908 was enacted, there was no rule prohibiting the arrest of women in execution of decrees and a purdannahin woman was held not exempt from arrest.¹ Under the present Section a Court cannot arrest a woman in execution of a *money decree*.² But, can a woman be arrested in execution of a decree for the restitution of conjugal rights? Under O. 21 R. 33 as it originally stood, such arrest was legal.³ But after that Rule was amended by Act XXIX of 1923 a decree for the restitution of conjugal rights, whether against the husband or the wife, cannot be executed by the arrest of the judgment-debtor.

Although this Section exempts a woman from arrest in execution of a decree for money, yet where in a suit for money a woman is the plaintiff, she may be required under O. 25 R. 1 (3) to give security for the defendant's costs.

57. [S. 338.] The *Provincial Government* may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

[1877, S. 338; See O. 21 R. 39.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1987, for "Local Government."

58. [Ss. 341, 342.] (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and, (b) in any other case for a period of six weeks:

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

Section 56 — Note 1

1. (168) 10 South W R 21 (26) (P B). (Absolutely.)
2. (122) AIR 1922 Nag 98 (100, 101) : 18 Nag L R 145. (The proposition that no money decree possible which does not carry with it a right to arrest the judgment-debtor is not correct.)
3. See (167) 11 Moo Ind App 551 (609) (P O).

(ii) on the decree against him being otherwise fully satisfied, or (iii) on the request of the person on whose application he has been so detained, or (iv) on the omission by the person, on whose application he has been so detained, to pay subsistence-allowance: Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

[1877, Ss. 341 and 342; 1859, S. 278.]

Synopsis

- | | |
|---|---|
| 1. Legislative changes. | 3. Omission to pay subsistence allowance will result in release of judgment-debtor. |
| 2. "Subsistence allowance." | 4. Person released from detention under this Section cannot be re-arrested. |
| 5. Interim protection order, effect of. | 5. Interim protection order, effect of. |
| 6. Period of detention. | 6. Period of detention. |
| 7. Release does not discharge debtor from debt. | 7. Release does not discharge debtor from debt. |
| 8. Contempt of Court. | 8. Contempt of Court. |
| 9. Application for arrest, if saves limitation. | 9. Application for arrest, if saves limitation. |
| 10. Miscellaneous. | 10. Miscellaneous. |

1. **Legislative changes.** — The following are the main changes effected : —
(1) Clauses (a) and (b) of sub-section (1) correspond to Section 342 of the old Code, but the phraseology has been changed with a view to make it clear that the Court has no power to fix shorter periods than those mentioned in the Section. See Note 6 below.
(2) The proviso to sub-section (1) and sub-section (2) correspond to Section 341 of the old Code, clauses (a) to (d).

2. **"Subsistence allowance."** — The cost of clothing, etc., of the judgment-debtor, required to be supplied by the decree-holder under Section 33 of the Prisons Act, is not "subsistence allowance" under Section 58 which includes only the monthly allowance fixed by scale under Section 57 of the Code.¹

3. **Omission to pay subsistence allowance will result in release of judgment-debtor.** — On failure of the decree-holder to pay subsistence allowance the judgment-debtor should be released.¹ A payment cannot be considered to have been made to the officer in charge of the prison until it actually reaches his hands. Hence, though the subsistence allowance has been sent by money-order to such officer there, the subsistence allowance must be paid in advance.)

Section 58 — Note 2
1. (12) 17 Ind Cas 911 (911) : 6 Low Bur Rail 61.
(Debtor released for non-payment of cost of clothing and bedding can be re-arrested.)
Bourke O C 59, (Do).
Bourke O C 51. (Subsistence allowance must be paid in advance.)
Bourke O C 59, (Do).

sufficiently early to reach him in time, it does not actually reach him in time, there is an "omission to pay" within Section 58 (b) (iv).² Where a judgment-debtor is released on the application of the decree-holder the latter is entitled to a refund of the balance of the subsistence money advanced by him that remains in Court at the time of the debtor's release.³

4. Person released from detention under this Section cannot be re-arrested. — A judgment-debtor released from detention under this Section cannot be re-arrested in execution of the same decree.¹ Hence a judgment-debtor cannot, in execution of an instalment decree, be arrested and imprisoned separately for default in respect of each instalment.² But the immunity from re-arrest exists only when the judgment-debtor has been actually *detained in prison*³ and not where he has been merely *arrested*. Hence, where after arrest the judgment-debtor is released before *actual imprisonment*, he can be re-arrested in execution of the decree.³ But where the warrant of commitment to jail has been made out, a discharge of the judgment-debtor whilst in confinement in the court-house is a release from "detention" within the meaning of this Section.⁴ Another condition for the applicability of the immunity from re-arrest is that the release from detention must be *under this Section*. Thus, a debtor who has been released owing to a mistake of the jail authorities in sending the demand for clothing under Section 33 of the Prisons Act to a wrong address is not exempt from re-arrest under this Section.⁵ See also Note 5. A Court cannot direct the re-arrest of a judgment-debtor without any petition or motion of the decree-holder.⁶

5. Interim protection order, effect of. — Where a judgment-debtor who has been arrested and imprisoned in execution of a decree applies to be adjudicated an insolvent and obtains an interim protection order and is released, is he liable to be re-arrested under the decree? On this question there is a conflict of decisions. The High Courts of Allahabad¹ and Bombay² take the view that the judgment-debtor is liable to be re-arrested in such a case as, according to them, the only cases in which the judgment-debtor is entitled to exemption from re-arrest are those enumerated in Section 58. But the Calcutta High Court has taken the opposite view and held that once the judgment-debtor is released from imprisonment in execution of a decree he cannot be re-arrested under the same decree.³ It is submitted that the view taken in Bombay and Allahabad is more in consonance with the language of the Section.

2. (14) AIR 1914 Mad 24 (24). (Consequent release of the debtor is a release under this Section)
3. (68) 5 Bom H C R A C 84 (85).

Note 4

1. (68) 4 Mad H C R 76 (77). (Release for non-payment of subsistence money.)
- Bourke O O 109. (Do. The decision in (1873) Pun Re No. 87 under the Code of 1859 must be regarded as obsolete.)
2. (88) 7 Bom 106 (108).
- 2a. (37) AIR 1937 Lah 253 (254). (Detention in court-house is not detention in civil prison — judgment-debtor can be re-arrested.)
3. (70) 6 Mad H C R 84 (84). (The Code expressly preserves a distinction between arrest and imprisonment.)
- (99) 2 UP Bur Rui 281. (Judgment-debtor arrested and released immediately without being imprisoned.)
- (29) AIR 1929 Lah 361 (362). (Judgment-debtor released while being taken to civil prison.)

1. (11) 33 All 279 (283). (Such release is not discharge under this Section.)
2. (02) 26 Bom 652 (659). (Release under S. 13, Indian Insolvents' Act.)
3. (98) 20 Cal 874 (878). (Circumstances under which release is obtained are immaterial.)

Note 5

4. (85) 9 Bom 181 (182).
5. (12) 17 Ind Gas 911 (911) : 6 Low Bur Rui 61.
6. (71) 15 Suth W R 68 (68).

4. (85) 9 Bom 181 (182).
5. (12) 17 Ind Gas 911 (911) : 6 Low Bur Rui 61.
6. (71) 15 Suth W R 68 (68).

4. (85) 9 Bom 181 (182).
5. (12) 17 Ind Gas 911 (911) : 6 Low Bur Rui 61.
6. (71) 15 Suth W R 68 (68).

6. Period of detention.—Under this Section, the Court has no power at its discretion to fix shorter periods of imprisonment than those prescribed in the Section.¹ Where the defendant is under imprisonment under O. 38 R. 4 of the Code, such imprisonment suffered after the date of the decree must be deemed as imprisonment in execution of the decree and the period of imprisonment after that date must be taken into consideration in calculating the period prescribed by Section 58.² Where a judgment-debtor is released, not under this Section, but under a mistake of the jail authorities and he is re-arrested, the period of imprisonment under the new warrant should include the period of imprisonment already suffered under the old warrant.³

7. Release does not discharge debtor from debt.—A release under this Section does not discharge the debtor from the debt. His property remains liable to attachment and sale¹ and he can also be adjudicated an insolvent for the debt.² Under the Agra Tenancy Act,³ where a judgment-debtor has been released from detention and the amount due under the decree does not exceed Rs. 100, the Court may declare him absolved from liability for payment of money, and such liability shall thereupon be extinguished except in regard to liability to ejectment.

8. Contempt of Court.—This Section does not apply to cases of imprisonment for contempt of Court,¹ the power of the Court to imprison for contempt being irrespective of the Code.²

9. Application for arrest, if saves limitation.—An application for the arrest of a judgment-debtor in contravention of this Section does not give a fresh starting point of limitation.¹

10. Miscellaneous.—A Court will release a debtor where the jailor holds no warrant¹ but not where the warrant is only informal.²

A return to a writ of *habeas corpus* must be taken to be true and cannot be controverted by affidavit,³ but where a debtor who is arrested and imprisoned under a warrant of the Presidency Small Cause Court is brought before the High Court on a writ of *habeas corpus*, he is entitled to show that he was privileged from arrest, the Presidency Small Cause Court not being a Court of co-ordinate jurisdiction with the High Court but subordinate to it.⁴ Under the Oudh Rent Act⁵ the imprisonment and attachment may, subject to the provisions of this Section, be continued until the party complies with the terms of the decree.

(196) 12 Cal 652 (657). (Debtor released on bail, in theory, remains in custody under the original warrant.)

Note 6

1. ('89) 13 Mad 141 (142).
(102) 5 Cal W N 145 (146).
2. ('83) 7 Bom 431 (437).
3. ('12) 17 Ind Gas 911 (912) : 6 Low Bur Rul 61.
(Demand to pay cost of clothing sent to wrong address—Decree-holder not receiving it in time.)

Note 7

1. ('68) 1868 Beng L R Sup 889 (891) (F B).
(Debtor released at the request of the creditor.)
2. ('69) 6 Bom H C O 86 (87).
3. Act III of 1926, Schedule II.

Note 8

1. ('79) 4 Cal 655 (659).

2. ('83) 7 Bom 5 (12). (Power was vested by Royal Charter in the Supreme Courts and subsequently in the present High Courts.)
(('88) 7 Bom 1 (4). (Power not affected by the Code.)

Note 9

1. ('90) 12 All 64 (65). (Being "not in accordance with law.")

Note 10

1. 1 Ind Jur (N S) 19.
2. Bourke, O C 96.
3. ('70) 5 Beng L R 418 (428). (But may be amended.)
4. ('76) 1 Cal 78 (86). (Arrest by bailiff of Court as soon as debtor left Court premises for going home.)
5. Act XXII of 1886, Section 148 (2).

59. [S. 653.] (1) At any time after a warrant for the

arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom —

(a) by the *Provincial Government*, on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

Synopsis

- 1. Discretion of Court in issuing warrant.
- 2. On the ground of serious illness.

1. Discretion of Court in issuing warrant. — The provisions of this Section are based on humanitarian grounds and if a judgment-debtor is suffering from serious illness, the Court would be well advised in ordering his release so as to escape from the moral responsibility in case anything should happen to him on being sent to jail. A Court is not bound in every case to issue a warrant for arrest and if it has reason to believe that the judgment-debtor is not in a fit state of health to undergo confinement, it would act wisely in issuing a notice to him to show cause in the first instance.^{1a} The discretion exercised in issuing a warrant of arrest will not ordinarily be interfered with in appeal.²

2. On the ground of serious illness. — Asthma and indigestion do not constitute "serious illness" sufficient to enable the Court to cancel a warrant of arrest issued against the judgment-debtor.¹

Section 59 — Note 1

1. ('34) AIR 1934 Lah 807 (808). (The provisions of this Section are also not controlled by sub-sections 3 and 4 of Section 55, ante.)
2. ('33) AIR 1933 Lah 307 (308). (Unless wrongly exercised.)
1a. ('11) 9 Ind Cas 746 (747) (Oudh).
Note 2
1. ('33) AIR 1933 Lah 307 (308).

ATTACHMENT

60. (1) The following property is liable to attachment and

sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale, namely:—

- (a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman; (b) tools of artisans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section;
- (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him;

(d) books of account;

(e) a mere right to sue for damages;

(f) any right of personal service;

(g) stipends and gratuities allowed to pensioners of the Crown, or payable out of any service family pension fund notified in the Official Gazette by the Central Government or the Provincial Government in this behalf, and political pensions;

(h) the wages of labourers and domestic servants, whether payable in money or in kind; and salary, to the extent of the first hundred rupees and one-half the remainder of such salary;

(i) the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary:

Provided that, where the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree;

(j) the pay and allowances of persons to whom the Indian Army Act, 1911, or the Burma Army Act applies, or of persons other than commissioned officers to whom the Naval Discipline Act as modified by the Indian Navy (Discipline) Act, 1934, applies;

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1925, for the time being applies in so far as they are declared by the said Act not to be liable to attachment;

(l) any allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority which the [appropriate Government] may by notification in the [Official Gazette] declare to be exempt from attachment, and any subsistence grant or allowance made to any such officer or servant while under suspension;

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(n) a right to future maintenance;

(o) any allowance declared by any Indian law to be

exempt from liability to attachment or sale in execution of a decree; and,
 (p) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation 1.—The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable, [and in the case of salary other than salary of a public officer or a servant of a railway company or local authority the attachable portion thereof is exempt from attachment until it is actually payable.]

Explanation 2.—In clauses (h) and (i), “salary” means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of clause (l), derived by a person from his employment whether on duty or on leave.

Explanation 3.—In clause (l) “appropriate Government” means —

(i) as respects any public officer in the service of the Central Government, or any servant of a Federal Railway or of a cantonment authority or of the port authority of a major port, the Central Government;
 (ii) as respects any public officer employed in connexion with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative;
 (iii) as respects any other public officer or a servant of any other railway or local authority, the Provincial Government.

(2) Nothing in this Section shall be deemed —

to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for “pensioners of the Government.”

b. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India."
 c. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Governor-General in Council."
 d. Clauses (i) and (i) substituted by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2, for the original clauses (i) and (i).
 e. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Indian Articles of War apply."
 f. Inserted by the Amending Act, 1934 (XXXV of 1934), Section 2 and Schedule.
 g. Substituted by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2, for "1897."
 h. Clause (i) substituted by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2, for the original clause.
 i. Words "appropriate Government" substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Governor-General in Council."
 j. Words "Official Gazette" substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India."
 k. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "any law passed under the Indian Councils Acts 1861 and 1892."
 l. The original Explanation was re-numbered Explanation 1 by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2 and words within square brackets inserted by *ibid*.
 m. Explanation 2 inserted by Section 2 *ibid*.
 n. Explanation 3 inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

Synopsis

15. Wages of labourers, etc., and salaries of private employees—Clause (h).
 16. Salary of public officers, etc. — Clause (i).
 16a. Salary of private servants. See Notes 15 and 16.
 17. Salary of Army Officers.
 18. Pay of persons to whom the Indian Army Act, 1911, etc., apply—Clause (f).
 19. Compulsory deposits, etc.—Clause (k).
 20. Allowances of public officers, etc. — Clause (i).
 21. Mere expectancy or other contingent or possible right — Clause (m).
 22. Right of future maintenance—Cl. (n).
 22a. Movable property exempt from sale for arrears of land revenue—Clause (p).
 22b. Explanation II—Salary, meaning of.
 23. Objection to attachment.

Other Topics (Miscellaneous)

Ornaments. See Note 8.
 Political Pensions. See Note 14 Pts. (8) to (22).
 Private Pensions. See Note 14 Pts. (23) to (25).
 Profits of property. See Note 7 Pt. (7) and Note 12 Pt. (5).
 Restraint upon alienation. See Note 6 Pt. (8) and Note 5 Pt. (19).
 Right of residence. See Note 5 Pt. (19).
 Salary of private servants. See Note 16 Pt. (4).
 Security for performance. See Note 7 Pt. (18).
 Service of a public nature. See Note 5.
 Soap making. See Note 9 Pt. (2).
 Stipends out of service family fund. See Note 14.
 Trustees of a charity. See Note 5 Pt. (18).

1. Legislative changes.
 2. Subsequent amendments.
 3. Scope and applicability of the Section.
 4. Property, meaning of.
 5. "All other saleable property."
 6. "Belonging to the judgment-debtor or over which or the profits of which he has a disposing power."
 7. Debts.
 8. Necessary wearing apparel, etc. — Clause (a).
 9. Tools of artisans, implements of husbandry, etc. — Clause (b).
 10. Houses, etc., of agriculturists — Clause (c).
 11. "Books of account" — Clause (d).
 12. Right to sue for damages—Clause (e).
 13. Right of personal service — Clause (f).
 14. Stipends and gratuities allowed to pensioners — Clause (g).
 Auctioneer. See Note 6 pt. (12).
 Bonus by Railway Company. See Note 6 Pt. (5) and Note 19 Pt. (2).
 Burmese marriage property. See Note 5 Pt. (3) and Note 6 Pt. (13).
 Cooking Vessels. See Note 8 Pt. (4).
 Delivery to post office. See Note 19 Pt. (6).
 In execution of a decree. See Note 3 Pts. (2), (3).
 Land assigned for maintenance. See Note 21 Pt. (7); Note 22 Pts. (4) and (5).
 Life interest. See Note 6 Pt. (4).
 Life-policy. See Note 6 Pts. (8) and (9).
 Non-transferable office. See Note 5 Pts. (8) and (9) and Note 18.

Provided that, where the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree;

(h) the wages of labourers and domestic servants, whether payable in money or in kind; and salary, to the extent of the first hundred rupees and one-half the remainder of such salary;

(b) The Explanation was re-numbered as Explanation I and the words "and in the case of salary until it is actually payable" were added.

(c) Explanation II was added.

4. Explanation III has been newly added by the Government of India (Adaptation of Indian Laws) Order, 1937, and defines the term "appropriate Government" in clause (1) which has been substituted for "Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.

See also the foot-notes to the Section.

Retrospective effect of amendments.

Under Section 3 of the Amending Act IX of 1937 referred to above, the Amendments made by Section 2 of that Act and referred to above have no effect in respect of any proceedings arising out of any suit instituted before the 1st June 1937.¹

3. Scope and applicability of the Section. — This Section declares what properties are liable to attachment and sale in execution of a decree and what properties are exempt therefrom.¹ It classifies the attachable properties under two heads :

1. lands, houses or other buildings, etc., which are specifically mentioned, and
2. all other *salable property* belonging to the judgment-debtor or over which he has a disposing power which he may exercise for his own benefit, except in the cases specified in the proviso.

The Section does not, however, affect any special or local law under which properties attachable under this Section are declared to be not attachable in execution of decrees.^{1a} Thus, the properties which have been declared by the following enactments to be not attachable cannot be attached even though properties are not exempted from attachment under this Section :—

1. *The Madras Estates Land Act (I of 1908), Section 192 (h).* — Exempting from attachment and sale the manure stocked by an agriculturist.
2. *The Agra Tenancy Act (III of 1926), Schedule II, Section 60.* — Exempting from attachment and sale the manure stocked by an agriculturist.

Section 60 — Note 2

1. ('39) AIR 1939 Pat 77 (79) : 17 Pat 706. (Clauses (h) and (i) of Section 60 (1), as amended by Act 9 of 1937, have no application to proceedings arising out of a suit instituted before the first day of June 1937.)

(38) AIR 1938 Cal 325 (326). (Insolvency case is not a proceeding arising out of suit within the meaning of Section 3 of the Amending Act IX of 1937.)

Note 3

1. See ('36) AIR 1936 Pesh 109 (110).

1a. See Section 4, *ante*.

the interest of a partner in the partnership assets,⁶ the interest of a purchaser in the property purchased after he has paid full consideration fixed,⁷ the proprietary interest of a surety in the surplus that may remain over after satisfying the purpose for which he offered the security,⁸ a *mulkhana* right to receive a percentage from musaddars⁹ and the interest of a life-tenant charged with the maintenance and education of children when the latter have received other property for their maintenance,¹⁰ are all instances of attachable property. See also the cases cited below.^{10a}

A mere right to sue is not 'property' but is only a title to recover future property.^{10b} A claim, therefore, to the right and interest of X in a *future award* which might be made on a reference to arbitration of matters in dispute between X and Y is not a claim to "property."¹¹

5. "All other saleable property."—The property, in order to be attachable under this Section, must be "saleable property."¹² The word "saleable" in this Section means saleable by court auction at a compulsory sale.¹³ For this purpose it is *firstly* essential that the property should be in *existence*. Uncertain, future and fluctuating profits derivable from a property,² or an indeterminate interest in properties varying according to contingencies, as for example, the interest of a Buddhist couple in marriage property,³ is not 'saleable property.' *Secondly* it is also essential that the property must, in law, be capable of being *transferred*. Where it is so transferable it is saleable property.* Property in which the judgment-debtor has no legally transferable

6. ('25) AIR 1925 Sind 18 (18, 19); 17 Sind L. R.

(1929) AIR 1929 Mad 641 (646); 52 Mad 568 (FB).

7. ('18) AIR 1918 Cal 928 (925). (But not if the purchase money has not been paid: see ('94) 18 Bom 18 (17, 18).)

8. ('30) AIR 1930 All 225 (242); 52 All 619 (FB).

9. ('28) AIR 1928 All 304 (304, 305).

10. ('99) 28 Bom 1 (10, 11). (Inasmuch as it is a benefit arising out of land.)

10a. ('39) AIR 1939 Cal 288 (284); 1 L. R. (1938) 2 Cal 618. (Rights of patentee can be attached under Section 60.)

(1936) AIR 1936 Pesh 90 (90). (A mere right to give a lease is not property which can be transferred.)

(1921) AIR 1921 Mad 498 (502). (Right to get a reconveyance and possession of property is property which is attachable and saleable in execution.)

10b. ('36) AIR 1936 Nag 218 (220). (Coshare's share of village profits before they accrue due to mere right to sue and not attachable.)

(1935) AIR 1935 Cal 751 (752). (But where the claim for money has been established and the Court, the decree is property and assignable.)

(1971) 14 Moo Ind App 40 (51). (PC).

11. ('71) 14 Moo Ind App 40 (51). (PC).

Note 5

1a. ('38) AIR 1938 Nag 504 (506).

1. ('16) AIR 1916 Cal 175 (175). (Does not mean transferable by act of parties.)

2. ('29) AIR 1929 Cal 352 (353).

(1967) 1 Suth W R 266 (266). (Unascertained surplus profits of shebaitship.)

(1983) 5 All 616 (618, 619).
('16) AIR 1916 All 334 (334).
('09) 4 Ind Cas 1057 (1057) (Mad).
('10) 5 Ind Cas 41 (42) (Mad). (Inam land in a proprietary estate attached to the office of blacksmith.)

Trees forming part of proprietary holding can be sold :

(179) 4 Cal 723 (724). (Do.)

interest of Hindu co-partener.

(191) 18 Cal 157 (161); 17 Ind App 194 (PC). (In-joint family property is saleable :

4. Thus the interest of a Hindu co-partener in against one partner only.)

ship cannot be seized in execution of a decree against one partner.)

(179) 4 Bom 222 (227). (A debt due to a partner-may or may not be payable by one partner to another.)

(187) 14 Cal 384 (385). (Uncertain sum which may or may not be payable by one partner to another.)

3. ('27) AIR 1927 Rang 274 (275); 5 Rang 478. (1916) AIR 1916 Cal 269 (270, 271); 43 Cal 28. (Do.)

idol.)

(1902) 29 Cal 470 (472, 473). (Future offerings to of ghatwahi tenure.)

(1901) 28 Cal 483 (485). (Future rents and profits of ghatwahi tenure.)

entrained.)

(194) 4 Mad L. Jour 13 (14). (Future melvaram rents of short-term village that have not been cannot be attached.)

(1920) AIR 1920 Pat 651 (651). (Future perquisite on account of offering or bhog to the deity will be an uncertain and indefinite income which uncertain property cannot be sold in execution.)

(1865) 4 Suth W R 87 (90) (PC). (Uncertain right in (1925) AIR 1925 Sind 18 (18, 19); 17 Sind L. R.

"The doors and windows of a house cannot be separately attached as they have no separate existence."

6. "Belonging to the judgment-debtor or over which or the profits of which he has a disposing power." — All saleable properties belonging to a judgment-debtor may be attached unless such attachment is prohibited by any law or the proviso to this Section. For instances of saleable property, see the undermentioned cases.¹

Given though a property may not *belong* to the judgment-debtor it may still be attachable if he has a *disposing power* over it which he may exercise for his own benefit.² Thus, a Hindu father has a disposing power over the whole of the joint family property for the purpose of satisfying his personal debts under certain circumstances.³ Similarly, a Hindu coparcener in Andras has a disposing power over his share of the joint family property.⁴ So also the karnavan and the senior karnadavan of a Malabar *turwad* have a disposing power over the *turwad* properties which they may exercise for the purpose of satisfying debts contracted for the benefit of the *turwad*.⁵ But on

- (12) 14 Ind Cas 227 (228) : 39 Cal 1010. (That wall tenure — A receiver may be appointed to collect the surplus rents and profits.)
- (22) AIR 1922 Mad 197 (198, 200) : 16 Mad 620. (Land held on Swasthikam service.)
- [See (37) AIR 1937 Nag 218 (219, 220) : ILR (1938) Nag 27. (Grant of land from generation to generation and expressing hope that grantee should wish for prosperity of donor—Expression did not impose upon grantee duty of rendering some special service—Grant was liable to attachment in execution of decree against grantee.)]
- [But see (88) 16 Cal 471 (481) : 16 Ind App 18 (17). (The interest of a ghatawali tenure in Khairpur saleable if assented to by the zamindar.)]
- (21) 61 Ind Cas 522 (523) (Pat). Police jagir transferable and saleable in execution of a decree subject to the right of the Government to object to it.)]
21. (90) 18 Mad 518 (520). (86) 11 Cal 161 (166). (91) 14 Mad 467 (469). (Case under District Municipalities Act.)
- Note 6
1. (38) AIR 1938 Mad 623 (631) : ILR (1938) Mad 767. (Grant of village — Grantee entitled to rents and profits but prohibited from alienating village — Right to enjoy rents and profits only, held attachable and saleable.)
- (37) AIR 1937 All 652 (653) : ILR (1937) All 829. (Preliminary decree in suit for the recovery of the unpaid consideration money due under a mortgage bond is saleable property.)
- (37) AIR 1937 Oudh 177 (177) : 13 Luck 64. (Books belonging to lawyer insolvent — Such books are not exempt from attachment and sale.)
- (38) AIR 1936 Cal 751 (752). (Preliminary decree for accounts.)
- (29) AIR 1929 Loh 600 (601). (Interest of heir in hands of administrator after latter has paid all expenses and debts.)
- (32) AIR 1932 Nag 18 (19) : 27 Nag L R 389. (Widow of a Mahomedan in possession of his land in lieu of dower debt — Husband's creditor
- 1a. (37) AIR 1937 Mad 424 (425) : ILR (1937) Mad 1004.
- 1b. (08) 26 Mad 214 (222, 223). (86) 11 Bom 37 (41). [See also (31) AIR 1931 Pat 364 (367) : 10 Pat 582. (Chota Nagpur Encumbered Estates Act, 1896, Section 12-A.)]
2. (81) 4 Mad 302 (307). (But it ceases to be saleable on his death unless it had been attached in his lifetime.) [See (89) 11 All 302 (303).]
3. (04) 27 Mad 375 (376).

partition between a Hindu father and his sons the father will cease to have disposing power over the shares allotted to his sons.³⁸

A Hindu widow has no disposing power over property which she is entitled to enjoy for her life but which she is not entitled to alienate.³ See also cases under clause (n) below.

A person in whose favour a retiring gratuity or *bonus* has been declared by a railway company, but which has not been completed by either a registered document or payment, has no disposing power over it so as to make it attachable in execution of a decree against him.⁵

A member of a mutual benefit fund or society has no disposing power over the monies which by rules of the fund or society are payable after the death of the member to his nominee or legal heir.³⁹

A person who holds properties in trust for another person or for other purposes has no disposing power over them⁶ and the *corpus* of the trust property in the hands of the trustee cannot be attached in execution.⁷ Where X effects an insurance policy on his own life and it is expressed to be for the benefit of his wife or of his wife and children, such expression amounts, in cases to which the Married Women's Property Act applies, to a trust in their favour, and consequently X has no disposing power over the policy so as to enable his creditors to attach it in execution of a decree against him.⁸ In cases to which the said Act does not apply, the simple declaration, (in the absence of an assignment under Section 130 of the Transfer of Property Act, or a declaration of trust under Section 5 of the Indian Trusts Act) does not create a trust in their favour, and X has a disposing power over the policy which he can exercise for his own benefit and the policy can consequently be attached in execution.⁹

A person who has transferred his property to another has no longer a disposing power over it.^{9a} Thus, money deposited under decree to the credit of a degree-holder who has already assigned his interest in the decree to another cannot be attached by the creditors of the degree-holder unless the transfer is proved to be not *bona fide*.¹⁰ Similarly, where X, a contractor, deposits materials on A's premises and the value

3a. (1938) AIR 1938 Nag 24 (27, 29) : ILR (1938)

Nag 136.

(1937) AIR 1937 Mad 424 (425, 426) : ILR (1937)

Mad 1004. (Motive behind partition is irrelevant

and it is immaterial to consider whether or not

creditor was aware of partition—Properties al-

lotted on partition for wife's maintenance and

daughters' marriage—Such properties also are

not liable to be attached for father's debt.)

4. (1937) AIR 1937 Mad 864 (864). (Receiver of

income of property can be appointed.)

(1928) AIR 1928 Bom 276 (280) : 47 Bom 597.

[See also (1936) 10 Bom 342 (345).]

5. (1924) AIR 1924 Bom 88 (88).

5a. (1939) AIR 1939 Sind 15 (17). (Where the em-

ployee died during service.)

(1936) 162 Ind Cas 889 (892) (Mad).

6. (1905) 1905 Pun L R No. 7. (Part of considera-

tion left with mortgagee for defraying the ex-

penses of the marriage of the mortgagee's

daughter.)

[See also (1973) 19 South WR 226 (226). (Property

placed in trust with a person as manager.)

10. (1925) AIR 1925 Pat 372 (374).

10a. (1925) AIR 1925 Pat 372 (374).

10. (1925) AIR 1925 Pat 372 (374).

10. (1925) AIR 1925 Pat 372 (374).

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a claim for profits⁷ or rent⁸ or salary or annuity⁹ or other claim¹⁰ not yet due but which might become due in the future is not a 'debt.'

It is important to remember that a debt may become due though payable in the future.¹¹

Illustrations

1. A is entitled to get a monthly allowance from B payable on the 1st of every month. X, a judgment-creditor of A, applies on the 21st December for the issue of an attachment (prohibitory order) in respect of a half of the allowance for the month of December. Held that the attachment could be validly made, inasmuch as the allowance for three weeks in December had already become an existing debt though payable on the first of January.¹² The same principle will apply to interest payable at fixed periods.
2. A deposits certain moneys with B as security for the due performance and completion of a contract entered into by him. X, who has obtained a decree against A, can attach the amount deposited as money due and owing to A though it is not payable to him till the completion of the contract, and may even be forfeited.¹³

Where the money is due as, for instance, by an agent or a vendee to his principal or vendor, it will be a "debt," though the exact amount due is not ascertained at the time of the attachment.¹⁴ But a mere claim for unliquidated damages is not a debt.¹⁵

A claim over which no Court in British India has jurisdiction is not a debt liable to be attached, but the mere circumstance that the garnishee is, at the time of the application for execution, beyond the limits of British India would not, of itself, render the debt not liable to be attached.¹⁶

The word "debts" in this Section includes share of debts. A judgment-debtor's share in a debt due to the judgment-debtor and other persons jointly can, therefore, be attached and sold in execution.¹⁷

7. ('08) 1908 All W N 101 (101) : 30 All 246. (Future profits of the village from lambaradar.)
- (01) 28 Cal 483 (485). (Future rents and profits from ghatali tenure.)
- (28) AIR 1928 All 198 (193) : 50 All 507. (As the obligation is not complete.)
- (25) AIR 1925 Rang 318 (319) : 3 Rang 235. (1888) 11 Q B D 518, Webb v. Stenton. (As to salaries of public officers, see clause (i).)
- (09) 1 Ind Cas 186 (187) : 31 All 304. (Future wages of lawyer's clerk.)
- (11) 11 Ind Cas 422 (425) (Cal). (Annuity not fallen due.)
- (38) AIR 1938 Lah 533 (534) : 1 L R (1938) Lah 548. (Compensation money in the hands of Collector awarded under Land Acquisition Act is not a debt due to the person whose land has been acquired until the money is tendered to him under S. 31 of the Act.)
- (81) 3 All 12 (14). (Vendor and vendee — Purchase money payable on execution of conveyance not a debt until it is executed.)
- (32) AIR 1932 Pat 311 (313) : 11 Pat 584. (Gratuity sanctioned but not yet paid — Gift incomplete — Not attachable.)
- (1900) 27 Cal 38 (42). (Maintenance allowance to fall due in future.)
- (84) 6 All 634 (636). (Gratuity sanctioned to A but not yet paid — Gift not complete — Cannot be attached.)

- (71) 8 Bom H C R A C 150 (151). (Right to an account claimed by the representatives of a deceased partner is not a 'debt'. (1858) 27 L J Q B 234. (Verdict of jury giving liquidated damages is not a debt until the judgment is signed.)
- 2 Hay 142. (Sum receivable by way of assignment.)
- (37) AIR 1937 Nag 391 (393) : 1 L R (1938) Nag 402. (Sale proceeds deposited in Court during continuation of sale — Judgment-debtor not objecting to continuation of sale — Surplus amount payable to judgment-debtor after confirmation is a debt and can be attached.)
- (08) 30 All 246 (247).
- (71) 14 Moo Ind App 40 (50).
- (69) 1869 Pun Re No. 90. (Installments payable by order of Court.)
- (05) 9 Cal W N 703 (704).
- (20) AIR 1920 Low Bur 46 (47) : 56 Ind Cas 948 (948, 949).
- [See also ('86) 9 Mad 203 (206).]
- (94) 16 All 286 (294).
- (1884) 12 Q B D 525 (529), Randall v. Lithgow.
- (81) 5 Bom 249 (252).
- (37) AIR 1937 Cal 199 (200) : 1 L R (1937) 2 Cal 48.

8. Necessary wearing apparel, etc. — Clause (a). — "The necessary wearing apparel of a person cannot be attached in execution." The *mangalsutra* worn by a Hindu married woman cannot, according to Hindu religious usage, be parted with by her during the lifetime of her husband, and cannot therefore be attached in execution.² Cooking vessels include vessels required for cooking operations, such as a *thali* and a *gajra*.

9. Tools of artisans, implements of husbandry, etc. — Clause (b). — An "artisan" is a person engaged in a *mechanical* employment. Musicians and washermen are not "artisans" and musical instruments are not "tools of artisans." Similarly, the instruments of a surgeon or a doctor do not come within this clause.³ But a sewing machine is a "tool of an artisan." In the undermentioned case⁴ it was held that an artisan is not merely a person who is engaged in mechanical employment but a person who works in the production of some commodity, that whatever he uses for the production of the commodity may be considered as his tools, and that therefore the utensils used by a sweetmeat vendor for preparation of sweets are tools of an artisan. But a person will not be an "artisan" within the meaning of this Section unless he employs himself in a handicraft personally and depends for his living essentially on the proceeds derived from that handicraft.⁵

(*Charaks, kachars* and planks of timber used by an agriculturist for pressing sugarcane grown on his field are implements of husbandry and are exempt from attachment.)

"The Sind Judicial Commissioner's Court has held that the term "implements of husbandry" should be interpreted in a fair and reasonable spirit and not in a narrow sense and that the term will include an engine or a water-pump as being necessary for the agriculturist to irrigate his fields." But, the Nagpur High Court has taken the view that implements would mean such instruments as the agriculturist handles in the course of his agricultural work and as driving a motor tractor cannot be regarded as manual work, it cannot be regarded as an "implement of husbandry."⁶

Such cattle and seed-grain as may, in the Court's opinion, be necessary to enable an agriculturist to make a living are not attachable.⁷ Even the fodder required for the cattle is exempt from attachment.⁸ The fact that the cattle have been pledged as security for a debt will not prevent the operation of this clause.⁹

But it is necessary that the Court should express its opinion that such cattle or seed-grain are *necessary* to enable the judgment-debtor to earn his livelihood, before the exemption can operate,¹⁰ and if the necessity is disputed, the executing Court must

Note 8

- 1. (72) 9 Bom II C R 272 (275).
- 2. (85) 9 Bom 106 (107).
- 3. (32) AIR 1932 All 344 (345) : 51 All 399.

Note 9

- 1. (17) AIR 1917 Upp Bur 4 (5) : 2 Upp Bur Rul 139.
- 1a. (33) AIR 1933 Lah 936 (936) : 15 Lah 26.
- 2. (23) AIR 1923 Nag 289 (289) : 19 Nag L.R. 22.
- 2a. (35) AIR 1935 All 848 (848).
- [See also (32) AIR 1932 All 344 (345) : 51 All 399. (One who practises the art of soap-making is an artisan — The paraphernalia of soap factory are tools and are exempt.)]
- 2b. (39) AIR 1939 Lah 368 (392) (F B).
- 3. (24) AIR 1924 Bom 294 (294, 295).

- (23) AIR 1923 Lah 943 (944).
- 3a. (39) AIR 1939 Sind 96 (97). (An engine or a water-pump is necessary for the agriculturist to irrigate and cultivate his fields and earn his livelihood as an agriculturist and therefore it comes within the term "implements of husbandry.")
- 3b. (39) AIR 1939 Nag 3 (4) : 1 L.R. (1939) Nag 355. (Motor tractor is not "implement of husbandry," more so when not used for agriculture but for driving flour mill.)
- 4. (21) 61 Ind Cas 777 (778) (All).
- 5. (07) 1907 Pun Re No. 82, p. 106. (Case governed by Civil Procedure Code and the Punjab Land Revenue Act.)
- 6. (21) 61 Ind Cas 777 (777) (All).
- 7. (33) 10 Cal 39 (40). (Execution Court only can decide the point.)

Decide it.⁸ The Section is only intended for the benefit of indigent agriculturists and an attachment of such cattle and seed-grain will be valid where the judgment-debtor is easily able to replace them.⁹

10. Houses, etc., of agriculturists — Clause (c). — The object of proviso (c)

to this Section is that an agriculturist should not be deprived of his means of livelihood by having his house and other buildings taken from him.^{1a} 'Agriculturist' means a person who earns his livelihood wholly or principally by *cultivating* land either personally or through servants.¹ It is not necessary that he should *own* the lands he cultivates.² He may be a proprietor or a tenant³ or even a person who without being either, earns his wages by cultivating the land of his employer.⁴ The test is, in each case, what is the *chief source of his livelihood*.⁵ If it is other than by *cultivation* of land he is not an agriculturist though he may also cultivate lands.⁶ Thus, a large landed proprietor or zamindar is not an agriculturist even though his sole income is from land, unless his chief source of income is by cultivating lands either personally or through servants.⁷ The *onus* lies on the person claiming the exemption to establish that his chief source of livelihood is by cultivation of land.⁸ The Nagpur High Court has, in a

8. ('20) AIR 1920 Sind 14 (15): 18 Sind L R 210.
(('83) 10 Cal 89 (40).
(('21) 61 Ind Cas 777 (778) (All).
9. ('15) AIR 1915 Mad 320 (321).
Note 10
1a. ('32) AIR 1932 All 508 (508): 54 All 736.
1. ('39) AIR 1939 Lab 40 (41).
(('38) AIR 1938 Lab 72 (72): TLR (1938) Lab 874.
(('Agri-cultu-ris-t' means person who carries on and makes living by tillage and not mere owner of land.)
(('37) AIR 1937 Mad 551 (553): TLR (1937) Mad 777 (F.B.). (The test is not whether agriculture is the sole, main, chief or principal source of his income.)
(('35) AIR 1935 All 448 (448).
(('28) AIR 1928 Bom 12 (13). (Case decided under Dekkhan Agriculturists' Relief Act, Sec. 2.)
(('33) AIR 1933 Oudh 79 (79). (Patwardi is Govern-ment servant and not agriculturist.)
(('32) AIR 1932 Oudh 76 (76).
(('27) AIR 1927 All 601 (603). (Ojibter.)
(('83) 12 Bom 363 (365). (Exemption limited to agriculturists in the strict sense and in that sole character.)
(('16) AIR 1916 Cal 891 (891). (Means common agriculturist such as lives in this country.)
(('17) AIR 1917 All 427 (428).
(('97) 1897 Pun Re No. 47, p. 212. (Mere owner of land not an agriculturist.)
(('28) AIR 1928 Lab 132 (133).
(('25) AIR 1925 All 432 (433).
(('16) AIR 1916 All 332 (332). (Person owning 20 bighas and tenant of 50 bighas and whose chief occupation is agriculture is an agriculturist.)
[See ('38) AIR 1938 Nag 366 (367): I L R (1938) Nag 461. (Agriculture need not be the sole means of livelihood.)]
2. See cases in foot-notes (3) and (4) below.
3. (1900) 13 C P L R 30 (32).
4. ('38) AIR 1938 Nag 366 (369): I L R (1938) Nag 461.
(('17) AIR 1917 Bom 253 (253): 41 Bom 475.
(('23) AIR 1923 Bom 12 (13).
(('27) AIR 1927 Lab 810 (811).
(('25) AIR 1925 All 432 (433).
8. ('36) AIR 1936 Lab 532 (533).
(('31) AIR 1931 All 20 (20). (Main source of liveli- hood to be agriculture.)
[But see ('28) AIR 1928 Nag 23 (24). (Where this proposition is doubted.)]
6. ('36) AIR 1936 Lab 532 (533).
(('36) AIR 1936 Pesh 151 (152). (Person living upon trade—Pleasure garden apartment to house—House and garden are not exempt from attachment.)
(('35) AIR 1935 All 292 (292). (The cultivation of land by hired labourers by a person who has a different occupation cannot constitute that per- son an agriculturist.)
(('35) AIR 1935 All 448 (449).
(('25) AIR 1925 Oudh 365 (365).
(('21) 63 Ind Cas 681 (682) (Cal).
7. ('39) AIR 1939 Lab 40 (41).
(('38) AIR 1938 All 85 (86). (Judgment-debtor having two sources of livelihood, zamindari and cultivation—Zamindari main source—Judg- ment-debtor is not agriculturist.)
(('38) AIR 1938 Mad 922 (923).
(('26) AIR 1926 Mad 350 (351): 49 Mad 227.
(('32) AIR 1932 Oudh 76 (76). (Do. AIR 1926 Mad 350 followed.)
(('13) 19 Ind Cas 125 (125): 35 All 307. (This was however doubted in A I R 1928 All 211 by Ashworth, J., sitting as a single Judge.)
(('27) AIR 1927 All 601 (603).
(('17) AIR 1917 All 427 (428).
[See also ('37) AIR 1937 Mad 551 (553): I L R (1937) Mad 777 (F.B.). (Dismissing from observa- tions of Goldstream J. in AIR 1936 Lab 737.)]
(('36) AIR 1936 Lab 532 (533).
(('25) AIR 1925 All 432 (433).
(('27) AIR 1927 Lab 810 (811).
(('23) AIR 1923 Bom 12 (13).

recent decision,"¹² expressed the view that the question whether a person is an agriculturist or not is a question turning on the source of the income or livelihood but on the nature of the employment or *occupation* and that the sole test for determining whether a person is an agriculturist or not is whether his occupation is that of a person cultivating the soil either personally or through servants whose activities he directs. The Allahabad High Court has also held in the undermentioned case¹³ that the term 'agriculturist' in clause (c) refers to an *occupation*. "The Lahore High Court has, in a recent Full Bench decision,"¹⁴ held that the true test is whether a man *personally* engages himself in tilling the soil and whether this occupation is essential to his maintenance. A person who lets out his land to another for cultivation, reserving either money or produce as rent is not an agriculturist," the reason being that in such a case neither his occupation nor the chief source of his livelihood will be the *cultivation* of land. A person, however, does not cease to be an agriculturist by the mere fact that he has obtained permission to build houses on a portion of the land which was formerly his occupance tenancy,"¹⁵ or because he has turned an Alkali."¹⁶ Nor does the fact that a person owns a vast extent of land which he cultivates himself or through servants make him any the less an agriculturist."¹⁷

The house of an agriculturist is exempt both from attachment and sale. Hence, where a judgment-debtor is not an agriculturist at the date of the attachment of his house but by a change of circumstances becomes one subsequently and is an agriculturist at the time of the proceedings for the sale of the house, the house cannot be sold in execution.¹⁸

Where a person is proved to be an agriculturist, the houses and other buildings belonging to and occupied by him are exempted from attachment.¹⁹ The exemption from attachment under this clause depends upon the property being that of an agriculturist at the time when the decree-holder seeks to execute the decree against it. Thus, where the decree-holder seeks to attach a dwelling-house belonging to the deceased debtor in the hands of his legal representative, the legal representative can claim exemption if he occupies the same as an agriculturist.²⁰ But, the Lahore High Court

- 8a. (193) AIR 1938 Nag 366 (369); ILR (1938) Nag 461. (A person may have many occupations—If one of them is agriculture and for that purpose a house or building is occupied, protection can be claimed.)
- 8b. (193) AIR 1935 All 292 (292). (The cultivation of land by hired labourers by a person who has a different occupation cannot constitute that person an agriculturist.)
- 8c. (193) AIR 1939 Lah 388 (393) (F B).
9. (193) AIR 1938 Nag 366 (369); ILR (1938) Nag 461. (Overruling AIR 1920 Nag 15 and AIR 1927 Nag 374.)
- (1930) AIR 1930 Lah 191 (191). (Temporary letting out of land.)
- See also cases cited in Foot-Note 7 above.
- [But see (1930) AIR 1930 Lah 191 (191). In this case it was held that the judgment-debtors who had for years been tilling their land could not, by reason of their temporary letting out of the land, be considered to have lost their status as agriculturists.]
- 9a. (1932) AIR 1932 All 499 (499).
10. (1925) AIR 1925 Lah 331 (331).
- 10a. (1938) AIR 1938 Nag 366 (369) : 1 L R 1938 Nag 461.

- (1936) AIR 1936 Rang 215 (215). (The mere fact that the judgment-debtor owns 150 acres of land makes no difference when there is evidence to the effect that he cultivates 25 acres, while the rest of the land is cultivated by his son who devotes all the profits to paying off his father's debts—That does not render the judgment-debtor a zamindar or a rent receiving landlord.)
- 10b. (1935) AIR 1935 All 85 (86).
11. (1936) AIR 1936 Bom 315 (319). (House should be in actual occupation.)
- (1917) AIR 1917 All 10 (11); 39 All 120.
- (1932) AIR 1932 All 499 (500).
- (1933) AIR 1938 Nag 80 (81); 29 Nag L R 106. (All the buildings are exempt even though a portion of the building is enough to enable the judgment-debtor to earn his livelihood as an agriculturist.)
- (1924) AIR 1924 Lah 226 (227).
- [See (1933) AIR 1933 Rang 227 (229) : 11 Rang 372 (F B). (Occupation must be in good faith and for purposes of agriculture.)]
12. (193) 7 Bom 530 (532).

As has been seen in Note 3 above that this Section does not apply to mortgagee degrees. Where, therefore, the house of an agriculturist is specifically mortgaged by him, the house can be sold in execution of the mortgage decree, unless it is appurtenant to an agricultural holding which is not transferable by law.²²

The exemption in this clause being intended only for the benefit of the judgment-debtor, it can be *waived* by him.^{22a} Thus, where a judgment-debtor agriculturist agrees to give his house as security for the amount of the decree²³ or agrees, in consideration of time being given to him, that his house may be sold in default of payment within the extended time, he cannot claim the exemption subsequently.²⁴ Similarly, where the judgment-debtor does not claim the exemption during the execution proceedings, he cannot raise it in a suit for possession by the purchaser.²⁵ But it is not necessary for him to raise his objections at the *earliest possible stage* in the execution proceedings.²⁶

Under Section 266 of the old Code only the *materials* of a house occupied by an agriculturist were exempted from attachment.²⁷ But it was held that even a house could not be attached if it was occupied by an agriculturist as such.²⁸ The present Section has now been drafted in conformity with this view.

See the cases cited below²⁹ as to the effect of the amendment of this clause by the Punjab Relief of Indebtedness Act of 1934, Section 35.

11. "Books of account"—Clause (d).—Under the Code of 1859 there was no express provision exempting account books from attachment. But it was held by the Courts, applying the Common Law rule of exemption, that such books were not

- (134) AIR 1934 Lah 168 (169). (Two houses of agriculturist attached—Finding that one is sufficient for occupation for agricultural purposes — Other held to be attachable.)
21. (79) 4 Bom 25 (26).
(89) 1889 Pun Re No. 1, p. 1. (Property not extra commercium.)
(11) 9 Ind Cas 825 (825) (All).
(11) 34 All 25 (28, 29, 30) (F B).
(14) AIR 1924 All 328 (336) : 46 All 489 (F B).
(15) AIR 1915 All 459 (459).
[See also (38) AIR 1938 Nag 544 (544). Agriculturist mortgaging his house—Protection is waived.]
22. (15) AIR 1915 All 459 (459).
(12) 34 All 25 (30) (F B).
(19) AIR 1919 All 222 (223).
(9) 1 Ind Cas 362 (363) (Cal). (Homestead in town of Comillah is not transferable in law.)
(11) 9 Ind Cas 981 (981) : 33 All 136.
22a. (39) AIR 1939 Lah 316 (318). (Agriculturist waiving objection to attachment of house and agreeing to sale of house in execution—Section 60 does not protect house from attachment and sale.)
(38) AIR 1938 Nag 544 (544).
(37) AIR 1937 Lah 100 (101).
(36) AIR 1936 Lah 737 (738).
(27) AIR 1927 Pat 233 (233) : 6 Pat 254.
(20) AIR 1920 Cal 424 (425).
23. (35) AIR 1935 Lah 164 (164).
(27) AIR 1927 Pat 233 (233) : 6 Pat 254.
[See also (37) AIR 1937 Lah 939 (940). (Offering house as security and thereby obtaining time for payment of decretal amount.)]

24. (20) AIR 1920 Cal 424 (425). (Compromise decree.)
25. (03) 28 Bom 125 (128).
(13) 19 Ind Cas 591 (594) : 37 Bom 415.
(18) AIR 1918 All 305 (306) : 40 All 680. (Sale becomes conclusive.)
(31) AIR 1931 All 112 (113) : 52 All 1027.
26. (36) 38 Pun L R 669 (669, 670). (Objection two days prior to sale—Intervenable.)
(35) AIR 1935 Lah 942 (943).
(30) AIR 1930 Nag 11 (12).
(30) AIR 1930 All 727 (729). (No objection taken, but Court otherwise becomes cognizant—Relief to be granted.)
27. (82) 1882 All W N 13 (13).
28. (83) 7 Bom 530 (531).
29. (39) AIR 1939 Lah 50 (51). (Judgment-debtor's house lent to and occupied by his sons who are independent proprietors living apart held not exempt from attachment.)
(38) AIR 1938 Lah 459 (460). (Property validly and legally vested in Official Receiver in 1933—Amendment coming into force in 1935 does not divest him of such property—Succession opening out long after vesting of property—Legal representatives can claim no exemption.)
(37) AIR 1937 Lah 100 (101). (The effect of the amendment of S. 60, by the Punjab Relief of Indebtedness Act, is that if a house is reserved for the personal occupation of the judgment-debtor, then it is saleable only if it has remained unoccupied for more than a year; otherwise only a house actually occupied by the judgment-debtor is exempt.)

saleable property and could not be seized in execution.¹ It was, however, held that the Court could require the judgment-debtor to produce them in Court.² The provision exempting books of account from attachment and sale was introduced in the Code of 1877, and is now incorporated in clause (d) of this Section.

12. Right to sue for damages — Clause (e). — It has been seen in Note 4 above that a mere right to sue is not 'property' at all and cannot be attached and sold in execution.¹ It follows that a mere right to sue for damages cannot be attached and sold² and if sold, the purchaser will not get any right or title thereby.³ It has however been held by the Sind Judicial Commissioner's Court that the words 'a mere right to sue for damages' are restricted to damages arising from bodily or mental suffering or injury to the person or reputation of the debtor and not to damages for breaches of 'contract.'⁴ The case was one under the Insolvency Act and the question was whether a right to sue for damages for breach of contract vested in the Official Receiver. It is submitted that the decision must be regarded as being applicable only to the facts of the particular case, and cannot be taken to lay down the correct law as to the interpretation of this clause.

A right to claim mesne profits for wrongful possession is a right to sue for damages, it can be attached.⁵ Where, however, a *decree* has been passed awarding damages and cannot be attached.⁶

A right to get a reconveyance and possession of property which has been sold with an agreement of reconveyance is *property* and is attachable in execution.⁷

13. Right of personal service — Clause (f). — A right of personal service cannot be attached and sold in execution.¹ Thus, the right of a *gangadhara* to receive offerings from pilgrims on the banks of the Ganges is a right of personal service and cannot be attached and sold in execution.² Similarly, a *writ* which is a priestly office by virtue of which certain personal services are performed on behalf of pilgrims,³ or a *divi mahabrahmana* or *divi jaymani*, which is a right to officiate at the funeral ceremonies of Hindus dying within a particular locality,⁴ cannot be attached and sold. But the interest of an *utpat* (priest officiating in the Pandharpur temples) in the net balance of

Note 11

1. (1865) 3 Bom H O R O 42 (43).
2. (171) 3 N W P H C R 334 (335).

Note 12

1. (1865) 3 South W R Misc 18 (18).
(170) 14 South W R 152 (153). (Right to sue to set aside a sale.)
(174) 6 N W P H C R 95 (97). (Right to sue for damages.)

(1865) 3 South W R Misc 16 (16). (Right to appeal.)
2. (35) AIR 1935 Nag 135 (137) : 31 Nag L R 235.
(25) AIR 1925 Sind 98 (99). (Damages for breach of contract.)

(31) AIR 1931 Oudh 398 (399). (Possible right on a contract to be decided in a pending appeal.)
(19) AIR 1919 Mad 864 (864). (Right of mortgagee in South Kanara to compensation for improvement.)

3. (25) AIR 1925 Sind 98 (99). (Since sale becomes invalid.)
4. (24) AIR 1924 Sind 89 (91) : 17 Sind L R 52. (Liquidated damages, if attachable — *Quere.*)
[See also (25) AIR 1925 Sind 159 (162) : 10 Sind L R 286.]

5. (183) 9 Cal 695 (697).
6. (171) 15 South W R 34 (34). (See "other sale-able property," *supra*.)
7. (21) AIR 1921 Mad 498 (502).
[See also (187) 14 Cal 241 (244).]
Note 13
1. (36) AIR 1936 Pat 10 (10).
(89) 23 Bom 181 (185). (Also opposed to Hindu law and public policy.)
2. (29) AIR 1929 Oudh 444 (445) : 5 Luck 206. (But right of occupation of particular spot attachable.)
3. (86) 10 Bom 395 (397, 398).
(88) 12 Bom 366 (367). (Under the Hindu law, writs are to be regarded as generally extra commercium.)
[See (84) 8 Bom 185 (187). (But if the decree directs the sale of writt, the execution Court cannot go behind it, but must sell it.)]
4. (18) AIR 1918 AII 380 (380). (Although in Hindu law such a right is immovable property.)
(71) 16 South W R 171 (171). (Such a right is attachable and impalpable.)
(89) 1889 AII W N 169 (169).

the offerings to the deity is not exempt from attachment and sale.⁵ *Jatri bali* which is a list of the names and addresses of pilgrims who are the clients of a Gayawal judgment-debtor and which can be used only by him in order to perform personal service to the pilgrims cannot be attached and sold in execution.⁶

A right to receive the offerings made at a temple is liable to attachment and sale in execution when such a right is independent of an obligation to render services of a personal nature such as officiating at the worship.⁷

Where it is shown that there is a custom to transfer by private treaty *palas* for worship of certain deities, there will be no objection to transfer the same by execution, limiting the class of persons entitled to bid and eventually purchase the property.⁸

14. Stipends and gratuities allowed to pensioners — Clause (g). — The word "pension" in this clause must be construed as having the same meaning as it has under Section 11 of the Pensions Act (XXIII of 1871).¹ Under that Section two essentials are necessary in order to constitute a grant a 'pension' —

1. it must be a *periodical* allowance, and
2. it must be a grant, not in respect of any right, privilege, perquisite or office, but on *political considerations* or on account of *past services* or *present infirmities* or as a *compassionate allowance*.²

A grant of a sum of money or land revenue³ or of a zamindari⁴ or other land is not a pension, for it is not a *periodical* allowance. A grant of an annual sum of money made by Government as *compensation* for resumption of the grantee's land is not a pension,⁵ for it is not granted on *political* grounds or for *past services* or *present infirmities* or as a *compassionate allowance*. Similarly, a *toda giras* hag is not a pension as it is a grant in respect of a right, privilege, perquisite or office.⁷ A *malikana* land taken over by Government.⁸

5. ('27) AIR 1927 Bom 143 (144).
6. ('22) AIR 1922 Pat 556 (556) : 1 Pat 619.
7. ('36) AIR 1936 All 181 (183) : 58 All 457.
8. ('35) AIR 1935 Pat 131 (132).

Note 14

1. ('14) AIR 1914 Cal 765 (766).
- (09) 31 All 882 (384).
- (04) 26 All 617 (621).
- (81) AIR 1981 P O 160 (161) : 59 Cal 1 : 58 Ind App 215 (P O). (26 All 617 Approved — The word has the same meaning it has in S. 6 of the Transfer of Property Act.)
- [But see ('37) AIR 1937 Lab 178 (179) : 1 L R (1937) Lab 415. (Not permissible to refer to the various provisions of the Pensions Act to find out the true import of the word "pensions" in the Civil Procedure Code.)]

2. ('37) AIR 1937 Nag 202 (208). ("Pension" implies periodical payments — It does not apply to rent of property drawn by a person as limited over thereof.)
- (80) 4 Bom 432 (436). (*Toda giras* hag is not a pension.)
- (84) AIR 1984 Lab 881 (881). (Compensation to de throne Prince is political pension and hence Ala Jagirs in Ambala District are political pensions and thus exempt from attachment.)
- (14) AIR 1914 Cal 765 (766).
3. ('09) 4 Ind Cas 1087 (1087) (Mad).
- (30) AIR 1980 Nag 134 (134). (Sum payable by Government as compensation in respect of jagir

- land taken over by Government.)
- (90) AIR 1980 Lab 816 (817). (Grant of land revenue — Not pension.)
- (02) 1902 All W N 161 (162).
4. ('04) 26 All 617 (621, 622).
5. ('38) AIR 1938 Nag 269 (270). (Grant of fields rent-free to grantee for his maintenance and in consideration of his rights as Deshmukh, Deshpanda and Sirmukaddam — No pension.)
- (87) AIR 1987 Nag 202 (208). (Grant of income lands for holding office of Deshpanda. Liable to attachment.)
- (17) AIR 1917 P O 94 (95) (P O). (Land granted in lieu of pension.)
- (09) 31 All 382 (384, 386).
- (14) AIR 1914 All 475 (476) : 36 All 318. (Grant of land for political considerations to A for life and as an absolute estate to A's descendants.)
- (31) AIR 1981 P O 160 (161) : 58 Ind App 215 : 59 Cal 1 (P O). (Rents from properties granted by Government for maintenance of dignity of donee — No pension.)
6. ('04) 8 Cal W N 665 (667).
7. ('76) 1 Bom 203 (207).
- (80) 4 Bom 432 (436).
- (09) 2 Ind Cas 271 (272) : 33 Bom 258. (Case under *Toda Giras Allowance Act VII of 1887*.)
- [See ('92) 16 Bom 731 (734, 735). (Case of desai-giri hak — See Pensions Act, Ss. 4 and 11. Similarly a Babuna allowance granted in lieu of maintenance is not inalienable during the lifetime of grantee.)]

allowance payable from a Government treasury is in the nature of a pension and cannot be attached in execution of a money decree.^{7a}

A pension granted by the Government by virtue of a treaty obligation con-

traced with another State' or for other reasons of State; is a *political pension* and is

example from international law under this decision. Thus, a *rescued* slave vessel which is guaranteed by the British Government by the Treaty of the 17th August 1825 in

consideration of the loan of 1825 by the then Ruler of Oudh, is a political pension.¹¹

Similarly, the pensions granted by the Government to the descendants of the families

who at one time occupied the throne of Ceylon," or to the members of the Mysore

foreign State by arrangement with the Government of India to a deposed Maharaja,

are all political pensions.

A *Jaahgir* may be a political pension,¹⁶ but there is no initial presumption that

it is so," and the Court should inquire, in each case, into the nature of the *jahgvi* and

61. Գնումն արվում է մեծությամբ 100 000 և ավելի հաշվառման միավորներով:

Political pensions and other Government pensions are exempt from attachment

so long as they are in the hands of the Government, notwithstanding the fact that the

The character of the fund remains unchanged as it amounts have become due.

remains unpaid in the hands of the government -- and although the government is aware of the situation, it has not been able to recover the money from the companies. The government is aware of the situation, but it has not been able to recover the money from the companies.

the person or persons subject to the lien, and the lien shall not be attached like any other monies in his hands.

Pensions not granted by Government are *private pensions*.²³ These are not

exempted from attachment but they are attachable only as debts, or as property,

7a. (12) 18 Ind Gas 194 (194) (All).

(192) AIR 1982 Mad 417 (417). (Jagir—Grant of then due was held attachable.)

8. (.90) 18 Cal 216 (223) : 17 and App 181 (PC).
land revenue—liable.)

415. (Tag: right) that was realized in the shape of an

ness of the relinquishment of the sovereign rights,

attached.)

(74) 1904 Pm L R No. 92. (Do.)
 with a view to remain their allies or good-
 will, was held to be 'pension' within the meaning
 (74) AIR 1914 Cal 765 (765). (Jagat without)

of clause (g), Affirming 38 Pun L R 531. (03) 26 Mad 423 (427).

10. (.27) AIR 1927 Mad 604 (606) : 50 Mad 711. (1927) AIR 1922 All 429 (429) : 44 All 697. (Onus

[See also (19) AIR 1919 Oudh 252 (252) : 21
whether a pension is within S. 1 of the Pensions
Act and so is attachable is on the decree-holder.]

12. (103) 26 Mad 423 (425).
19. (90) 1890 Pun Re No. 137, p. 489.

13. (1967) 7 South W R 169 (169).
 14. (1969) 4 Mad FCR 277 (1979).

15. (27) AIR 1927 Mad 604 (606, 607): 50 Mad 711.
is liable to sale.)

(1987) AIR 1988 Punj & H No. 133, p. 361.
 (1937) AIR 1937 Lah 178 (179); ILR (1937) Lah

415. (a) in shape of an assignment of land revenue.

22. (199) 4 Ind Cas 145 (1954) : 12 Oudh Cas 323.

—furnished out water mills — Income
Bridges as water power to develop
—furnished out water mills — Income

17. (730) AIR 1980 Tab 816 (818).
 From lease cannot be attached.
 Lying in deposit in the Government treasury at
 his call is attachable.)

(728) III Ind Gas 838 (839) (Lab).
(703) 26 Mad 69 (71).
18. (93) 1893 Pun Re No. 47. (Before issue in- 23 For example positions awarded by British

come could be attached, the Court should enquire

belonging to the judgment-debtor.²⁴ It follows therefore that they could be attached only to the extent of the sums that *have become due*.²⁵

A *gratuity* or *bonus* allowed by the Government to its servants is exempt from attachment, whether granted to a non-pensioner or to a pensioner in addition to his pension.²⁶

For Notifications issued under this clause, *vide* General Statutory Rules and Orders, Vol. IV, page 685. See also Gazette of India, 1909, Part I, page 5.

15. Wages of labourers, etc., and salaries of private employees —

Clause (h).—This clause was substituted by Section 2 of Act IX of 1937 for the old clause (1). The old clause only applied to the wages of labourers and domestic servants and there was no provision for exempting the salary of a person in private employment. Hence, the salary of such a person was not exempt from attachment to any extent.¹ The present clause (h) confers such exemption in respect of the salaries of private employees also, to the extent indicated in the clause.² But, under Section 3 of Act IX of 1937, the provision as to salary cannot apply to proceedings arising out of suits instituted before 1st June 1937.³ O. 21 R. 48 does not apply to the salary of a *private* servant. Hence, it was held before the amendment of the Section by Act IX of 1937 that such salary could be attached only as a *debt* after it had fallen due.^{3a} Explanation I now makes it clear that the attachable portion of it can be attached only after it has become payable. For meaning of "salary," see Note 22b.

A person is a 'labourer' within the meaning of this clause who earns his daily bread by personal manual labour, or in occupations which require little or no art, skill or previous education. A person who spins cotton and receives wages according to the quantity spun is a 'labourer.' Similarly, coolies employed on railways or other works and paid by the number of baskets of earth carried are 'labourers.'⁴

16. Salary of public officers, etc. — Clause (i). — This clause has been

substituted for the old clause (i) by Act IX of 1937. See Note 2 *ante*. But the new clause has no application if the proceeding for attachment had arisen out of a suit instituted before 1st June 1937 (See Section 3 of Act IX of 1937).^{1a} Under the Code of 1859 there was no exemption to any extent in regard to the salaries of public servants and the whole of such salary was attachable as a *debt* when the salary had fallen due.¹ The later Codes provided for a partial exemption of such salary but the unexempted portion could be attached.² A special procedure was also provided for the attachment of salaries in such cases, so that they need not be attached as *debts* after

(84) 1884 Pun Ra No. 58, p. 155. (Pension granted

by the Mandoi estate.)

(24) AIR 1924 Lah 688 (688). (Gratuity granted

by a university.)

24. See Note 7 above.

25. (80) 6 Cal L Rep 19 (20). (Pension granted

by the Bank of Bengal.)

26. (84) 6 All 173 (174). (Gratuity in considera-

tion of past services.)

(82) 5 Mad 272 (273). (Bonus in addition to pen-

sion.)

Note 15

1. (39) AIR 1939 Sind 134 (135).

2. (39) AIR 1939 Sind 134 (135, 137).

[But see (38) AIR 1938 Cal 325 (327). (Per Bis-

was J. (Obiter) : It is fairly arguable that

1a. (39) AIR 1939 Pat 77 (79) : 17 Pat 706.
1. (70) 7 Bom H C R AC 110 (111). (Prospective
salary unattachable.)
(72) 18 South W R 124 (124). (Government Tele-
graph Officer.)
(75) 24 South W R 446 (447).
2. (83) 6 Mad 179 (180).
(14) AIR 1914 Cal 1 (2). (Officer insolvent —
Attachable portion of salary vests in receiver.)

Note 16

3a. (29) AIR 1929 Nag 333 (334).
(98) 21 Mad 393 (394).
(09) 31 All 304 (307).
4. (80) 5 Bom 132 (134).

they had fallen due but could be attached in advance.^{2a} (See O. 21 R. 48.) (See also Explanation I.) The object of the provision for exemption is to enable public officers, etc., to maintain themselves and their families in a suitable manner. That the debtor is a European and that the pay is not large enough to maintain his family is, however, no ground for refusing attachment of the attachable portion of his salary.³

Clause (h) now extends the exemption from attachment to salaries of *private servants* also. (See Note 15.) As the provisions of O. 21 R. 48 do not apply to the salary of a *private servant*, it was held before the amendment of the Section by Act IX of 1937 that such salary was attachable only as a *debt* and therefore must have fallen due at the time of attachment.⁴ Explanation I now makes it clear that the attachable portion of such salary is attachable only after it has become payable.

For definition of "public officer," see Section 2, clause 17 *ante*. An advocate engaged by the Government on daily fees for the conduct of civil litigation on its behalf is a "public officer" within the meaning of the clause.⁵

16a. Salary of private servant. — See Notes 15 and 16, above.

17. Salary of army officers. — Section 4 of the Code provides that the provisions of the Code shall not affect any special or local law for the time being in force. Section 60 will not therefore apply where there is a special or local law to the contrary. Two of such enactments are —

1. The Indian Army Act (VIII of 1911), Section 120, and

2. The Army Act, 1881 (44 & 45 Vict. Ch. 58) as amended by the Army (Annual) Act of 1895 (58 Vict. Ch. 7), Sections 136, 144 and 145.

The Indian Army Act, 1911, applies only to *Indian officers* and other persons specified in Section 2 of that Act, and it is provided in Section 120 of the Act that the pay or allowances of any person subject to the Act cannot be attached.¹

The Army Act, 1881, applies to British Officers in His Majesty's Regular Forces including the Indian Army, and to other persons specified therein. An 'Officer' means, under that Act, a *Commissioned Officer*.² Thus, a first class Warrant Officer³ or other Non-Commissioned Officer⁴ is only a 'soldier' for the purposes of that Act. Section 136 of the Act provides that the pay of an *officer* of His Majesty's Regular Forces serving in India should be paid without any deduction 'other than deductions authorised . . . by any law passed by the Governor-General of India in Council.' Section 60 of the Code being such a law passed by the Governor-General in Council, it was held by the

(17) AIR 1917 Upp Bur 1 (1). (Half of insolvent's salary vests in receiver.)

2a. ('98) 21 Mad 393 (394).

3. ('18) AIR 1918 All 248 (248, 249) : 40 All 213.

Note: — A moiety of an insolvent's pay can be ordered to be given to the receiver for the benefit of the creditors: See AIR 1922 Mad 439 (440).

4. ('68) 10 South W R 447 (448). (Railway servant.)

(09) 31 All 304 (307). (Future and unearned salary of a vakil's clerk cannot be attached.)

(08) 30 Cal 713 (716). (Railway servants—Salary can be attached at or about the time when the agent of the disbursing officer goes to hand over the money to the railway servants.)

(98) 21 Mad 393 (394). (Wages of private servant.)

(89) 13 Bom 673 (674). (A khot is not a public officer nor is the percentage he receives "salary.")

(94) 19 Bom 232 (236). (An attachment upon the

salary of a railway servant ceases to be operative after he has filed his petition in insolvency.)

Note 17

1. ('26) AIR 1926 All 122 (124) : 48 All 73. (Assistant Surgeon is warrant officer and if recruited in India is governed by the Indian Army Act and his pay is exempt from attachment under Section 120.)

(38) AIR 1933 All 153 (154).

2. ('26) AIR 1926 All 122 (123) : 48 All 73.

3. ('11) 10 Ind Cas 719 (720) : 14 Oudh Cas 82.

(19) AIR 1919 Bom 133 (134) : 43 Bom 368.

4. ('18) AIR 1918 Upp Bur 39 (40) : 3 Upp Bur

Rail 20.

High Courts of Madras⁵ and Calcutta⁶ and by the Court of the Judicial Commissioner of Oudh^{6a} that the pay of such officer could be attached as being that of a 'public officer' within the definition of Section 2 (17) of the Code. It was also held that sub-section 2 (b) of Section 60, as it originally was, could not be taken to negative the application of Section 60 to cases coming under Section 136 of the Army Act, 1881, inasmuch as the latter Section is not in conflict with Section 60.⁷

The High Courts of Allahabad⁸ and Bombay,⁹ on the other hand, held, that clause (2) (b) clearly negatived the applicability of Section 60 to such cases and that, therefore, the pay of such officers could not be attached.

By Act X of 1914, clause (2) (b) of Section 60 was repealed with the result that Section 60 clearly becomes applicable to cases under Section 136, and the salary of a British Officer in an Indian Regiment can be attached in execution as provided by this clause.¹⁰

But Section 60 cannot prevail over other special provisions in the Army Act such as Sections 144 and 145 relating to 'soldiers' and providing that their pay shall not be attached in execution.¹¹ The reason is that there is no saving in those Sections, such as is found in Section 136, as to any law passed by the Governor-General in Council. By virtue of Section 4 of the Code, therefore, Section 60 cannot prevail over those special provisions.¹²

18. Pay of persons to whom the Indian Army Act, 1911, etc., apply — Clause (j). — Clause (j) originally ran as follows: "the pay and allowances of persons to whom the Indian Articles of War apply." This clause was amended into its present form by the Amending Act XXXV of 1934, S. 2 and Schedule and the Government of India (Adaptation of Indian Laws) Order, 1937. (See foot-notes to Section.) The Indian Articles of War which applied to soldiers and followers of the Native Army¹ have been repealed by the Indian Army Act (VIII of 1911), and the reference to the Indian Articles of War in this clause as it originally existed must be read as referring to the Indian Army Act (VIII of 1911).² As has been seen in Note 17 above, the pay of persons subject to that Act is not, in view of Section 120 of that Act, attachable in execution.

5. ('01) 25 Mad 402 (406).
6. ('96) 24 Cal 102 (106).

6a. ('14) AIR 1914 Oudh 199 (201): 17 Oudh Cas 99. [See also ('97) 1897 Pun Re No. 59. (The moiety of the salary of an officer of a British regiment serving under the orders of the Government of India will be liable to attachment in execution.)]
7. ('14) AIR 1914 Oudh 199 (201): 17 Oudh Cas 99. (Salary of Honorary Commissioned Officer in Indian Subordinate Medical Department held attachable.)

8. ('11) 9 Ind Cas 1023 (1025): 33 All 529.

9. ('12) 17 Ind Cas 13 (13): 37 Bom 26.

('14) AIR 1914 Bom 137 (137): 38 Bom 667. (Case under S. 60 as it was originally, before the amendment by Act 10 of 1914, repealing cl. (2) (b).)

10. ('17) AIR 1917 All 315 (316): 39 All 308.

('33) AIR 1933 All 597 (599): 55 All 648.

('18) AIR 1918 Bom 32 (33, 38): 43 Bom 716.

11. ('11) 10 Ind Cas 719 (720): 14 Oudh Cas 82.

('33) AIR 1933 Bom 185 (187).

('34) AIR 1934 Bom 31 (32).
(10) 1910 Pun Re No. 10.
(19) AIR 1919 Bom 133 (134): 43 Bom 368. (Case falling under S. 145 of the Army Act — Pay of soldier not to be attached in execution of decree for alimony and maintenance.)
[See also ('38) AIR 1938 Sind 237 (239): ILR (1939) Kar 160. (The pay of a soldier of His Majesty's Regular Forces, subject to the Army Act of 1881 is not liable to attachment under a decree of the Civil Court.)]
(37) AIR 1937 All 129 (141): ILR (1937) All 350 (F.B.). (Pay of Military Assistant Surgeon is not attachable.)
12. ('19) AIR 1919 Bom 133 (134): 43 Bom 363. ('38) AIR 1938 Bom 185 (187).
Note 18
1. [See also ('82) 1882 Pun Re No. 41. (Native grass-cutters attached to Battery of Artillery of British Army while not on active service — Pay not exempt from attachment.)]
2. ('26) AIR 1926 All 122 (124): 43 All 73.

authority while absent from duty" were exempt from attachment so that, in the above illustration, the whole of the Rs. 150 would be exempt from attachment. By Section 2 of Act IX of 1937 the above clause (h) has been replaced by the present clause (l).

21. Where expectancy or other contingent or possible right—Clause (m).

—This clause declares that—

(1) an expectancy of succession by survivorship, or (2) other merely contingent or possible right or interest, cannot be attached in execution.^{1a}

The right of a Hindu reversioner to succeed to the properties inherited by a Hindu widow or other Hindu woman is a mere hope or expectancy of succession and cannot be attached.¹ Similarly, the right of a son to succeed to his father's specific share of property by survivorship,² or the chance of Alahomedan heir-apparent to succeed to the property of the owner,³ cannot be the subject of a sale or attachment. The interest in the pre-empted property of a successful pre-emptor who has not paid the pre-emptive price fixed by his decree is only a *contingent* right and cannot be attached under this clause.⁴ Similarly, the right of a Muzeni tenant in South Canara to compensation for improvements is a contingent and inchoate right which becomes perfected only at the time of eviction.⁵

A *vested remainder* is not a mere expectancy though liable to be displaced later on.⁶ Thus, where A gives certain property to B for life for her maintenance, the reversion after the life estate is a vested estate in A which can be attached and sold in execution of a decree against A.⁷

In the undermentioned cases¹ it was held by the Madras High Court that where a Hindu widow alienates her husband's property without legal necessity, the alienee gets an interest in the property which will last during the lifetime of the widow but that as the widow fully represents the husband's estate, the reversionary interest.

21 Note

- Note 21
- 1a. (39) AIR 1939 P C 6 (7) : 32 Sind L R 963 : 1 L R (1939) Bom 36 (PC). (Request of income of property to husband and wife for life—Gift over of income and corpus to children—Interest of children—Attachability during lifetime of parents—*Affect* on construction of will that during lifetime of both parents, a child's interest was only contingent and not liable to attachment—Confirming A I R 1936 Sind 65.)
 - (31) AIR 1931 Oudh 398 (399). (The right of a person which might be determined in his favour with reference to an agreement in a suit pending before a Court is only a possible right and cannot be attached.)
 1. (39) 21 All 71 (85); 25 Ind App 188 (PC). (25 Cal 778 overruled by this decision.)
 - Cal 778 overruled by this decision.)
 - 2 Ind Jur (NS) 277 (FB). (Daughter's son's right to succeed the daughter to the estate of the grand-father.)
 - (98) 22 Bom 384 (985, 986).
 - (02) 29 Cal 355 (961, 963).
 - (66) 6 South W R 34 (94).
 - (71) 7 Beng L R 341 (345, 346) (FB). (Such a right is not property.)
 - (82) 10 Cal L Rep 61 (65) (PC).
 - (06) 29 Mad 120 (120).
 - (07) 30 Mad 201 (202).
 - (07) 30 Mad 255 (262).
 - (50) 6 Cal L Rep 528 (532) (PC). (Quare.)
 2. (67) 8 South W R 258 (254).
 3. (94) 1894 Pun Re No. 58, p. 185.
 - (09) 1 Ind Gas 590 (591) (Cal).
 - (07) 31 Bom 165 (171). (It is only by an application of the principle that equity considers that done which ought to be done that such a chance can, if at all, be bound.)
 4. (06) 28 All 383 (384).
 5. (19) AIR 1919 Mad 864 (864).
 6. (36) AIR 1936 Cal 802 (803) : 1 L R (1937) 1 Cal 538. (Life estate to widow and grant absolute of residue to daughter after widow's death.—Daughter dying before widow leaving husband—Interest of the husband is not mere expectancy and hence attachable.)
 - (08) 32 Bom 172 (175, 180).
 - (91) 18 Cal 164 (176); 17 Ind App 201 (PC). (Gift to A for life, then to B, but if A should have a child, the whole estate to go to A—Estate taken by B is a vested one though liable to be displaced by A getting a child.)
 - (30) AIR 1930 Rang 184 (185). (Trust to A for life with direction to trustee to convey to B after A's life—Interest is vested.)
 - [See also (98) 17 Bom 503 (505, 506).]
 7. (98) 10 All 462 (466).
 8. (16) AIR 1916 Mad 347 (350); 39 Mad 565.

continues to be vested in the widow and can be attached in execution of a decree for a debt due by the husband.

A vested interest does not cease to be so merely because the person in whom it is vested will be entitled to receive the property at a future date⁹ or because the property is the subject of an existing suit.¹⁰

A resulting trust is not a mere expectancy or contingency.¹¹ Where in execution of a mortgage decree the sale proceeds are deposited in Court pending confirmation of sale, to which the judgment-debtor does not object, the right to the surplus amount of the sale proceeds which is payable to the judgment-debtor after the confirmation of the sale is not a *contingent* interest as contemplated by this clause.¹²

22. Right to future maintenance — Clause (n). — Under this clause, a judgment-debtor's right to *future* maintenance cannot be attached in execution of a decree.¹ The reason is that such a right is a *personal* right and it is in accordance with public policy that this right which is generally created for the maintenance or personal enjoyment of the grantee, e.g., a Hindu female, ought to be inalienable.² Where, therefore, the right of maintenance is not a mere *personal* right or where it amounts to an *interest in property*, the exemption will not apply. Thus, a *hereditary* right of maintenance is not a mere personal right but an alienable one, and can be attached in execution.³ Again where, in lieu of maintenance, there is a *transfer of an interest in property*, such interest is not exempt from attachment⁴ unless such interest is restricted [See (36) AIR 1936 Lah 55 (55) : 17 Lah 878.]

(Test to see whether right to maintenance is exempt from attachment is whether such right is personal, non-hereditary and non-assignable.) (36) AIR 1936 Oudh 76 (79). (Right to future maintenance as contemplated by S. 60 (1) (n) means a personal right for the maintenance and personal enjoyment of the grantee.) 3. (36) AIR 1936 Oudh 76 (79). (Heritable but non-transferable interest in property granted in lieu of maintenance is not exempt from attachment.)

9. (12) 18 Ind Cas 795 (795) (Mad). (Legacy to A—entitled to receive it in due course of administration—A's interest is a vested one from the date of bequest.) (26) AIR 1926 Mad 871 (873). (Present gift with payment postponed.)

10. (73) 19 Suth W R 182 (138).

11. (99) 1 Bom L R 808 (807).

12. (87) AIR 1987 Nag 391 (392) : 1 L R (1988) Nag 402.

Note 22

1. (87) AIR 1987 Nag 202 (203). (The rule in S. 60 (1) (n) is no more than an application of the general principle that only present rights can be dealt with as property and not inchoate future rights which have not accrued, such as a spes successionis or a right to future rents.) (36) AIR 1936 Lah 944 (946). (Pocket money allowance treated as future maintenance and hence held not attachable.) (35) AIR 1935 Sind 21 (22) : 28 Sind L R 317. (Maintenance charged on property—Such property or its sale proceeds cannot be attached.) (17) AIR 1917 Mad 79 (82) : 40 Mad 302. (Hence receiver cannot be appointed.)

(1865) 3 Suth W R Misc 16 (16).

(66) 5 Suth W R 111 (112). (Personal right.) (67) 7 Suth W R 311 (311).

(75) 23 Suth W R 427 (428).

(10) 5 Ind Cas 879 (879) (Mad). (Decree for maintenance.)

2. See Statement of Objects and Reasons to the Transfer of Property (Amendment) Act XX of 1929 with reference to the addition of the new clause (dd) to Section 6.

(93) AIR 1933 Bom 350 (351) : 57 Bom 507.

(05) 32 Cal 688 (689). (Babuana grant for maintenance is alienable by custom and can be attached.)

(25) AIR 1925 All 297 (298).

(25) AIR 1925 Mad 624 (626).

(16) AIR 1916 Mad 838 (834). (Malabar law.)

(83) 1883 All W N 9 (9). (Land transferred to Hindu widow without power of alienation.)

(83) 1883 All W N 9 (9). (Land transferred to and 10 Bom 342.)

(12) 13 Ind Cas 152 (153). (Crop standing on land allotted to a widow for maintenance can be attached — Distinguishing 15 Mad L Jour 7 and 10 Bom 342.)

(37) AIR 1937 Nag 202 (203). (Grant of land as inam for maintenance—Inam lands not exempt from attachment.)

4. (38) AIR 1938 Nag 269 (270). (Land granted as inam for maintenance is not exempt from attachment.)

(81) AIR 1931 P O 160 (161) : 58 Ind App 215 : 59 Cal 1 (P C). (Property settled on Nawab Bahadur of Moorshedabad under Act XV of 1891—Rents and profits thereof are saleable property.)

(21) AIR 1921 Oudh 164 (165) : 24 Oudh Cas 250. (Heritable annuity.)

(84) 10 Cal 521 (522).

(07) 30 Mad 279 (280).

in its enjoyment to the grantee personally in which case it will not be a *saleable property* attachable under this Section.¹² In the case cited below,¹³ it was held by the Madras High Court that this clause only applies to cases where the right to maintenance is based on the personal law or the personal relationship of the parties and not where such right is *purely* the result of a contractual arrangement between the parties. Hence, it was held that where a person grants a usufructuary mortgage of all his properties to another and under one of the terms of the mortgage is entitled to receive a certain periodical payment for his maintenance, his right to such payment is not exempt from attachment under this clause.

The more fact that the person entitled to maintenance is placed in a position to enforce his right by recourse to a particular fund or interest in land in the event of default of payment by the grantor, or that the maintenance is payable out of a particular estate, will not constitute the right an *interest in the property*, so as to take it out of the application of this clause.¹⁴ An *annuity* charged upon an estate is property which can be attached under this Section.¹⁵

This clause prevents the attachment of a judgment-debtor's right to *future* maintenance. It does not prevent the attachment of *arrears* of maintenance which have fallen due.¹⁶ It was, however, held by the Calcutta High Court in the case cited below¹⁷ that arrears of maintenance under an order of a Criminal Court under Section 488 of the Criminal Procedure Code were not attachable, the reason given being that the right to such arrears was a purely *personal* one and not assignable by the judgment-debtor.

It was held in the undermentioned case¹⁸ that the right of the judgment-debtor to reside in a particular house was exempt from attachment under this clause, but where the house was not in the actual occupation of the judgment-debtor but only had been let out by him, a receiver could be appointed to realise the rents and apply them in discharge of the decree.

There is no provision in the Section exempting from attachment land belonging to the judgment-debtor and required for his maintenance and that of his family.¹⁹

- (1909) 86 Cal 918 (952) : 36 Ind App 176 (P C).
 (Property though impartible is alienable.)
 (1906) 88 Cal 1158 (1162). (Babuana grant alienable subject to the contingent interest of the grantor.)
 4a. (117) AIR 1917 Mad 624 (624). (Zamindari 'Jahal' estate left for the enjoyment of the Zamindari ladies.)
 (1928) AIR 1923 Bom 276 (277) : 47 Bom 597.
 4b. (135) AIR 1935 Mad 815 (815).
 5. (110) 7 Ind Cas 80 (86) (Cal). (Allowance payable out of grantor's estate.)
 (1925) AIR 1925 P C 176 (176) : 47 All 385: 52 Ind App 262 (P C). (On appeal from AIR 1921 All 120 disagreeing with the view of the High Court that the right was more than a right to maintenance. But a receiver can be appointed. In view of the Privy Council decision in AIR 1925 P C 176, the decision in 11 South W R 138 cannot be considered to be good law.)
 (1931) 15 All 371 (372). (Land left in possession of Hindu widow for her maintenance—Her rights in it cannot be attached.)
 [See (135) AIR 1935 Nag 138 (135) : 31 Nag L R 239. (Impartible property—Specific share of

- profits allotted to junior member in lieu of maintenance cannot be attached.)
 [See also (135) AIR 1935 Sind 21 (22). (A right to future maintenance cannot be attached—A fortiori the charge on the property securing the right would not be attachable.)
 (1931) AIR 1933 Bom 350 (352) : 57 Bom 507.]
 6. (136) AIR 1936 Lah 55 (58) : 17 Lah 378.
 (1936) AIR 1936 Pat 527 (530).
 (1935) AIR 1935 Lah 811 (812).
 (1912) 17 Ind Cas 284 (286) (Cal). (Not the same as right to future maintenance.)
 (1912) 17 South W R 254 (255).
 (1901) 23 All 164 (166).
 (1906) 10 Cal W N 1102 (1104). (An annuity given by will and not by any right of maintenance.)
 7. (110) 6 Ind Cas 826 (827) : 38 Cal 13.
 (1934) AIR 1934 Nag 83 (83). (Maintenance decree can be attached as to arrears.)
 (1917) 8 South W R 41 (41).
 (1966) 6 South W R Misc 64 (64).
 8. (135) AIR 1935 Cal 578 (579, 580) : 62 Cal 401.
 9. (137) AIR 1937 Lah 433 (434) : 1 L R (1937) Lah 486.
 10. (136) AIR 1936 Lah 448 (448).

22a. Movable property exempt from sale for arrears of land revenue — Clause (p). — This clause exempts from attachment any *movable* property which is exempt from sale for arrears of land revenue. The clause has no application to immoveable property.¹

22b. Explanation II — Salary, meaning of. — Explanation II has been newly added by Section 2 of the Amending Act IX of 1937, and has no retrospective effect by virtue of Section 3 of the said Amending Act.

In a case to which the provisions of the Amending Act did not apply, it was held that the daily remuneration of a counsel charged by the Government to conduct civil litigation on its behalf, was "salary" of a public servant.² This will no longer be so in view of the Explanation "under which salary means the *total monthly emoluments* derived by a person from his employment. Profits accruing to a shareholder from his estate are not "salary."³

The word "salary" in clause (b) does not exclusively mean "salary of a labourer or domestic servant" but includes salary of a person who is neither a labourer nor a domestic servant in the strict sense.⁴

23. Objections to attachment. — A decree-holder is not precluded from taking any of his judgment-debtor's properties in execution of his decree merely because he has a lien on particular properties⁵ or because the judgment-debtor denies that he has any interest in the properties.⁶ But if he effects a wrong attachment, he will be liable in damages resulting therefrom though he may have acted in good faith.⁷

It is for the person claiming exemption from attachment to prove the circumstances entitling him to do so.⁸ And he must raise his objections at the proper time, otherwise he will be precluded from raising them later on. Thus, where a property has been attached and sold in execution, a person who was a *party* to the order for sale or was aware of it, cannot object to the attachment after the sale.⁹ But if he was not such a party or was not aware of the proceedings, he can object to the attachment even after

Note 22a

1. (35) AIR 1935 Pesh 113 (114).

Note 22b

1. (39) AIR 1939 Pat 77 (80) : 17 Pat 706.

2. (39) AIR 1939 Pat 242 (244).

3. (39) AIR 1939 Sind 134 (137). (Salary of an employee in a Bank.)

Note 23

1. (72) 4 N W P H C R 99 (100).

2. (66) 1 Agra 169 (171).

3. (25) AIR 1925 Nag 390 (391). (Property of stranger not a party to suit.)

4. (35) AIR 1935 Nag 59 (60).

(27) AIR 1927 All 601 (603).

(33) AIR 1933 Lab 251 (252). (Judgment-debtor alone can claim. If he chooses to waive that privilege his son cannot complain of his action.)

(37) AIR 1937 Lab 309 (310). (Objection under Section 60 (1) (c) after sale but before confirmation cannot be entertained.)

(36) AIR 1936 Bom 315 (317, 319).

(36) AIR 1936 Nag 123 (124, 125) : 1 L R (1936) Nag 30.

(35) AIR 1935 Nag 30 (31) : 31 Nag L R 217.
(35) 7 All 641 (642, 643).

(34) AIR 1934 Nag 82 (83) : 30 Nag L R 135.
(34) AIR 1934 Bom 348 (350) : 58 Bom 564.
(Objection that house could not be attached and sold should be raised before sale.)
(07) 29 All 612 (614). (Party aware of sale but retaining from objecting or preferring an appeal against it cannot object after sale.)
(05) 9 Cal W N 972 (973).
(07) 34 Cal 199 (206). (9 Cal W N 972 followed.)
(18) AIR 1918 All 305 (306) : 40 All 680. (Sale conclusive between parties — No objection after it.)
(26) AIR 1926 Mad 12 (13). (9 Cal W N 972 and AIR 1918 All 305, followed.)
(30) AIR 1930 Lab 106 (106).
(24) AIR 1924 All 726 (727).
(31) AIR 1931 Bom 446 (447). (Unsuccessful objection before sale that decree is not executable — Objection under Section 60 taken after sale — Latter disallowed.)
[But see (39) AIR 1939 Lab 256 (257). (Objection can be taken at any time before confirmation of sale.)]
(39) AIR 1939 Lab 113 (115, 116) : 1 L R (1939) Lab 103. (Do.)
(35) AIR 1935 All 1016 (1017) : 58 All 360. (Do.)]

there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

[1877, S. 285; see Order 21.]

Synopsis

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| <p>7. Rateable distribution — See Notes 6 & 10 and also Section 78.</p> <p>8. "Court of highest grade."</p> <p>9. Effect of non-compliance with sub-section (1) — Sub-section (2).</p> <p>10. Procedure when inferior Court sells property.</p> <p>11. Appeal.</p> | <p>1. Legislative changes.</p> <p>2. Scope, object and applicability of the Section.</p> <p>3. "Of more Courts than one."</p> <p>4. "Is under attachment," meaning of.</p> <p>5. "Shall receive or realize," meaning of.</p> <p>6. "Claim thereto and any objection to the attachment thereof," meaning of.</p> |
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Other Topics (Miscellaneous)

- Attachment by Courts of different grades — Validity of sale by inferior Court. See Note 9 and Note 10 Pt. (1).
- Attachment by Courts of same grade — Validity of sale by one. See Note 8 F-N (5).
- Attachment by Revenue and Civil Courts. See Note 3.

1. Legislative changes. — The following are the changes introduced in the Section:—

1. The words "has been attached" in Section 284 of the Code of 1882 have been replaced by the words "is under attachment" in the present Section. (*vide* Note 4).
2. Sub-section (2) is new (see Note 9).

2. Scope, object and applicability of the Section. — This Section deals with the procedure to be adopted where the same property is under attachment in execution of decrees of more Courts than one.^{1a} The object of the Section is to prevent confusion in the execution of decrees¹ and to avoid conflicting claims which might arise out of the attachment and sale of the same property by different Courts.² This Section deals merely with *procedure* and does not affect the substantive rights of the decree-holders *inter se*,³ nor does it affect the *jurisdiction* of Courts.⁴ There was a conflict of views under the old Code on this point for which see Note 9 below.

The words "property not in the custody of any Court" include immovable property.⁵

Section 63 — Note 2

- 1a. ('35) AIR 1935 Mad 988 (995).
 - ('36) AIR 1936 Cal 728 (726): ILR (1937) 1 Cal 391.
 1. ('66) 12 Cal 333 (338).
 - ('94) 18 Bom 458 (463).
 2. ('98) 25 Cal 46 (48).
 - ('21) AIR 1921 Pat 140 (141) : 6 Pat L Jour 332.
 3. ('14) AIR 1914 Mad 454 (455).
 - ('94) 21 Cal 200 (203). (This Section and S. 73 should be read together and due effect given to each.)
 - ('28) AIR 1928 Rang 157 (158) : 6 Rang 131.
 - (S. 73 must be read with S. 63.)
- [But see ('81) 7 Cal 410 (413).]

3. "Of more Courts than one." — It has been held that the Courts contemplated in the Section are Courts which are capable of being compared as Courts of different grades or of the same grade. They must therefore be all Civil Courts or all Revenue Courts. A Civil Court cannot be compared with the Revenue Court and the Section will not apply to attachments made by a Civil and also by a Revenue Court.¹ It has been held by the Madras High Court that the expression "of more Courts than one" qualifies the word "attachment" and not the word "decrees" so that the Section applies also to a case where the property has been attached by different Courts though the decrees have been passed by the same Court.^{1a} This Section applies to Small Cause Courts also.²

4. "Is under attachment," meaning of. — It was held under the old Code that the attachments of two or more Courts must be *subsisting* or existing at the same time.¹ This has been made clear by the substitution of the words "is under attachment" for the words "has been attached" occurring in the old Section. It has been held that where immovable property which is under attachment is sold for arrears of land revenue, the attachment does not cease but fastens itself to the balance of the sale proceeds that remains after paying the revenue.² The Section requires an attachment in *execution*. But where a property has been attached before judgment, such attachment will become one in execution on an application for execution being made by the decree-holder.^{2a}

It has been held by the Nagpur High Court that the words "where property . . . is under attachment" do not mean that the only 'claim' which can be determined under the Section is one relating to the attachment or put forward by a person who has attached the property.³ In that case, it was held that the Court of the highest grade under this Section has the power to allow without recourse to the provisions of Section 73, rateable distribution of the judgment-debtor's assets and that in exercise of this power, such Court could grant a rateable share of assets even to a decree-holder who has not attached the property from which the assets have been derived. (See Note 8 to Section 73.)

5. "Shall receive and realise," meaning of. — These words will include the sale of the attached property.¹

6. "Claim thereto and any objection to the attachment thereof," meaning of. — The above words mean claims and objections which can be summarily decided in execution proceedings.¹ As to whether a claim for rateable distribution comes within the meaning of the above expression, see Section 73 Note 8.

7. Rateable distribution. — See Notes 6 and 10 and also Section 73.

Note 3
1. ('21) AIR 1921 All 142 (143) : 43 All 612.
1a. ('36) AIR 1936 Mad 797 (799) : 59 Mad 1028.
2. ('95) 19 Bom 127 (129).
3. ('37) AIR 1937 Nag 80 (83) : 1 L R (1937) Nag 219.

Note 5
1. ('39) AIR 1939 Mad 169 (170) : 1 L R (1939) Mad 248. (Section 63 cannot be controlled by Section 38.)
[See ('93) 22 Bom 83 (93, 94). ('82) 4 All 359 (361).]

Note 4
1. ('34) 6 All 255 (258).
2. ('37) AIR 1937 Nag 80 (83) : 1 L R (1937) Nag 219. (Doctrine of the "right to follow" is not confined to cases where there is a fiduciary relationship.)
2a. ('36) AIR 1936 Mad 91 (93) : 59 Mad 203.

Note 6
1. ('09) 3 Ind Cas 105 (103) (Cal). (Sec. 235 of the Civil Procedure Code of 1882 is governed by the immediately preceding Sections with which it must be read.)

Where, after the sale by the inferior Court in contravention of the Section, the property is sought to be sold by the superior Court, then, according to the Madras High Court, the purchaser as a *representative* of the judgment-debtor may apply to the superior Court under Section 47 to stop the sale.⁵ According to the Calcutta High Court, the purchaser is not a representative of the judgment-debtor and cannot apply under Section 47.⁶

It has been held in the undermentioned case⁷ that even if a sale is liable to be set aside for irregularities under Section 63, it cannot be impeached in collateral proceedings, or by persons who are not parties to the proceedings.

Suppose in a sale held by a Court of an inferior grade, the Court has allowed the decree-holder to purchase the property and to set off the decree amount against the purchase-money. In such a case, is the effect of sub-section 2 not only to validate the sale but also to exempt the amount so allowed to be set off, from the claims of other decree-holders for rateable distribution? On this question, there is a conflict of decisions. It has been held by the Calcutta High Court⁸ and in an earlier decision by the Bombay High Court⁹ that the order allowing set-off of the decretal amount must also be considered to be validated by the sub-section so as to exempt the amount so allowed to be set off from the claims of other decree-holders for rateable distribution and that the Court of the superior grade can only call for the balance, if any, out of the sale proceeds remaining after such set-off is allowed, for the purpose of rateable distribution among the other decree-holders. But, the Bombay High Court in a later decision^{8b} and the Madras High Court^{8c} have taken a different view and held that in such cases, the effect of the sub-section is only to validate the sale held by the Court of the inferior grade and not to exempt the amount allowed to be set off from the claims of other decree-holders for rateable distribution.

Where an inferior Court sells the property and pays out the sale proceeds to the decree-holder in ignorance of an attachment in a pending execution proceeding of a superior Court, the superior Court has no jurisdiction to order restitution and rectify the error.⁹

10. Procedure when inferior Court sells property.—Where the inferior Court has sold the property, the superior Court should not re-sell it but should adopt the sale held by the inferior Court and after getting the sale proceeds transferred to itself, should distribute them rateably among the decree-holders.⁷ As to the procedure to be adopted in getting such sale proceeds transferred to the superior Court, there is a difference of opinion. The Bombay² and Madras³ High Courts have held that the

(34) AIR 1934 Pat 511 (513) : 13 Pat 765. (In this case it was held that the Court did not know of the prior attachment and so the sale was not invalid.)

5. (24) AIR 1924 Mad 889 (890).
6. (11) 9 Ind Cas 194 (194, 195) (Cal).
7. (17) AIR 1917 Mad 602 (603).
8. (37) AIR 1937 Cal 55 (56).

8a. (31) AIR 1931 Bom 350 (353, 354) : 55 Bom 473.

8b. (35) AIR 1935 Bom 176 (177) : 59 Bom 310.
8c. (36) AIR 1936 Mad 797 (798) : 59 Mad 1028.

(35) AIR 1935 Mad 988 (994).
(35) AIR 1935 Mad 904 (905).
9. (30) AIR 1930 Mad 699 (700).

1. (85) 12 Cal 333 (338).
(27) AIR 1927 Mad 67 (68). (The sale proceeds had not reached the superior Court at the time of application.)
(09) 3 Ind Cas 105 (110) (Cal).
(94) 21 Cal 200 (203).
(02) 29 Cal 773 (778).
(32) AIR 1932 All 2 (3, 4) : 53 All 759.
(31) AIR 1931 Bom 350 (352, 354) : 55 Bom 473.
(30) AIR 1930 Mad 699 (700).
(19) AIR 1919 Cal 545 (546) : 46 Cal 64.
(36) AIR 1936 Cal 723 (726) : 1 L R (1937) 1 Cal 391.
(36) AIR 1936 Mad 797 (798) : 59 Mad 1028.
(38) AIR 1938 Sind 175 (176).
2. (25) AIR 1925 Bom 420 (422) : 49 Bom 655.
3. (27) AIR 1927 Mad 67 (68).

Note 10

superior Court itself can send for the proceeds of the sale from the inferior Court. The Patna and Calcutta High Courts have, on the other hand, held that the *District Judge* must be moved in the matter of the transfer of the sale proceeds.⁴

11. Appeal.—An order of the inferior Court refusing to proceed with the execution on the ground of pendency of execution against the same property in a superior Court is an order under Section 47 and is appealable as a decree.¹

64. [S. 276.] Where an attachment has been made,³ any private transfer or delivery of the property attached or of any interest therein¹⁰ and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment,¹¹ shall be void as against all claims enforceable under the attachment.¹²

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.¹³

[1877, S. 276; 1859, S. 240. See O. 21 R. 58.]

Synopsis

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| <p>10. "Private transfer or delivery of the property attached or of any interest therein."
 11. Contrary to such attachment.
 12. Transfer is void only as against claims enforceable under the attachment.
 13. Claims enforceable under an attachment include claims for rateable distribution.—Explanation.
 14. Effect of vesting order or winding up order after attachment.
 15. Prior contract for sale of property.
 16. Objections as to attachment.
 17. Waiver of benefit under the Section.</p> | <p>1. Legislative changes.
 2. Scope and object of the Section.
 3. "Where an attachment has been made."
 4. Attachment before judgment.
 5. Effect of attachment.
 6. Effect of removal of attachment.
 7. Abandonment or discontinuance of attachment.
 8. Effect of striking off or dismissal of execution proceedings.
 9. Revival of attachment.</p> |
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Other Topics (Miscellaneous)

- Alienation under irregular attachment. See Note 3 and Note 12 Pt. (9).
 Attachment by prohibitory order. See Note 3 R-N (5).
 Attachment creates no charge. See Note 5 Pt. (1).
 During continuance of attachment. See Note 6. Effect of adjudication. See Note 3 R-N (7); Note 5 Pt. (6); Note 10 Pt. (8) and Note 14.
 (35) AIR 1935 Mad 988 (994, 995).
 4. (21) AIR 1921 Pat 140 (142): 6 Pat L. Jour 332. (Following obiter in 18 Bom 458 which however was not followed in A I R 1925 Bom 420.)
 (19) AIR 1919 Cal 545 (546): 46 Cal 64.
 1. (17) AIR 1917 Cal 182 (182).
 Note 11
 (36) AIR 1936 Cal 723 (726): 1 L R (1937) 1 Cal 391.
 Transfer when not void. See Notes 6 and 10.
 Transfer under O. 21 R. 83. See Note 11.
 Transfer to decree-holder. See Note 11 and Note 12 R-N (1).
 Right of purchaser. See Note 12 R-N (1).
 Right of decree-holder to question transfer. See Note 12.

1. Legislative changes.—The following are the changes introduced by this Section:—

1. The words "by actual seizure or by written order duly intimated and made known in the manner aforesaid" occurring in the old Section (276) have been omitted. See Note 3.
2. For the words "any private alienation of property attached whether by sale, gift, mortgage or otherwise" in the old Section, the following words, *viz.*, "any private transfer or delivery of the property attached, or of any interest therein" have been substituted. See Note 10.
3. The words "during the continuance of the attachment" occurring in the old Section have been substituted by the words "contrary to such attachment." See Note 11.
4. The Explanation to the present Section is new. See Note 13.

2. Scope and object of the Section.—This Section enacts that a *private* alienation of property after attachment is void as against claims enforceable under the attachment.¹ The object of the Section is to prevent fraud on decree-holders and to secure intact the rights of attaching creditors and of those creditors who have obtained decrees and are entitled to satisfaction out of the assets of the judgment-debtor.² It is immaterial for the application of the Section whether the decree had or had not been passed before the time when the transfer was effected³ or whether the transferee acted in good faith or not.⁴

The effect of the Section is, however, not to invalidate such private alienations for all purposes but only *as against claims enforceable under the attachment*.⁵ The benefit of the Section can also be *waived* by the decree-holder so as to bind himself and his assignees with notice.⁶

As the Section operates as a distinct interference with the rights of alienation of property, its provisions should be *strictly construed*,⁷ and cannot be extended to cases not contemplated by the Section.⁸ Thus, a transfer by a successful claimant after the date of the claim order but before institution of a suit under O. 21 R. 63 is not prevented by the Section which only prohibits a transfer by the *judgment-debtor*.⁹

The provisions of the Section relate to execution and a *suit* by the attaching creditor to avoid an alienation made during attachment is not maintainable.¹⁰ The Section must be read with O. 21 R. 83 which provides for the private transfers of attached property with the Court's permission in certain circumstances. (See O. 21 R. 83, Note 6.)

Section 64—Note 2

1. ('02) 6 Cal W N 57 (59). (Court sale in execution is not affected by the Section.)
2. ('20) AIR 1920 Mad 626 (626).
2. ('17) AIR 1917 Cal 561 (561).
- ('06) 30 Bom 337 (339). (Qualified by O. 21 R. 83.)
- ('16) AIR 1916 Cal 927 (927).
3. ('17) AIR 1917 Cal 561 (561).
4. ('19) AIR 1919 Oudh 4 (7); 23 Oudh Cas 18.
5. ('39) AIR 1939 Mad 702 (706) : 1939 Mad W N 329 (334). (Section does not put an end to the power of sale.)
- ('17) AIR 1917 Cal 281 (282).
- ('27) AIR 1927 Mad 445 (446). (A mortgagee pending attachment can apply under O. 21 R. 89.)

6. See Note 17.
7. ('85) 7 All 702 (707). (Attachment must be duly intimated and made known.)
- ('72) 14 Moo Ind App 543 (549) (PC). (Decisions under Section 240 of the Code of 1859 which differed in language from the present Section are not binding on the construction of the present Section or of Section 276 of the Code of 1882.)
- [See ('92) 16 Bom 91 (104).]
8. ('16) AIR 1916 Cal 927 (928). (Obligations prior to attachment not affected.)
9. ('15) AIR 1915 Mad 495 (497) : 38 Mad 535 (540).
10. ('01) 28 Cal 492 (497, 499).

See also Section 47 of the Code.

3. "Where an attachment has been made."—The words "where an attachment has been made" show that the Section has no application to transfers made before the attachment is levied.¹ Such a transfer, if real, would be valid even though it may have been in the contemplation of the parties that future attempts to attach the property should be defeated.^{1a}

Before property could be subjected to the restriction imposed by the Section, there must be a perfected attachment.² The modes of attachment of various kinds of property are prescribed in Order 21 and an attachment takes effect not from the date of the Court's order but only from the date of its actual promulgation in the manner prescribed. In *Muthia Chetti v. Palaniappa Chetti*,³ their Lordships of the Privy Council observed as follows :

"No property can be declared to be attached unless first, the order of attachment has been issued and secondly, in execution of that order the other things prescribed by the rules in the Code have been done."

It follows that where a transfer is made after an order of attachment but before it was *actually* effected,⁴ or where the mode prescribed is not complied with,⁵ or where

Note 3

1. ('98) 8 Mad L Jour 266 (268, 269). (The attachment of property cannot override the rights already acquired against the property at the time of the attachment.)
- ('82) AIR 1982 Sind 164 (165): 26 Sind L R 158.
- ('01) 8 Bom L R 892 (892). (Sale by mortgagee under power conferred by mortgage prior to the attachment is valid.)
- ('30) AIR 1980 Lah 858 (859). (No order of attachment but only ad interim injunction reserved on Court passing decree — Subsequent transfer of said decree void against all claims enforceable under attachment.)
- ('37) AIR 1987 All 63 (64). (Attachment of money decree complete when notice of attachment is served on Court passing decree — Subsequent transfer of said decree void against all claims enforceable under attachment.)
- ('37) AIR 1987 Nag 143 (144, 145) : 1 L R (1939) Nag 266. (Sale deed executed before but registered after attachment — Sale not affected by Sec. 64.)
- ('36) AIR 1986 Nag 209 (213, 214) : 1 L R (1936) Nag 127. (Attaching creditor can claim priority only against those persons who derive their interest from the judgment-debtor after attachment but his right cannot prevail against those who hold a superior or paramount right such as the prior mortgagee.)
- 1a. ('79) 4 Bom 70 (73, 74). (See Sections 23 and 24 of Contract Act.)
- ('70) 5 Mad H C R 368 (371).
- ('70) 2 N W P H C R 225 (225).
- ('74) 22 Subh W R 473 (474).
- ('67) 2 Aggra 206 (208, 210).
- ('81) 1881 All W N 158 (158).
- (85) 7 All 702 (706, 709). (Per Mahmood, J.)
3. ('28) AIR 1928 P C 139 (142): 51 Mad 349: 55 Ind App 256 (PC).
- (See ('70) 13 Subh W R 136 (137).
- ('20) AIR 1920 Mad 804 (807): 42 Mad 844 (851).
- ('31) AIR 1931 Pat 58 (59): 9 Pat 860.]
- (See also ('85) 7 All 702 (707, 709).
- ('37) AIR 1937 Lah 671 (672).]
- See also cases cited in Note 4 to O. 21 R. 54.
- (705) 9 Cal W N 693 (695). (Do.)
- lector's office.)
- the Court house or sent to or posted in the Collector's office.)
- (78) 2 All 58 (60). (Where copy was not posted in the Court house or sent to or posted in the Collector's office.)
- (28) AIR 1928 Lah 423 (424) : 4 Lah 211. (Do.)
- (19) AIR 1919 Mad 594 (595): 42 Mad 565. (Do.)
- (17) AIR 1917 Cal 832 (832). (Do.)
- O. 21 R. 54 is ineffective.)
- property not made in the manner prescribed by the Court house or in Collector's office.)
- (86) 7 All 702 (709). (Attachment of immovable property not made in the manner prescribed by the Court house or in Collector's office.)
- (68) 10 Subh W R 264 (265, 266).
- (81) 1881 All W N 65 (65). (Attachment order not attached not affixed — Attachment is not valid.)
- (38) AIR 1938 Rang 267 (268). (Warrant of attachment not affixed — Attachment is not valid.)
- O. 21 R. 54, sub-r. 2 not complied with.)
- (33) AIR 1933 Rang 198 (199). (Requirements of not perfected.)
- served as provided in O. 21 R. 46 — Attachment of order not served up in Court house or in Collector's office.)
- (34) AIR 1934 Pat 619 (622). (Copy of order not served up in Court house or in Collector's office.)
5. ('67) 2 Aggra 206 (208).
- (10) 33 Mad 429 (431, 433).
- information of order of attachment to the purchaser before his purchase is immaterial.)
- (29) AIR 1929 Bom 395 (396): 53 Bom 851. (Where information of order of attachment to the purchaser before his purchase is immaterial.)
- proved.)
- (29) AIR 1929 All 846 (847). (Service of prohibition order on the judgment-debtor must be proved.)
- (28) AIR 1928 Lah 423 (424): 4 Lah 211. (Do.)
- (19) 9 Mad L W 13n. (Do.)
- 853 (RB). (Do.)
- (20) AIR 1920 Mad 804 (807): 42 Mad 844 (852, Do.)
- (19) AIR 1919 Mad 594 (595): 42 Mad 565 (566).
- complete until O. 21 R. 54 is complied with.)
- (16) AIR 1916 Oudh 169 (173). (Attachment not complete until O. 21 R. 54 is complied with.)
- (81) AIR 1981 Mad 570 (571).
- (16) AIR 1916 Cal 135 (135).
- (07) 1 Sind L R 176 (177).
- (05) 1905 Fuz L R No. 137, p. 458.
- on the Court house.)
- (Mortgage before affixture of order of attachment)
- (33) AIR 1933 Cal 212 (212, 214): 59 Cal 1176.
- (90) 1890 All W N 224 (225).
4. ('90) 1890 All W N 224 (225).

crops which have been attached, will be liable in damages to the person at whose instance the crops were attached.²

An attachment does not prevent an alienation by *operation of law*.³ See Note 10 below.

A judicial sale of property in pursuance of an attachment carries with it any enlargement thereof that accrues after the attachment and before the sale.⁴ But an attachment cannot be enforced against property received in lieu of the property originally attached, in a subsequent partition.⁵

As to the distinction between attachment under the Code and a vesting order in insolvency, see the undermentioned case.⁶

See also O. 21 R. 54 Note 11 and O. 21 R. 63 Note 24.

6. Effect of removal of attachment.—A transfer by the judgment-debtor after an attachment has been removed or withdrawn is valid and a subsequent attachment cannot be made so as to *relate back* to the date of the first attachment and operate against a transfer in the interval, even though the removal or withdrawal of the first attachment was under a misapprehension.⁷ Similarly, a private transfer pending an attachment which has subsequently ceased will be valid.⁸ Even an *implied withdrawal* as, for example, where an order of withdrawal is not formally passed but the attachment is understood by the decree-holder to have been withdrawn, bars any objection against the validity of an alienation of the attached property.⁹

As to the *revival* of attachment, see Note 9 below.

7. Abandonment or discontinuance of attachment.—See also O. 21 R. 57. An attachment may cease for various reasons. Thus it may cease—

1. by an express order withdrawing or putting an end to the attachment;¹ there cannot, however, be a *partial* withdrawal by consent;²
2. by the decree being discharged by payment out of Court³ or by sale of the

[See ('31) AIR 1931 Cal 474 (476) : 58 Cal 1. (Attaching creditor does not acquire more rights than what debtor has.)]
 2. ('07) 30 Mad 413 (415, 416).
 3. ('14) AIR 1914 P O 129 (130); 42 Cal 72 : 41 Ind App 251 (PC). (Reversing 15 Ind Cas 288).
 4. ('91) 18 Cal 164 (176) : 17 Ind App 201 (PC).
 5. ('13) 20 Ind Cas 43 (44) (Oudh).
 6. ('28) AIR 1928 Mad 785 (742, 745) : 51 Mad 417 (FB).

Note 6

1. ('29) AIR 1929 Rang 229 (237) : 7 Rang 201. ('34) AIR 1934 All 165 (167, 168). ('13) 18 Ind Cas 524 (525) : 6 Low Bur Bul 170. ('73) 20 Suth W R 133 (136). ('95) 22 Cal 909 (920) : 22 Ind App 129 (PC).
 2. ('21) AIR 1921 Oudh 176 (183, 184). (Attachment ceasing—No right to rateable distribution.) ('32) AIR 1932 Rang 103 (104) : 10 Rang 199. (Mortgage subsequent to attachment—Amount of decree deposited and full satisfaction entered—Mortgage valid.) ('99) 23 Mad 478 (482). ('19) AIR 1919 Lah 129 (130) : 1919 Pun Re No. 5. ('27) AIR 1927 Nag 289 (289). (Sale executed pending attachment, registered after release thereof is valid.)

Note 7

1. ('21) AIR 1921 Oudh 176 (183, 184). ('27) AIR 1927 Mad 648 (649). (Sale with decree-holder's consent is not excepted.) ('99) 23 Mad 478 (482). ('11) 35 Bom 516 (523, 525). ('82) 8 Cal 279 (281). ('69) 1 N W P H C R 125 (127). (Satisfaction of day prior to the removal of the attachment held valid.)

3. ('69) 1 N W P H C R 30 (31).
 against fresh attachment also.]]
 fresh attachment made—Transfer inoperative pending attachment—Attachment removed and (Transfer ('36) 163 Ind Cas 812 (813) (Cal). (But see ('70) 14 Suth W R 25 (25). (Case under the Code of 1859).)

(But see ('68) 1 Beng L R A G 71 (73). ('73) 12 Beng L R 411 (421) (PC). (Sale after removal of one attachment and before a fresh attachment.)
 ing prior attachment.)
 late decree does not affect alienation made during prior attachment.)
 Appellate Court—Fresh attachment after appeal judgment cases on dismissal of suit—No revival of attachment on suit being decreed by

attached property in execution of the decree,³

3. by the decree being set aside,⁵

4. in cases of attachment before judgment, by the suit being dismissed,⁶ or

5. by abandonment of the attachment by the decree-holder.⁷

Whether an attachment has been abandoned is a question of fact depending upon the circumstances of each case. Thus, where the decree-holder took no steps to enforce his rights for a very long time after the attachment was made, and the application for execution was consequently 'struck off,' it was held by the Privy Council that the attachment must be presumed to have been abandoned.⁸ In *Chamiappa Tharagan v. Rama Aiyar*,⁹ where the application for execution was 'struck off' after some time after the attachment was made and the decree-holder did nothing further for nearly twelve years, except keeping alive the decree by periodical applications for execution, Wallis, C. J., held, applying the Privy Council case above referred to, that the attachment must be taken to have been abandoned. Seshagiri Aiyar, J., dissented from this view and held, distinguishing the Privy Council case, that the periodical applications by the decree-holder negatived the idea of abandonment. *Mere* lapse of time after the attachment will not, however, be sufficient to prove abandonment,¹⁰ especially if the delay was caused by the decree-holder's willingness to grant his debtor indulgence and opportunity to repay the debt.¹¹

The mere fact that the decree-holder applies for *fresh* attachment does not necessarily imply an abandonment of the attachment already made,¹² though it may, under particular circumstances, give rise to a presumption as to abandonment.¹³ See also O. 21 R. 54 Note 11 and O. 38 R. 11 Note 3.

An attachment does not abate on the death of the judgment-debtor.¹⁴

8. Effect of striking off or dismissal of execution proceedings.—An order 'striking off' execution proceedings does not necessarily operate as a dismissal or a final disposal of the execution petition.¹ It is competent to the Court to strike off execution proceedings and to continue the attachment.²

- (12) 15 Ind Cas 677 (678) (All). (But attachment cannot be deemed to be withdrawn when decree is satisfied in part only.)
4. (86) 12 Cal 317 (322).
- (05) 8 Oudh Cas 409 (417).
- (20) AIR 1920 Pat 75 (77).
- (78) 20 Subh W R 19 (20). (But if the execution sale is set aside on account of irregularity in the proceedings, the attachment remains, so that the decree-holder can again bring it to sale.)
5. (68) 10 Subh W R 99 (99).
- (06) 29 Mad 175 (176). (A renewed decree in the same terms will not validate it.)
6. (88) 10 All 506 (511). (Though eventually on appeal it may be decreed.)
7. See the discussion *infra*.
8. (78) 20 Subh W R 133 (136) (P C).
- (78) 20 Subh W R 418 (418). (20 Subh W R 133 (P C). Followed — Case of long delay.)
9. (21) AIR 1921 Mad 80 (82) : 44 Mad 232.
10. (15) AIR 1915 Mad 61 (61).
- (69) 11 Subh W R 517 (518).
11. (75) 24 Subh W R 56 (58, 59).
12. (18) 18 Ind Cas 691 (694) (Mad).
- (15) AIR 1915 Mad 386 (386).

- (74) 12 Beng L R 414 (415).
- (81) 6 Cal 129 (133). (A re-attachment of property after decree does not imply an abandonment of attachment before decree.)
- (69) 11 Subh W R 517 (518).
- (76) 25 Subh W R 513 (515). (Creditor submitting to fresh attachment ordered by Court.)
14. (90) 12 All 440 (445) (P B).
- [See (14) AIR 1914 Bom 256 (257) : 38 Bom 105. (But an attachment before judgment will be displaced by the death of a Mitakshara coparcener.)]
- Note 8
1. (84) 6 All 269 (275) : 11 Ind App 37 (P C).
2. (07) 11 Cal W N 163 (166). (Dissenting from 18 All 49.)

The striking of an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done and there is no general rule as to its effect on an attachment made already.³ It must depend upon the circumstances of each case.^{3a} But certain broad principles have been recognised. If the striking off takes place under circumstances which *terminate* the case,⁴ or which render a *fresh attachment* necessary,⁵ the attachment ceases. Where such circumstances do not exist, the proceedings in execution are merely suspended and the attachment continues.⁶

It was held under the old Code that the *dissmissal* of an execution application did not necessarily put an end to the attachment made already but that it is dependent on the circumstances of each case.⁷ Under the present Code, O. 21 R. 57, an attachment shall cease where the application for execution is dismissed for *default* of the decree-holder.⁸ Where it is dismissed in any other way, it is not the necessary consequence that the attachment ceases.⁹

9. Revival of attachment.—It has already been seen in Note 6 above that if an attachment comes to an end, interests created thereafter are not affected by a second attachment. But an attachment cannot be said to have come to an end, so long as the order releasing the attachment is liable to be set aside by way of appeal or otherwise.¹ It can only be said to be temporarily discontinued or suspended.² Thus, where an

3. ('73) 20 South W R 133 (136) (P O).
- ('97) 1 Cal V N 617 (621).
- ('75) 14 Beng L R 323 (329, 330).
- 3a. ('82) 11 Cal L Rep 17 (21, 22).
- ('75) 24 South W R 36 (37). (Security not given
- Proceedings struck off — Attachment not
- affected.)
- ('97) 1 Cal V N 617 (621).
- ('91) 17 Mad 180 (182). (Necessary affidavit not
- filed — Execution petition struck off — Attach-
- ment not affected.)
- ('69) 11 South W R 517 (518).
- [See also ('05) 27 All 334 (338) : 32 Ind App 103
- (P O).]

4. ('05) 8 Oudh Gas 152 (154).
- [See also ('01) 21 South W R 66 (67).]
5. ('01) 23 All 114 (116). (Where the decree-holder
- is compelled to take out another execution his
- right should be presumed to date from the second
- attachment.)
- ('74) 12 Beng L R 411 (422) (P O).
- ('71) 17 South W R 15 (17).
- ('78) 1 All 616 (618).
- ('81) 8 Cal L Rep 157 (160).

6. ('15) AIR 1915 All 410 (411) : 37 All 518 (521).
- ('68) 9 South W R 205 (206). (Proceedings stayed
- for a fixed period and attachment continued.)
- ('69) 1 N W P H O R 48 (52) (PB). (Where exe-
- cution petition was struck off on the parties
- asking for postponement of sale the attachment
- does not cease.)
- ('71) 17 South W R 234 (235). (An order striking
- off an attachment pending appeal does not
- release the property from attachment.)
- ('73) 5 N W P H O R 70 (72).
- ('75) 24 South W R 36 (38). (Striking off the exe-
- cution proceedings, because of the inability of
- the decree-holder to furnish security leaves the
- attachment, etc., intact.)

8. See O. 21 R. 57 and the following cases—
- ('15) AIR 1915 All 371 (372) : 37 All 542.
- ('22) AIR 1922 Nag 81 (81). (Dismissed in default
- of appearance.)
- ('23) AIR 1923 Pat 564 (567).
- ('13) 20 Ind Gas 149 (150) (Cal).
9. ('18) AIR 1918 Pat 454 (456).
- ('23) AIR 1923 Mad 703 (703). (Dismissed because
- of the decree-holder's absence from the sale or
- his failure to bid.)
- Note 9
1. ('24) AIR 1924 Cal 744 (747) : 51 Cal 548.
2. ('19) AIR 1919 Lah 54 (55). (Decree-holder's
- rights are not affected by the temporary disconti-
- nuation of the attachment.)

attachment is wrongly released and the order of release is set aside in appeal, the attachment will be deemed to have continued and an alienation made between the date of the order of release and the date of the order in appeal, will be void against all claims enforceable under the attachment.³ See also Note 4 to O. 21 R. 55, *infra*. Similarly, where a claim is allowed and the property is released from attachment, such release is only provisional and subject to the result of the suit under O. 21 R. 63. Where therefore the order in the claim petition is set aside in the suit, the attachment is revived so as to affect the alienations made in the interval.⁴

In the case of an *attachment before judgment* the attachment comes to an end upon the dismissal of the suit and is not revived upon the reversal of the judgment in appeal.⁵ The reason is that O. 38 R. 9 contains no provision corresponding to O. 21 R. 63 which makes the order in the claim case and the release from attachment thereupon subject to a regular suit.⁶ See also Note 1 to O. 38 R. 9 *infra*.

10. "Private transfer or delivery of the property attached or of any interest therein." — The word "transfer" is used in the most generic sense and includes all species of contract which pass real rights in property from one person to another.⁷ But it is not *confined* to transfers by contract. A transfer purporting to be made by a deed of appointment is a "transfer."⁸

The transfer contemplated by the Section is a transfer between *living* persons and therefore does not include a devise by will.⁹ A "private transfer" means a *voluntary* transfer such as a sale, mortgage, lease or gift and not a transfer by operation of law, such as an involuntary sale under a decree of a Court¹⁰ or the enforced execution of a conveyance or assignment in obedience to the order of the Court.¹¹ Thus, a transfer effected by an award which has been given effect to by a decree,¹² or a conveyance

3. ('74) 21 Suth W R 485 (485).
(12) 34 All 490 (492). (Review.)
(20) AIR 1920 All 856 (857) : 42 All 39. (Attachment before judgment set aside.)
[See also ('21) AIR 1921 Cal 101 (103).]
[But see ('95) 22 Cal 909 (920) : 22 Ind App 129 (PC). (Attachment does not revive on a mere order of remand in appeal.)]
4. ('22) AIR 1922 Mad 176 (178) : 45 Mad 84.
(21) AIR 1921 Cal 101 (103).
(79) 3 Cal L Rep 146 (149, 150).
(96) 28 Cal 829 (833, 834, 835).
(06) 33 Cal 1158 (1162).
(09) 31 All 367 (368).
(18) AIR 1918 Mad 1095 (1096) : 40 Mad 955.
(22) AIR 1922 Nag 138 (140). (The attachment is revived even if the order of release is set aside only in appeal from the decree in the claim suit.)
(39) AIR 1939 Oudh 178 (179) : 181 Ind Cas 362 (363).
[See also ('15) AIR 1915 Mad 495 (497) : 38 Mad 535.]
5. ('21) AIR 1921 Cal 101 (103).
(34) AIR 1934 All 165 (167).
6. ('21) AIR 1921 Cal 101 (103).
Note 10
1. ('83) 5 All 121 (137) (FB).
[See ('34) AIR 1934 Rang 813 (815). (Transfer of property by agreement which is incorporated in a decree is a private transfer.)]
collusive.)
(22) AIR 1922 Mad 221 (222) : 45 Mad 103. (Unless
(19) AIR 1919 Mad 798 (798).
13 Lab 702 (PC).
(32) AIR 1932 P O 235 (237) : 59 Ind App 405 :
6. ('82) 4 All 219 (225, 226) (FB).
(82) 4 All 219 (225, 226) (FB).
(36) AIR 1936 Nag 163 (165) : 1 L R (1936) Nag 172.
(24) AIR 1924 Mad 610 (610).
5. ('82) 4 All 219 (225, 226) (FB).
(20) AIR 1920 Mad 626 (626). (Section does not affect court sale.)
(39) AIR 1939 Lab 360 (381) : 41 Pun L R 305 (307).
(37) AIR 1937 Pat 50 (52).
(90) 17 Cal 826 (828).
under a decree of a Court.
sale in satisfaction of a decree is not a sale
(81) 7 Cal 107 (118) : 8 Ind App 65 (PC). (Private
(86) 10 Bom 400 (406, 407).
(01) 28 All 467 (470).
(96) 18 All 123 (125). (Do.)
(95) 1 Oudh Decision 792 (793). (Lease.)
(11) 21 Mad L Jour 82 (84, 85). (Unless collusive.)
(33) AIR 1933 All 953 (953).
4. ('82) 4 All 219 (225) (FB).
the Section.)
not included in an alienation contemplated by
3. ('02) 15 O P L R 1 (5). (A power of devise is
settlement held to come within the Section.)
2. ('95) 22 Cal 185 (202). (Appointment under a

executed in obedience to a *decree* for specific performance of a contract of sale,⁷ is not a 'private transfer' within the meaning of this Section. But it has been held that where a transfer is embodied in a decree but the decree is entirely based on an agreement between the parties, the transfer is a 'private' transfer.^{8a} A vesting order in insolvency is a transfer by operation of law and is not within the mischief of this Section.⁸ But where the adjudication order is made by a *foreign* Insolvency Court, it cannot have the effect of prevailing over a prior attachment effected by the order of a British Indian Court.^{8a}

The prohibition under the Section extends to all private transfers and delivery of property by which the attachment is defeated by the property or interest therein being put out of the reach of the attaching creditor.⁹ But an act which is consistent with the proper management of the property is not barred by the Section.¹⁰ A consent given by heirs of a Mahomedan after his death, to a bequest made by him, does not amount to an alienation of property.¹¹

The operation of the right of survivorship among members of a Hindu joint family is not a private transfer, but it has been held *independently of this Section* that when a judgment-debtor dies after an attachment *in execution* is effected on his undivided share, the right of survivorship of his co-parceners does not prevail over the rights enforceable under the attachment.¹² Where, however, the judgment-debtor dies after an attachment but before it is converted into an attachment in *execution*, the right of survivorship would prevail over the attachment.¹³ The reason is that when the right by survivorship accrued, there was not in existence any competing right or title at all.

An assignment of a decree under attachment is a "transfer of a property" within the meaning of this Section.¹⁴ Where the *karita* of a Hindu joint family business is adjudicated an insolvent, the power of such *karita* to dispose of joint family property for discharging business obligations vests in the Official Receiver. But such power in the hands of the Official Receiver will be subject to the same qualifications as it was

[See ('39) AIR 1939 Bom 212 (214).] Where there is no arbitration at all but merely a private arrangement between the parties drawn up in the form of an award, the Section applies.]]
 7. See ('10) 7 Ind Cas 795 (796) (Mad). ('32) AIR 1932 Bom 301 (303, 305). (Decree for specific performance of a contract of mortgage.)
 7a. ('87) 1937 Mad W N 45 (46). (Charge created under a compromise decree is no better than any other private transfer.)
 ('34) AIR 1934 Rang 313 (315) : 11 Rang 310. [See also ('39) AIR 1939 Bom 212 (214).]
 8. ('69) 1 N W P H C R 172 (188). ('96) 20 Bom 403 (407). ('35) AIR 1935 Mad 151 (151) : 58 Mad 408. (Attachment before judgment — Subsequent insolvency of defendant — Attachment does not prevent vesting of property in Official Receiver.) ('33) AIR 1933 Nag 229 (230) : 29 Nag L R 303. 8a. ('33) AIR 1933 P C 134 (135, 136) : 60 Ind App 167 : 56 Mad 405 (PC). (Reversing AIR 1931 Mad 474.)
 9. ('27) AIR 1927 Mad 1147 (1148). (Resolution of a Bank setting off shares for debts due to the Bank.)

('22) AIR 1922 Lah 147 (148). (Mutation by gad-dinashin of property standing in his name to the name of the shrine.) ('29) AIR 1929 Rang 229 (234) : 7 Rang 201. (An assignment of a debt or fund.) ('98) 23 Bom 1 (10, 11). (An assignment of a Hindu widow's life interest in the profits of immovable property left to her by her husband's will.) ('08) 35 Cal 889 (895). (Release of an easement.) ('10) 7 Ind Cas 481 (482) (Cal). (A compromise resulting in transfer of property after attachment.) ('10) 8 Ind Cas 76 (77) (Cal). (Surrender of holding after attachment to the landlord.) ('09) 33 Bom 264 (266). (Attachment of son's interest — Father cannot thereafter exercise his disposing power over son's share.) 10. (1900) 13 C P L R 145 (151). 11. ('02) 26 Bom 497 (499). 12. ('93) 20 Cal 895 (898). ('79) 5 Cal 148 (174) : 6 Ind App 88 (PC). ('14) AIR 1914 Bom 256 (257) : 38 Bom 105. 13. ('14) AIR 1914 Bom 256 (257) : 38 Bom 105. 14. ('37) AIR 1937 All 63 (64). (Assumed.)

in the hands of the *karta*. Hence, where the joint family property is under attachment, at the time of the adjudication, the Official Receiver's powers of disposal over such property are not unrestricted but subject to the clog created upon it by the attachment.¹⁵

11. Contrary to such attachment.—These words have been substituted for the expression 'during the continuance of the attachment' which occurred in the old Section. This latter expression was too wide and was capable of being construed as rendering any alienation during the attachment void, *whether prejudicial to the claims enforceable under the attachment or not*. The Privy Council in the undermentioned case¹ under the old Code, negatived such a construction and held that the object of Section 276 (corresponding to present Section 64) was only to prohibit alienations 'contrary to the attachment'. The substitution of the said words brings out this idea clearly and specifically. The words 'contrary to the attachment' mean that the transfer must be prejudicial to the interests of the attaching creditor or the auction-purchaser,^{1a} and an alienation which does not in any way prejudice the rights of the attaching creditor or the auction-purchaser is not affected by the Section.^{1b}

Where a mortgage is executed pending attachment in renewal of² or for the purpose of discharging³ prior mortgages, the transfer is not really contrary to the attachment as the attaching creditor is not in any way prejudiced thereby. But if the amount secured under the new mortgage is in excess of the amount secured under the prior one at the time of the attachment, the security to the extent of the additional amount is void against the claims enforceable under the attachment.⁴ A sale pending attachment for the purpose of discharging a prior mortgage debt will be one 'contrary to attachment,' but if the vendee has paid off the prior mortgage, he is entitled to stand in the shoes of that mortgagee in respect of the amount so paid off.⁵

An attachment of a decree is made under the provisions of O. 21 R. 53. Under that Rule the holder of the attached decree is not prohibited from transferring the decree attached and therefore an assignment of the decree will be valid and will entitle the transferee to have his name substituted in place of the assignor and to apply for execution under O. 21 R. 16.⁶ But his right to execute the decree is only a permissive right and is subject to the rights of the attaching decree-holder to be paid out first from out of the monies recovered in execution. See O. 21 R. 53.⁷

15. (37) AIR 1937 Cal 517 (519) : 1 L R (1937) 2 Cal 675.

Note 11

1. (02) 29 Cal 154 (166) : 29 Ind App 9 (PC).

[See also (34) AIR 1934 All 902 (908). (Land

let out during attachment on nominal rent

is act "contrary to attachment".]

1a. (84) AIR 1984 All 902 (908). (Thus, where

the landlord, while the lands were under attach-

ment, let in the tenants on a nominal rent

which was one-fifth of the annual letting value

of the land, it was held that this act was "con-

trary to the attachment".]

(36) 164 Ind Cas 1031 (1032) (Oudh). (Transfer

prior to attachment is not affected by this

Section.)

1b. (38) AIR 1938 Lah 737 (739).

2. (82) 4 Mad 417 (418).

3. (98) 20 All 421 (424).

(02) 29 Cal 154 (165, 166).

(28) AIR 1928 Mad 708 (704).

(35) AIR 1935 All 391 (397). (Portion of amount

advanced paid to discharge prior encumbrance

— Mortgage is valid to this extent.)

4. (82) 4 Mad 417 (418).

[See (35) AIR 1935 All 391 (397). (Is

void so far as it tended to defeat the object

with which the attachment was made.)]

5. (82) 8 Cal 530 (533).

(26) AIR 1926 Mad 1082 (1083).

(13) 11 All L Jour 127 (128). (In such cases the

purchaser must be presumed to have intended

to keep the mortgage alive.)

[See also (38) AIR 1938 Mad 465 (467). (Pro-

perties mortgaged to a person—Personal decree

passed in favour of another person and against

the owner of the properties—Attachment of

properties during the continuance of attachment

—Purchase is void.)]

6. (29) AIR 1929 Pat 1 (2, 3) : 7 Pat 726.

(12) 17 Ind Cas 323 (325) (Mad).

7. (27) AIR 1927 Mad 1025 (1026, 1027).

The attachment referred to in the Section is the particular attachment under which a claim is being made⁸ and when an alienation is not contrary to such attachment the Section has no application.⁹ Consequently, an alienation, resulting in the satisfaction of the decree in execution of which the attachment is made, is not 'contrary to such attachment' within the meaning of the Section,¹⁰ whereas an alienation pending one attachment, in order to pay off another attaching creditor, is invalid as against the former.¹¹

Any payment to the judgment-debtor of an attached debt contrary to the attachment will be void under this Section as against all claims enforceable under the attachment and the mere fact that the debtor does not pay money into the hands of the judgment-debtor but to somebody else will not make it any the less a payment contrary to the attachment, if the payment is voluntarily made at the instance of or for the benefit of the judgment-debtor.¹²

12. Transfer is void only as against claims enforceable under the attachment.—A private transfer is not *wholly void* but is void only as against *claims enforceable under the attachment* and only to the extent necessary to meet those claims.¹³ The only persons therefore who are entitled to object to an alienation pending attachment are those who have legal claims enforceable thereunder.¹⁴ Thus, a transferee

8. ('28) AIR 1928 Bom 545 (547).
9. ('28) AIR 1928 Bom 545 (548).
- (87) AIR 1937 Mad 843 (844): I L R (1937) Mad 970.
- (86) 163 Ind Cas 587 (589) (Cal).
- (84) AIR 1934 All 165 (167, 168). (Attachment before judgment comes to an end on dismissal of suit — Reversal of judgment in appeal does not revive attachment—Fresh attachment after appellate decree does not affect alienation pending the previous attachment.)
10. ('18) AIR 1918 Mad 127 (131): 41 Mad 265 (FB).
- (22) AIR 1922 P C 398 (396) (PC).
- (70) 6 Mad H C R 65 (70).
- (81) AIR 1931 Mad 570 (571).
- (87) AIR 1937 All 641 (642).
- (87) AIR 1937 All 424 (426). (Attachment of debt — Assignment of debt to attaching creditor himself is not invalid.)
- (84) AIR 1934 All 1057 (1060).
11. ('22) AIR 1922 All 443 (445): 44 All 714.
12. ('36) AIR 1936 Mad 251 (252). (Debt due to judgment-debtor attached—Debtor B paying amount into Court at instance of A or for his benefit—Payment is one made to judgment-debtor and void as being contrary to attachment. — Position will be different if B pays it under compulsion of law.)
- Note 12**
1. ('21) 68 Ind Cas 108 (108) (Lab).
- (82) 1882 All W N 210 (210).
- (69) 1 N W P H C R 18 (19).
- (72) 14 Moo Ind App 548 (549, 550) (PC).
- (1900) 1900 All W N 148 (149). (A decree-holder who having purchased the property from the judgment-debtor by a private sale deed has dropped the execution proceedings has no right to bring a suit for possession against a third party to whom the judgment-debtor have in defiance to injunction alienated a portion of the property.)
2. ('74) 6 N W P H C R 296 (300, 301).
- (81) 7 Cal 107 (118): 8 Ind App 65 (PC).
- (02) 29 Cal 154 (166): 29 Ind App 9 (PC).
- [See also ('19) AIR 1919 Oudh 351 (352): 22 Oudh Cas 150. (Mortgage, under mortgage executed while property under attachment, can claim rateable distribution in respect of simple money decree for interest due on mortgage.)]
3. ('29) AIR 1929 Pat 1 (3): 7 Pat 726.
- (37) AIR 1937 All 63 (64).

(05) 2 All L Jour 265 (267). (Purchaser is entitled to appeal against an order for sale of the property purchased by him.)

(17) AIR 1917 Cal 281 (282). (Application under O. 21 R. 89 does not offend S. 64.)

(16) AIR 1916 Pat 353 (356). (The private transfer has not even a lien on the property to the extent of the purchase money.)

(10) 8 Mad L Tim 197 (198).

(91) 14 Mad 277 (282).

(99) 26 Cal 531 (535).

(27) AIR 1927 Lab 101 (102).

(17) AIR 1917 All 423 (423).

(25) AIR 1925 Mad 338 (340).

(98) 20 All 421 (425).

(38) AIR 1938 Mad 465 (466).

(37) AIR 1937 All 424 (426).

(37) AIR 1937 Mad 843 (844): I L R (1937) Mad 970. (Alienation is void only as against claims under the particular attachment.)

[See also ('33) AIR 1933 Mad 96 (97). (Transferee after attachment entitled to apply under O. 21 R. 90 as same is not contrary to attachment.)

(36) AIR 1936 Mad 100 (101): I L R (1937) Mad 335. (Debtor alienating property in contravention of attachment—Debtor subsequently declared insolvent — The property does not vest in Official Receiver — After discharge of debtor in the insolvency proceedings, creditor can proceed against the property.)]

[But see ('96) 18 All 123 (124).]

from the decree-holder, a claimant for the rateable distribution of assets⁵ and an auction-purchaser at the sale held in pursuance of the attachment,⁶ are all persons whose claims are enforceable under the attachment and who can object to the private transfer pending attachment.

The attachment referred to in the Section is the attachment in respect of which the property was sold and it is *that* attachment alone which can be employed for the purpose of impugning a private alienation.⁷ Thus, where property attached in execution is alienated, but such attachment ceases by a dismissal of the application for execution under O. 21 R. 57 and the property is again brought to sale in pursuance of a second attachment, the alienation pending the first attachment is not void against the auction-purchaser in the sale held under the second attachment.⁸

If an attachment is not properly perfected, no claim can be enforced thereunder.⁹ Again, if the attachment comes to an end by the satisfaction of the decree in execution of which it was attached, all claims enforceable under the attachment also cease to be enforceable and the Section does not apply.¹⁰ Nor can a decree-holder who has not secured his title from the Court and has no longer any claim enforceable under the attachment, obtain any benefit from the provisions of this Section.¹¹

A who has mortgage rights over certain properties transfers the rights to B in order to discharge two other decree debts in execution of which those rights had been attached. B delays in discharging those debts and in the meanwhile C, in execution of another decree against A, attaches the monies retained by B to pay off the prior attaching creditors. Subsequent to this B pays off the decree debts. Is such payment valid against C? Yes. The reason is that A himself has no absolute rights to amounts retained by B but is subject to the latter's right to pay off the prior encumbrances. C's attachment of A's rights will therefore be also subject to the paramount rights of B to protect his title by paying off the prior creditors.¹²

13. Claims enforceable under an attachment include claims for rateable distribution — Explanation. — The Explanation to the Section is new. It gives effect to the view taken by Telang, J., in *Sorabji v. Govind*,¹ a case under Section 276 of the old Code, that claims enforceable under an attachment include claims under

4. ('13) 18 Ind Cas 691 (693) (Mad).
5. See Explanation to the Section.
6. ('69) 11 Suth W R O C 1 (5, 9, 10) (PB).
('13) 20 Ind Cas 241 (243) (Cal).
(Note—The decision of Stuart, A. J. C. in A I R 1915 Oudh 157 to the effect that an auction purchaser cannot question the validity of a mortgage pending attachment and that the title to hold the house unencumbered is not a claim enforceable under the attachment is, it is submitted, not correct.)
7. ('16) AIR 1916 P C 238 (241) : 44 Ind App 72 : 44 Cal 662 (P C).
('33) AIR 1933 Nag 230 (232). (Mortgage after decree-holder — Second attachment by another attachment — Property sold in execution of first attachment — Mortgage will prevail as against the second attachment.)
('84) 6 All 33 (36).
('74) 11 Bom H C R 159 (161). (Sale pending one attachment — Another creditor attaching subsequent to sale does not claim under the prior attachment and cannot impugn sale.)
8. ('26) 97 Ind Cas 547 (548) (All).
1. ('92) 16 Bom 91 (101).
Note 13
12. ('15) AIR 1915 Mad 599 (600).
11. ('19) AIR 1919 Lah 54 (56). (Forfeiting his rights by becoming private purchaser.)

Section 73 of the Code for rateable distribution of assets.² But in order that the Explanation may apply, two conditions must be satisfied —

1. there must be assets held by the Court, for otherwise there is no right to rateable distribution at all,³ and
2. the claim of the decree-holder must be one enforceable under the particular attachment in respect of which the assets have been realised.⁴

Illustrations

1. A obtains a decree against B and attaches his properties in execution. B transfers the property pending the attachment, to C. Subsequently X attaches the same properties in execution of his decree against B, brings it to sale and purchases it himself. Here if assets are held by the Court in X's execution, A will be entitled to rateable distribution, he having applied in execution before the X's attachment which cannot be enforced against the transfer to C which took place prior to that attachment.⁵
2. A obtains a decree against B and attaches his properties in execution. C also obtains a decree against B and applies for execution of his decree. B then transfers the property to D and discharges A's decree. Here no assets are received at all and C has no right to any rateable distribution. He cannot consequently question D's title to the property.⁶

It has been held by the Bombay⁷ and Madras⁸ High Courts that in order that a claim for rateable distribution may be 'enforceable' so as to defeat an alienation pending the attachment in respect of which assets are received, it is not necessary that the claim should have been *in existence on the date of the alienation*, i.e., that the claimant should have obtained a decree and applied for execution before that date. The same view was taken in an earlier decision of the Calcutta High Court.⁹ The same High Court has however, in a later case, held that the claim should have been in existence on the date of the alienation.¹⁰ There does not seem to be anything in the Section itself which leads to the restricted interpretation adopted by the later decision of the Calcutta High Court. It is submitted that the Bombay and Madras views are correct.

14. Effect of vesting order or winding up order after attachment. — As

has been seen in Note 10 above, a vesting order in insolvency is a transfer by operation

2. ('34) AIR 1934 All 896 (897). (Applicant for rateable distribution is on the same footing as attaching decree-holder.)

('33) AIR 1933 Nag 349 (352). ('36) 164 Ind Cas 1081 (1082) (Oudh).

[See also ('22) AIR 1922 Bom 241 (242): 46 Bom 895.]

3. ('12) 16 Ind Cas 640 (640) (Bom). ('Assets' mean all a man's property, of whatever kind, which may be used to satisfy debts or demands existing against him.)

('15) AIR 1915 Low Bur 92 (92). (If there are assets received, a claimant for rateable distribution can question an alienation pending attachment.)

('37) AIR 1937 Nag 1 (4): 1 L R (1937) Nag 291. ('37) AIR 1937 Pat 609 (610).

('34) AIR 1934 All 1069 (1070). ('34) AIR 1934 All 1057 (1061).

('36) 163 Ind Cas 587 (589) (Cal). (The claim for rateable distribution must be an enforceable claim.)

4. See the case in foot-note (5). [See also ('26) AIR 1926 Sind 177 (177): 20 Sind L R 111. (Private transfer before attachment and sale—Purchaser cannot question validity though the transfer was made pending

a different attachment by another person.) ('33) AIR 1933 Nag 349 (351). 5. ('16) AIR 1916 P C 238 (241): 44 Ind App 72: 44 Cal 662 (PC). 6. ('21) AIR 1921 All 45 (46): 43 All 399. ('12) 14 Bom L R 511 (514). ('21) AIR 1921 Oudh 176 (184). ('18) AIR 1918 Mad 127 (132): 41 Mad 265 (PB). ('19) AIR 1919 Lah 129 (130): 1919 Pun Re No. 5. ('20) AIR 1920 Lah 94 (94). ('28) AIR 1928 Bom 545 (547). ('05) 28 Mad 380 (382, 384, 385). ('37) AIR 1937 All 641 (642). ('34) AIR 1934 All 1069 (1070). ('34) AIR 1934 All 1057 (1060). [See also ('37) AIR 1937 Pat 609 (610). (Property sold by private treaty between judgment-debtor and decree-holder.) ('36) 163 Ind Cas 587 (589) (Cal).] 7. ('22) AIR 1922 Bom 241 (242): 46 Bom 895. ('92) 16 Bom 91 (101, 102). 8. ('26) AIR 1926 Mad 307 (308, 310): 49 Mad 38. 9. ('17) AIR 1917 Cal 561 (561). 10. ('21) AIR 1921 Cal 801 (805, 806). (Dissented from in AIR 1926 Mad 307.)

of law and is not affected by Section 64. Where the judgment-debtor is adjudicated an insolvent, the whole of his property vests in the Official Receiver or Official Assignee for the benefit of the general body of creditors and an attaching creditor has no priority over the Official Receiver or Official Assignee.¹ Under Section 34 of the Provincial Insolvency Act, 1907, the attaching creditor was entitled to the assets realised in execution or otherwise before the *order of adjudication* so that if execution had taken place and sale price deposited in Court before adjudication, the decree-holder was entitled to the sale proceeds as against the receiver.² This is now no longer law in view of the provisions of Section 51 of the Provincial Insolvency Act, 1920, which provides that "no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition."

Where property under attachment is transferred contrary to such attachment, the transfer is not *absolutely void* and so, where the debtor is adjudicated insolvent after the alienation, the property does not vest in the Official Receiver.³

An order for liquidation does not vest the property of the company in the liquidator and an attachment made on the property of the company at the instance of the decree-holder *before* the winding up of the company will prevail over the rights of the liquidator.³

15. Prior contract for sale of property. — It has been held in the under-

mentioned cases that an alienation of immovable property pending an attachment of such property can be avoided under this Section, although the alienation has been made in pursuance of a contract entered into before the attachment.

But a contrary view has been held in several cases. In *Gutta Bapineedu v. Gutta Venkayya*,² it was held by the High Court of Madras that as the contract entered

(135) AIR 1936 Mad 882 (883, 884). (Attachment for non-payment of income-tax and sale for non-payment of income-tax — *Held* title of purchaser of insolvent's property from Official Receiver was superior to that of purchaser under attachment for non-payment of income-tax though such attachment was prior in point of time.)

15
Note 15
3. (16) AIR 1916 Cal 918 (919): 43 Cal 586.
property notwithstanding such discharge.)
insolvent — Creditor can proceed against the
2a. (36) AIR 1986 Mad 100 (101). (Discharge of
of the insolvent which he had attached.)
(12) 34 All 628 (630, 631). (But not to the money
(22) AIR 1922 Mad 189 (190): 45 Mad 70.
(19) AIR 1919 All 68 (69): 41 All 374.
(18) AIR 1918 All 402 (403): 40 All 197.

15

1. (09) 2 Ind Gas 950 (350): 5 Low Bur Rut 6.

2. (10) 7 Ind Cas 795 (1966) (Mad).
[See also (192 AIR 1982 Bom 301 (303, 305).
(Prior decrees for specific performance of agree-
ment to mortgage—Subsequent attachment—
Mortgage executed by Court as per decree—*Held*
attachment subject to mortgage.)]]

defendant—Plaintiff is entitled to deposit in preference to general creditors.]] See also (69) 12 South W R 108 (104). (Money due to an insolvent deposited in Court—Court orders it to be paid to creditors who had attached it—Remedy open to Official Assignee is a suit

(18) 40 Cal 78 (81).
(18) AIR 1918 Cal 351 (353); 44 Cal 1016.
(38) AIR 1933 Nag 229 (230) : 29 Nag L R 303.
[See (19) AIR 1919 Mad 607 (608); 41 Mad 1053.
R. 2 — Insolvency of the defendant under O. 38
decree—Plaintiff can appropriate that amount
to the exclusion of receiver.)
(193) AIR 1933 Cal 625 (626, 627). (Defendant
depositing amount with plaintiff's spreader under
Court's order—Deposit subject to result of
pending action—Subsequent insolvency of

Note 14

14 Note

into before attachment could be enforced under Section 27 (b) of the Specific Relief Act, against the transferee in court auction and the attaching creditor, the claim of the latter was not one *enforceable* under the attachment against the sale executed in pursuance of such a contract and therefore cannot prevail against the sale. In *Babala Venkata Reddi v. Mangadu Yellappa Chetty*,³ the same High Court rested the view on another ground. It held, following an earlier decision of the Calcutta High Court,⁴ that the contract of sale created an *obligation annexed to the ownership of the property* under Section 40 of the Transfer of Property Act and that the attachment and sale must be deemed to have been made of the property only *subject to such obligation*. The High Court of Rangoon has held the same view in the undermentioned case⁵ on yet another ground. In that case possession of the property had also been delivered to the promisee under the contract of sale prior to the attachment and it was held that the *beneficial interest* had been transferred before attachment, that what is aimed at by Section 64 is only the transfer of the beneficial interest and that therefore the mere conveyance of the *legal title* after the attachment is not affected by Section 64. The view held in *Babala Venkata Reddi's case*³ has also been taken by the Madras High Court in subsequent decisions.⁶ The Nagpur High Court has also held that this Section does not affect a transfer in pursuance of a contract entered into prior to the attachment.⁷

It is submitted that the second of the two views mentioned above seems to be the correct one. No doubt a mere contract for the sale of immovable property does not create any interest in the property. But the contract certainly creates an obligation annexed to the ownership of the property and as what is attached is the right, title and interest of the debtor in the property, the attachment cannot be free from any obligation to which the debtor is subject in respect of the property at the date of the attachment. As the learned Judges observed in *Babala Venkata Reddi's case*,³ "It does not seem to be sound sense that when a creditor attaches property which is subject to a particular obligation, he should be able to override it."

If an *interest in the property* is created only after the attachment, it is clearly within the terms of the Section and cannot prevail against claims enforceable under the attachment.

16. Objections as to attachment.—The onus of proving that an attachment *prima facie* legal is not legal is on the party pleading it.¹ But a judgment-debtor who consents to an attachment of an occupancy holding is not estopped from objecting to the sale of the holding on the ground of its non-transferability.² An attachment *before judgment* does not stand on the same footing as an attachment in execution; and a party who does not object to the attachment before judgment is not estopped from objecting to its validity after the decree.³ The question of non-observance of the

3. ('17) AIR 1917 Mad 4 (5).
4. ('16) AIR 1916 Cal 927 (928).
5. ('25) AIR 1925 Rang 382 (383).
6. ('39) AIR 1939 Mad 702 (707) : 1939 Mad W N 329 (334). (There is no distinction in this respect between a conveyance voluntarily executed by the judgment-debtor in pursuance of a pre-existing contract and a conveyance executed by him under an order of Court on basis of such contract.)
- (35) AIR 1935 Mad 193 (195). (Attachment holds good in respect of judgment-debtor's right to the balance of the unpaid purchase money.)

1. ('99) 1899 All W N 127 (128).
- (81) 6 Cal 129 (134) : 7 Ind App 157 (P.C). (*Held* that the objection to the validity of attachment cannot be raised for the first time in appeal.)
- (10) 20 Mad L Jour 821 (822). (Attachment for a larger amount than due is valid to the extent of the amount due.)
2. ('18) AIR 1918 Pat 604 (605).
3. ('11) 10 Ind Cas 305 (306) (Cal).

Note 16

- (35) AIR 1935 Mad 872 (873) : 59 Mad L (D.C).
7. ('36) AIR 1936 Nag 163 (165) : 1 L R (1936) Nag 172.

formalities of attachment cannot be raised for the first time in appeal to the Privy Council.⁴

See also the undermentioned case⁵ where the Privy Council observed that the main purpose of attachment is to prevent the transfer or charging of the property by the judgment-debtor and held that the alleged irregularities in the attachment in the particular case did not justify the setting aside of the sale.

17. Waiver of benefit under the Section.—The Section being intended for the benefit of the attaching creditor, the benefit can be *waived* by him.¹ Waiver, however, is an intentional act and a clear act showing such an intention must be shown.² The mere fact that the degree-holder in taking out execution referred to a mortgage that had been executed pending attachment,³ or that such mortgage was notified in the proclamation of sale,⁴ will not amount to a waiver of the plea under Section 64. If however the degree-holder *expressly permits* its notification at the time of the sale, he cannot be permitted to plead the bar under Section 64.⁵

SALE

65. [S. 316.] Where immoveable property³ is sold in execution of a decree and such sale has become absolute,⁴ the property shall be deemed to have vested⁵ in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

[1859, S. 259; see O. 21 Rr. 82 and 92.]

Synopsis

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| <p>12. Titles of purchasers at successive execution sales.</p> <p>13. What passes under a court sale. See O. 21 R. 94.</p> <p>14. Sale in execution of mortgage decree.</p> <p>15. Sale in execution of satisfied decree. See Notes 4 & 6 and Note 71 to Section 47.</p> <p>16. Sale in execution of decree barred by limitation. See Note 69 to Section 47.</p> <p>17. Revenue sales.</p> <p>18. Effect of vesting order in insolvency proceedings. See Section 64 Note 14.</p> | <p>1. Legislative changes.</p> <p>2. Scope and object of the Section.</p> <p>3. "Immoveable property." See Section 16.</p> <p>4. "Become absolute."</p> <p>5. Sale certificate. See O. 21 R. 94.</p> <p>6. Effect of reversal of decree after confirmation. See Note 58 to Section 47.</p> <p>7. Effect of reversal of decree before confirmation.</p> <p>8. "Shall be deemed to have vested."</p> <p>9. Right to possession, when accrues.</p> <p>10. Right to mesne profits.</p> <p>11. Liability for rent and revenue.</p> |
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Other Topics (Miscellaneous)

Purchase pendente lite. See Notes 6 and 7.
 Sale, when void or voidable. See Note 4.
 Subsisting decree. See Notes 1 and 7.

4. (81) 6 Cal 129 (134): 7 Ind App 157 (P O).
 5. (38) AIR 1938 P C 230 (232): 32 Sind L R 879 (P O).
 Note 17
 1. (23) AIR 1928 Mad 230 (231).
 (86) 1886 All W N 176 (176).
 (34) AIR 1934 Pat 685 (693): 13 Pat 446.
 5. (16) AIR 1916 Oudh 169 (174).
 4. (22) AIR 1922 All 443 (445): 44 All 714.
 3. (28) AIR 1928 Bom 444 (447).
 2. (28) AIR 1928 Bom 444 (447).
 [Where the facts are not clear.]
 [See however (27) AIR 1927 Mad 648 (649).]

1. Legislative changes.—Two important changes have been introduced into the present Section—

1. The date of vesting of title in the auction-purchaser is the date of the sale and not the date of the sale certificate.
2. The decree under which the property is sold need not be *subsisting* at the time of the confirmation of the sale.

2. Scope and object of the Section.—A judicial sale, unlike a private one, is not complete immediately it takes place. It is liable to be set aside on appropriate proceedings taken under O. 21 Rr. 89 to 91. If no such proceedings are taken, or if taken are not successful, the sale will then be made absolute under O. 21 R. 92. Questions, therefore, arise as to whether the auction-purchaser is entitled to rents and profits during the period between the two dates, *i.e.*, the date of the sale and the date of the certificate of sale. Again, there may be successive sales of the same property in execution of different decrees giving rise to questions of priority of title with reference to dates of confirmation. Questions as to the validity of private sales by auction-purchasers or judgment-debtors before the date of confirmation may also arise. In order to settle the law bearing on such questions, this Section lays down that though the property does not vest in the auction-purchaser till the date of confirmation, once the sale is confirmed and becomes absolute, the title of the auction-purchaser shall relate back to the date of the sale itself.

3. "Immoveable property."—See Section 16.

4. "Becomes absolute."—See O. 21 R. 92. As to when a judicial sale is void or voidable, see O. 21 Rr. 89 to 91 and Section 47 Notes 51 to 71.

5. Sale certificate.—See Order 21 Rule 94.

6. Effect of reversal of decree after confirmation.—See Note 58 to Section 47.

7. Effect of reversal of decree before confirmation.—Under the old Section there was a proviso that the decree must be *subsisting on the date of the sale certificate* for the property to vest in the purchaser.¹ This is now no longer necessary and a sale in favour of a *bona fide* purchaser not a party to the suit will not be set aside merely because the decree has been reversed before confirmation.²

As to the cases where a judicial sale may be set aside on the reversal of the decree, see Note 58 to Section 47.

8. "Shall be deemed to have vested."—Until the sale is confirmed, title does not vest in the purchaser.^{1a} But where, on confirmation, it does vest in him, it shall be deemed to have vested from the date of sale. In other words, the vesting relates back to the date of sale.¹ The fact that the sale certificate is issued on a later

Section 65—Note 7

1. ('88) 10 All 88 (84, 85).
- ('78) 2 Bom 540 (541).
- ('81) 7 Cal 91 (95). (Decree subsists unless set aside or reversed by competent Court.)
- ('98) 25 Cal 175 (178, 179).
- ('07) 29 All 591 (592, 593).
2. ('83) AIR 1933 Mad 598 (603, 604, 605) : 56 Mad 808.
- 1a. ('33) AIR 1933 Sind 198 (200) : 27 Sind L R 256.

Note 8

1. ('12) 16 Ind Gas 210 (212) : 40 Cal 89 : 39 Ind App 228 (P C).
- ('38) AIR 1933 Mad 482 (484).
- ('38) AIR 1933 Mad 317 (318). (The tenant of the judgment-debtor is entitled to pay rent to the judgment-debtor until sale has been confirmed—Auction-purchaser to recover it from judgment-debtor—Tenant is protected.)
- ('38) AIR 1933 Pesh 49 (50).
- ('33) AIR 1933 Oudh 38 (39). (Judgment-debtor after sale but before confirmation altering rent

date than that of the confirmation, does not affect the vesting of title on the confirmation of the sale.²

The legal effect of the relation back of the vesting of the title to the date of the sale is that the auction-purchaser will be entitled to rights in the property and be liable to the obligations in respect of the same as from the date of sale. Thus, if there are accretions to the property between the date of sale and the date of confirmation, they would belong to him. But if the property is between those two dates sold for arrears of revenue, he would lose it completely.³

Though, according to the strict terms of Section 316 of the old Code, title vested only on the date of the sale certificate, the Courts had held that even from the date of sale the purchaser acquired an *equitable* interest in the property to be perfected on confirmation,⁴ and, in effect, the same position was reached as is now embodied in the Section in clear terms. Again, under the old Code the property vested in the purchaser only against parties to the suit and persons claiming under them.⁵ The omission from the present Section of the words "so far as regards the parties to the suit and persons claiming through or under them" does not, however, alter the law under the present Section.

9. Right to possession, when accretes.—As has been seen in Note 8 above, the right of the auction-purchaser to the property arises on confirmation of the sale.¹ It is therefore no longer necessary to obtain a sale certificate before applying for possession² as was held to be necessary under the Code of 1859.³

in kind to rent in cash—*Helid*, he had no right

to do so.)

(19) 2 Ind Cas 81 (82) (All).

(15) AIR 1915 Mad 806 (806).

(21) AIR 1921 Mad 498 (503). (The converse is

true so that where sale not confirmed nothing

is vested.)

(25) AIR 1925 Bom 483 (484). (No title till con-

firmation though vesting relates back to date of

sale.)

(30) AIR 1930 Bom 81 (83). (Before confirmation

property purchased agreed to be sold—Sale con-

firmed—Agreement specially enforceable.)

(27) AIR 1927 Oudh 261 (262) : 2 Luck 496.

(Gift by auction-purchaser before confirmation

—Donee authorized to take possession—Valid.)

2. (14) AIR 1914 Oudh 306 (306).

(26) 95 Ind Cas 965 (966) (All).

(96) 19 All 188 (191).

(82) 7 Bom 254 (256).

(10) 5 Ind Cas 268 (264) (All). (Purchaser's title

though not full till grant of sale certificate, he

has lesser equitable interest on sale confirmation.)

(15) AIR 1915 Lah 9 (10) : 1915 Pun Re No. 81,

p. 328. (Confirmation of sale inferable from

Court's action.)

(81) 6 Bom 139 (142, 143).

(74) 21 South W R 349 (350).

(88) 12 Bom 589 (594, 595).

(10) 7 Ind Cas 409 (411) : 33 All 45.

(81) 7 Cal 199 (207).

(32) AIR 1932 Pat 80 (83) : 10 Pat 670. (Title

derived from court sale—Sale certificate is only

an evidence.)

(31) AIR 1931 Pat 241 (243) : 10 Pat 670 (FB).

[See also (82) 6 Bom 586 (587). (Question left

open.)]

3. (13) 40 Cal 89 (102, 103, 104) : 39 Ind App

228 (P O).

(98) 2 Cal W N 589 (591).

(26) AIR 1926 Nag 17 (19) : 24 Nag L R 48.

4. (98) 2 Cal W N 589 (590, 591).

(97) 19 All 188 (190).

(06) 11 Cal W N 158 (160). (Purchased decree

attached by purchaser's decree-holder—Latter

has right to get sale certificate.)

(10) 8 Ind Cas 657 (660) (Cal).

(86) 10 Bom 453 (455).

5. (91) 18 Cal 164 (178) : 17 Ind App 201 (P O).

Note 9

1. (83) 5 All 305 (309) (P B). (If sale confirmed

purchaser can prove title otherwise than by a

sale certificate.)

(92) 1892 Pun Re No. 27.

(94) 1894 All W N 54 (54). (After sale confirma-

tion purchaser can sue for possession, though

sale certificate not yet had.)

(88) 15 Cal 546 (553, 554).

(96) 23 Cal 49 (51).

(82) 5 Mad 54 (60).

(88) 11 Mad 296 (299, 300).

(83) 9 Cal 842 (843).

2. See cases in foot-note (1) above.

3. (73) 10 Bom H C R 435 (439). (Sale not com-

plete until sale certificate compulsorily registra-

ble is so registered.)

(80) 4 Bom 155 (157).

(79) 3 Bom 433 (436).

(84) 10 Cal 252 (255, 256). (Without sale certi-

ficate purchaser cannot sue for partition.)

[But see (74) 21 South W R 349 (351).

16. Sale in execution of decree barred by limitation. — See Note 69 to Section 47.

17. Revenue sales. — It has been seen in Note 58 to Section 47 that in case of execution sales by the Civil Courts, the title of a *bona fide* auction-purchaser is not affected by the subsequent reversal or modification of the decree. But in the case of sales by Revenue Courts for arrears of Government revenue the purchaser gets no title, if it is subsequently declared in a suit that no arrears exist or no revenue is payable.¹

As to what passes to the purchaser at a revenue sale, see the undermentioned cases² and also O. 21 R. 94.

18. Effect of vesting order in insolvency proceedings. — See Section 64, Note 14.

66. [S. 317.] (1) No suit shall be maintained⁷ against any person¹⁶ claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one¹¹ through whom the plaintiff claims.

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently¹⁹ or without the consent of the real purchaser, or interfere with the right of a third person¹¹ to proceed against that property, though ostensibly sold to the certified purchaser,¹⁷ on the ground that it is liable to satisfy a claim of such third person against the real owner.

[1877, Ss. 316 and 317; 1859, S. 260.]

Synopsis

1. Legislative changes.
2. Scope, object and applicability of the Section.
3. English law.
4. Retrospective operation of the Section.
5. Revenue sales.
6. Cases under the Public Demands Recovery Act. See Note 5 above

7. "No suit shall be maintained."
8. Plea in defence, if can be raised.
9. Suits outside the Section.
10. Suit by beneficial owner in possession or his successor in title for declaration of title.
11. Suits by third person.
12. Suit on grounds other than those mentioned in the Section.

Note 17

1. ('21) AIR 1921 Bom 257 (258, 259, 260) : 45 Bom 45. (Because the impartiality of Civil Courts cannot be expected of fiscal authorities.)
2. ('26) AIR 1926 Cal 97 (98) : 52 Cal 862. (Sale under Bengal Revenue Sales Law, 11 of 1859—In the absence of anything else land or share in it passes and not the structures on the land.)
3. ('23) AIR 1923 Cal 324 (326). (Fraudulent revenue sale—Purchaser in collusion with defaulter—Protected interests do not pass to him.)
4. ('23) AIR 1923 Cal 82 (83). (Not interest of de-

faulter but of the Crown subject to Government assessment passes to purchaser.)

(('21) AIR 1921 Cal 699 (701, 702). (Purchaser at revenue sale obtains title to purchased property as from date of default and is entitled to mesne profits.)

(('14) AIR 1914 Cal 785 (785). (Liability to pay rent from date of sale passes to purchaser.)

[See also ('94) 21 Cal 255 (258). (Revenue sale set aside by a decree—Decree not executed within time—Revenue sale restored—Revenue purchaser has right to sue for possession.)]

13. Suits by joint purchasers.
14. Purchase by Hindu coparcener.
15. Suit for specific performance of agreement to sell.
16. Suit against certified purchaser and persons claiming through him is barred.
17. "Certified purchaser," meaning of.
18. Waiver of right by auction-purchaser.
19. Name inserted in the certificate fraudulently or without the consent of the real purchaser.
20. Objection as to bar by Section 66, when can be raised.
21. Benami transactions in general.

Other Topics (Miscellaneous)

- Benami sales not illegal, unless fraudulent and unless fraud is carried out. See Note 2 Pts. (1) and (2).
- Benami transactions, meaning and effect of. See Note 2 and Note 21 foot-notes.
- Benamidar's or real owner's right to apply for setting aside execution sale. See O. 21 R. 90 Notes.
- Benamidar's right to execution of decrees. See Note 21 foot-notes. See also O. 21 R. 16 Notes.
- Estoppel of real owner against innocent transferees from benamidar. See Note 21 foot-notes.
- Fraudulent purchases not to be recognised if fraud is carried out by the person seeking relief. See Note 21 foot-notes.
- Right of benamidar to sue. See Note 21 foot-notes.
- Strict construction of the Section. See Note 2 Pt. (7).
- Suits falling under this Section. See Notes 2 & 7.

1. Legislative changes. — The main changes that have been introduced in this Section are as follows —

1. For the words "no suit shall be maintained against *the certified purchaser*" in Section 317 of the old Code, the words "No suit shall be maintained against *any person claiming title under a purchase certified* by the Court in such manner as may be prescribed" have been substituted. See Notes 16 and 17 below.
2. For the words "any other person" and "such other person" in the old Code, the words "the plaintiff" have been substituted.
3. The words "or interfere with the right of a third person . . . real owner" in sub-section (2) have been newly added. See Note 11 below.

2. Scope, object and applicability of the Section. — This Section enacts an exception to the general rule applicable to *benami* transactions, *i.e.*, transactions by one person in the name of another. A *benami* transaction is not *per se* illegal¹ and, unless brought about for a fraudulent purpose and the fraud is carried out, a Court of Equity will give effect to the *real* title as against the *benami* title.² This is the general rule. The Legislature has, by this Section, declared that this general rule shall not apply to *execution sales* held by the Court.^{2a} The object is to put an end to purchases in court auction by one person in the name of another³ and to protect third parties.

Section 66 — Note 2

1. ('88) 11 Mad 218 (214).
- ('19) AIR 1919 Pat 523 (524).
- ('75) 28 Suth W R 358 (358); 2 Ind App 154 (PC).
- ('30) AIR 1930 Bom 81 (83).
2. ('06) 33 Cal 967 (969).
- ('01) 28 Cal 370 (379, 380).
- ('87) 11 Bom 708 (716, 719).
- ('07) 31 Bom 405 (412).
- ('97) 20 Mad 326 (329, 331).
- ('06) 29 Mad 72 (74).
- ('08) 31 Mad 97 (99). (Vendee holds the property for the benefit of the vendor.)
- ('08) 31 Mad 485 (489).

See also Indian Trust Act, Section 84.

- 2a. ('39) AIR 1939 Rang 122 (123). (Section protects certified purchaser at an auction sale from any claim that his purchase was made not on

- his own behalf but on that of the plaintiff.)
- ('37) AIR 1937 Mad 362 (363). (Object of Section is to prohibit on grounds of public policy a suit against the certified purchaser on the ground specified in the Section.)
3. ('16) AIR 1916 Cal 762 (763) : 43 Cal 20.
- ('19) AIR 1919 Pat 523 (524).
- ('74) 12 Beng LR 317 (329) (PC). (But the Section does not affect such purchases by a member of joint Hindu family in his own name, but with the joint funds.)
- ('20) AIR 1920 P C 30 (32) : 43 Mad 643 : 47 Ind App 108 (PC). (But a purchase coupled with an undertaking to convey to another at the price of purchase is not affected by this Section.)
- ('69) 11 Suth W R 16 (19) (FB).
- ('72) 14 Moo Ind App 496 (525) (PC).

who might deal with the purchaser against the claims of an undeclared or secret owner who puts forward the certified purchaser as the legal owner.⁴ The effect of the Section would appear to help the certified purchaser in his fraud or breach of trust against the real purchaser, but really the Section is designed to prevent fraud against third parties resulting from the collusive action of the real and certified purchasers.⁵ Hence, the Section should be applied in all cases without any regard to the consequences.⁶ But inasmuch as it is restrictive of the Court's equitable jurisdiction to grant relief to the real owner as against the ostensible owner, it should not be extended beyond its *actual terms* but *should* be construed strictly.⁷

In order that the Section may apply, the following essentials are necessary —

- (1) There should be a *court sale*. In other words, the Section applies only to *execution sales*. Thus, a sale by a *receiver* is not within the Section.⁸
- (2) The sale must be a *real* and not a *fictitious one*. Thus, where a collusive suit is brought in which a collusive decree is allowed to be passed and a fictitious sale held in execution of such decree, this Section has no application.⁹
- (3) The suit must be *against* the certified purchaser or his representative, on the ground that the purchase was *made on behalf of the plaintiff* or his predecessor-in-interest.¹⁰

('75) 23 Suth W R 358 (358): 2 Ind App 154 (PC).
(Leading case relied on in AIR 1929 P C 226.)

('05) 27 All 194 (197).

('16) AIR 1916 Oudh 255 (256).

('15) AIR 1915 P C 81 (82): 37 All 545: 42 Ind App 177 (PC).

('20) AIR 1920 Mad 422 (422).

('07) 29 All 557 (559).

('09) 31 All 282 (284).

('96) 23 Cal 699 (701).

('99) 21 All 238 (243).

('04) 26 All 82 (87) (FB).

[See also ('12) 10 All L Jour 97 (99). (Section is intended to preclude institution of suit against certified purchaser by beneficial owner or his successor.)]

4. ('98) 22 Bom 672 (678). (But if the benamidar himself raises no objection, and admits the title of the true owner, or owner obtains transfer of possession, Section does not come in the way of the true owner asserting his right as against third parties or vice versa.)

5. ('84) AIR 1934 Cal 567 (568): 61 Cal 440.

('86) 12 Cal 204 (206). (Section is intended to prevent and not to promote fraud. Dissented from in 16 Mad 290.)

6. ('99) 21 All 29 (43).

(1900) 22 All 434 (438). (Trust Act, S. 82, saves the operation of this Section.)

7. ('38) AIR 1938 Cal 874 (877).

('37) AIR 1937 Mad 362 (363).

('20) AIR 1920 Cal 48 (49).

('01) 23 All 175 (177).

('98) 2 Cal W N 433 (447).

('72) 14 Moo Ind App 496 (528) (PC).

('03) 5 Bom L R 329 (331).

('31) AIR 1931 Bom 578 (581). (Therefore this Section will not apply to a suit based on a con-

tract which is separate from the transfer.)

(1900) 3 Oudh Cas 229 (230).

('75) 23 Suth W R 358 (358): 2 Ind App 154 (PC).

('01) 5 Cal W N 341 (343).

('99) 21 All 238 (245).

('99) 21 All 29 (43).

8. ('26) AIR 1926 All 124 (125, 126): 48 All 209. (Such sale is not by the Court but under the Court.)

('66) 6 Suth W R 160 (161). (Property purchased benami but not in execution sale.)

9. ('13) 18 Cal L Jour 616 (620). (Rent suit.)

10. ('38) AIR 1938 Cal 874 (877). (A suit for a relief which can only be given on declaration of title as against persons claiming title under a purchase certified by the Court, such persons being parties and contesting the claims, is barred under Section 66.)

('38) AIR 1938 Cal 602 (604). (The fact that the certified purchaser was a benamidar for the plaintiff even before the auction sale is no answer to an objection under S. 66, C. P. C.)

('37) AIR 1937 Mad 362 (364). (If the cause of action is not based on the benami purchase but on a contract, or title acquired subsequent thereto Section 66 is not a bar. The fact that the basis of the contract embodied in the sale deed is the prior benami purchase does not affect the title obtained under the conveyance. Suit for rectification of sale deed executed subsequent to the auction sale is not barred.)

('35) AIR 1935 All 143 (146). (Plaintiff claiming property on the allegation that auction-purchaser A was a benamidar for B, under whom plaintiff claimed, and that in collusion with C, A transferred his rights to C instead of to plaintiff—Section 66 applies.)

('23) AIR 1923 Cal 302 (303). (Certified purchaser or his successor not party to the suit.)

The test to see whether a suit is *based* on the ground that the auction-purchase was made on behalf of the plaintiff is whether the plaintiff can get any relief or any material relief without proving that the purchase was made on behalf of the plaintiff.^{10a} The Section, like the Limitation Act, does not extinguish the rights of the real owner but only prevents him from *enforcing* them in a Court of law.¹¹ See Note 15 below. Sub-section (2) excepts the classes of cases mentioned therein from the operation of sub-section (1). The rule in sub-section (1) therefore does not apply —

(1) to a suit for a declaration that the name of the certified purchaser was inserted in the certificate *fraudulently* or *without the consent* of the real purchaser,¹²

(2) to the right of a *third* person to proceed against the property on the ground that it is liable to satisfy his claim against the real owner.

3. English law. — Under the English law, as in the Indian law, where *A* purchases with his own funds property in the name of *B*, there will, in the absence of any other circumstances, be a resulting trust in favour of *A* which the Courts will enforce against *B*.¹ But no such trust will result if the policy of any Act of Parliament would thereby be defeated.² Thus, under the old Registry Acts, where *A* purchased a ship in the name of *B*, the register was conclusive evidence of the ownership of *B* both at law and equity.³

4. Retrospective operation of the Section. — There is a conflict of opinion as to whether this Section is retrospective in its operation. The conflict arises in view of the fact that under Section 317 of the old Code an action against the *representative* of the certified purchaser was not barred but that, under the present Section, it is barred. If a court sale is held and confirmed *before* this Code came into force, but a suit is brought against the representative of the certified purchaser *after* the Code came into force, is the suit barred under Section 66? The Calcutta High Court has held that it is not,¹ on the ground that the real owner had, on the date of the confirmation of the sale, acquired a *vested right* to have his title declared in respect of the properties, which he could enforce against the benamidar's transferee, and that such right is not taken away

('83) AIR 1933 Lah 636 (637); 14 Lah 712. (Suit against mortgagor and subsequent purchaser—Mortgagor can plead that purchaser is benamidar for plaintiff.)

('05) 27 All 194 (197). (Suit on the ground that the certified purchaser is not the real purchaser must be dismissed.)

('20) AIR 1920 Lah 491 (493); 2 Lah L Jour 353 (358, 359). (Hence suit not prohibited if defendant does not claim through certified purchaser.)

('29) 118 Ind Cas 713 (713) (All).

('67) 8 Suth W R 130 (131).

('68) 9 Suth W R 360 (361). (Possession of plaintiff—Immaterial.)

('25) AIR 1925 Nag 41 (44). (Plaintiff resting his case on the fact that defendant purchased on his behalf—Suit is barred.)

('16) AIR 1916 Mad 657 (658). (Suit against representative of certified purchaser.)

[See also ('11) 33 All 382 (384). (Purchase of mortgaged property in execution of decree on prior mortgage—Auction-purchaser alleged to be benamidar of mortgagor—Subsequent mortgagee cannot bring to sale the property on the ground that auction-purchaser was benamidar.)

('28) AIR 1928 PC 75 (76); 24 Nag LR 59 (PC).]

10a. ('38) AIR 1938 Cal 602 (604).

11. ('96) 23 Cal 699 (701).

('17) AIR 1917 Mad 324 (325).

12. ('05) 1 Cal L Jour 550 (556).

('93-1900) 1893-1900 Low Bur Rul 16 (18).

(1864) 1 Suth W R 328 (329).

Note 3

1. ('28) AIR 1928 P C 172 (173); 55 Ind App 235; 55 Cal 944 (PC).

2. (1829) 3 Y & J 163 (175), *Groves v. Groves*. (Purchase in name of *A* to enable him to vote at election of member of Parliament.)

3. (1808) 15 Ves 60 (71), *Ex parte Yallop*. (The policy of the Act being to secure evidence of title to a ship and enable it to be seen how far throughout her existence she was British built.)

(1810) 17 Ves 251 (254), *Ex parte Houghton*.

(1840) 1 Beav 354 (361), *Slater v. Willis*.

Note 4

1. ('20) AIR 1920 Cal 435 (437); 47 Cal 1108 (1112). (On appeal from A I R 1919 Cal 210.)

('23) AIR 1923 Cal 228 (232).

by Section 66. The Lahore High Court has followed the Calcutta view.^{1a} The Allahabad² and the Madras³ High Courts have taken a contrary view, on the ground that this Section embodies, as Section 317 of the old Code did, merely a rule of *procedure* and that rules of procedure are always retrospective. The view of the Calcutta High Court that Section 66 or the corresponding Section 317 of the Code of 1882 embodies anything more than a *rule of procedure* does not seem to be a sound one.

Where a sale was held before, but confirmed *after* the Code came into force, the purchaser's title becomes perfected only after the confirmation and consequently Section 66 applies.⁴

5. Revenue sales. — As has been seen in Note 2 above, this Section applies only to *execution sales under the Code*.¹ It has no application to revenue sales.² By virtue of Section 19 (2) of the Public Demands Recovery Act (Bengal Act I of 1895), however, the provisions of this Section apply to the case of a purchaser at a sale in enforcement and execution of a certificate issued under that Act.³

6. Cases under the Public Demands Recovery Act. — See Note 5 above.

7. "No suit shall be maintained." — The words "no suit shall be maintained" in the Section mean "no suit shall be instituted and if it is instituted, it shall fail."¹ The words "no suit" show that not even a suit for the *return of the purchase money* from the *benamidar* will lie.²

8. Plea in defence, if can be raised. — The Section bars only a *suit against the certified purchaser* or his representatives-in-interest. Where a suit is brought *by the certified purchaser* or his representatives against the real owner, the latter can

[See also ('16) AIR 1916 Cal 394 (394). (Right to redeem.)]

1a. ('37) AIR 1937 Lah 471 (474).

2. ('38) AIR 1938 All 391 (393); ILR (1938) All 556. ('14) AIR 1914 All 552 (554). (No one has a vested right in a particular form of procedure.)

('21) AIR 1921 All 165 (167) : 43 All 416. (Reversed on another point in A I R 1929 P O 228 : 51 All 675 (P O).)

[See also ('15) AIR 1915 All 316 (317). (Point assumed.)]

3. ('17) AIR 1917 Mad 324 (326). (New Section is merely declaratory of the real meaning of the old Section 317.)

4. ('28) AIR 1928 Cal 338 (339).

Note 5

1. ('37) AIR 1937 All 176 (179) : ILR (1937) All 113. (Section 66 is confined to a purchase certified by the Court in such a manner as may be prescribed; and 'prescribed' means under S. 2 (16) 'prescribed by rules'. 'Rules' under sub-s. (18) of S. 2 means 'rules and forms contained in Sch. I or made under S. 122 or S. 125, Civil P.C.' Hence, a person who is not claiming title under a purchase certified by the Court under any of the rules framed under the Code will not be protected under Section 66.)

('37) AIR 1937 Pat 324 (325). (Section 66, Civil P.C., is not applicable to sales in execution of rent decrees under the Chota Nagpur Tenancy Act, held by the Deputy Commissioner.)

See also the following cases:

('97) 1897 Bom P. J. 27 (27). (Sale under S. 113,

Bombay Land Revenue Code.)

('87) 14 Cal 583 (585). (Sale under the provisions of Act 11 of 1859 for arrears of land revenue.)

('09) 19 Mad L Jour 270 (270). (There is nothing to preclude a plea that a purchase in a revenue sale was benami.)

('70) 14 Suth W R 372 (373). (Revenue sale.)

2. ('38) AIR 1938 Mad 283 (284).

('97) 1897 Bom P J 27 (27).

('05) 28 Mad 526 (536). (Hence real purchaser is not precluded from showing that the certified purchaser was only a benamidar.)

('06) 29 Mad 473 (476) (FB). (25 Mad 655 overruled.)

('11) 9 Ind Cas 136 (137) (Mad). (Sale under Madras Revenue Recovery Act, 1864.)

('70) 14 Suth W R 372 (373).

('97) 20 Mad 494 (496). (Sale under Madras Revenue Recovery Act, 1864.)

('09) 4 Mad L Tim 316 (316). (Following 29 Mad 473 (FB).)

[See also ('94) 21 Cal 554 (558). (Benami sale under Bengal Tenancy Act, VIII of 1885—S. 173 provides that it may be avoided on application.)]

('05) 9 Cal W N 134 (140). (Do.)

('95) 18 Mad 469 (471). (Suit by benamidar to eject tenant—Not maintainable.)]

3. ('12) 16 Cal W N 973 (975).

Note 7

1. ('99) 21 All 238 (242).

2. ('10) 7 All L Jour 623 (626).

[But see ('36) AIR 1936 Pat 429 (430).]

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plead that the purchase was only benami for him. The Section does not bar a plea of benami *in defence*.¹ In *Mussumat Bahuns Kowur v. Lalla Buhoree Lall*,² which was a case under Section 260 of the Code of 1859 corresponding to the present Section, their Lordships of the Privy Council said as follows:

"It is well known that benami purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and therefore they must still be recognised and effect given to them by the Courts *except so far as positive enactment stands in the way and directs a contrary course*. . . . The only express enactment on the subject occurs in Section 260. . . . This enactment is clear and definite. . . . It is confined to a suit brought *against the certified purchaser*. . . . The present suit which is converse of that pointed at in the Section is not within the words or scope of it. It would be specially unsafe so to construe the Act as by inference to import into it prohibitory enactments which would exclude any inquiry into the truth in any suit between the parties."

9. Suits outside the Section. — As has been seen in Note 2 above, a suit which is not *against the certified purchaser or his representatives, or which is not based on the ground that the purchase was made on behalf of the plaintiff*, is not within the Section. A suit by a certified purchaser for declaration of his own title to the property purchased is not barred by the Section.¹ For suits based on grounds other than that the purchase was made on behalf of the plaintiff, see Notes 12, 13, 14 and 15 below.

10. Suit by beneficial owner in possession or his successor in title for declaration of title. — Where the beneficial owner is in possession and brings a suit against the *benamidar for declaration of his title*, is the suit barred by Section 66? The general consensus of opinion is that it is *barred*.¹ The reason is that the words "no suit shall be maintained" in the Section are very general and do not exclude a suit

Note 8

1. ('72) 14 Moo Ind App 496 (526, 527) (P O). (Suit for redemption by certified purchaser.)
('38) AIR 1938 Lah 686 (687); 14 Lah 712. (Plea raised to show that the plaintiffs had no locus standi to sue.)

('75) 28 Suth W R 858 (858). (If the defendant is in possession.)

('67) 8 Suth W R 130 (131). (Auction-purchaser's transferee seeking to oust real owner.)

('68) 9 Suth W R 498 (439). (Defendant in possession — Transferee of the certified purchaser seeking to oust him.)

('18) AIR 1918 Mad 1258 (1259). (Suit by benamidar to eject transferee of the real owner in possession.)

('05) 27 All 443 (446). (Suit for rents and profits against real purchaser in possession.)

('76) 1 All 290 (291).

('74) 22 Suth W R 270 (270). (Following 10 Moo Ind App 522 (P O).)

('15) AIR 1915 Nag 51 (52); 11 Nag L R 130. (Suit by heirs of auction-purchaser—2 C P L R 137 not followed.)

[See also ('01) 28 Cal 370 (381).
('75) 24 Suth W R 278 (279).

('74) 6 N W P H C R 197 (200). (Certified purchaser — Benamidar of judgment-debtor who had been in possession—Property again attached and sold by decree-holder — Suit for confirmation of possession by benamidar.)

('12) 36 Bom 116 (117). (Purchaser at court sale, benami for defendant, cannot oust defendant from possession.)

(1900) 3 Oudh Cas 229 (230). (Section does not relieve auction-purchaser plaintiff from showing the justice of his claim.)

2. ('72) 14 Moo Ind Cas App 496 (522, 523) (P O).
[See also ('75) 2 Ind App 154 (155) (P O).]

Note 9

1. ('96) 9 C P L R 55 (55, 56). (Suit brought by certified purchaser against a party in possession is not barred.)

('96) 18 All 461 (463). (Suit against third party.)
('99) 21 All 29 (43).

Note 10

1. ('38) AIR 1938 Cal 602 (604). (It is immaterial whether the plaintiff is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover possession. In either case Section 66 applies.)

('01) 23 All 175 (178, 180).

('33) AIR 1933 Pat 264 (266, 267); 12 Pat 616. (However, possession by real owner is a good defence to suit by certified purchaser.)

('68) 9 Suth W R 360 (361).

('16) AIR 1916 Cal 762 (764); 43 Cal 20.

('26) AIR 1926 Cal 542 (543, 544); 53 Cal 297.

('17) AIR 1917 Mad 324 (325). (Even when defendant recognises plaintiff's title, unless there is recognition by the execution of deed of gift or sale.)

for a declaration of title on the mere ground that the plaintiff is in *possession*.² A contrary opinion was, however, expressed by the Calcutta High Court in the undermentioned case.³ Their Lordships seem to have proceeded in that case on the view that the suit was not based on the ground that the purchase was made *benami*, but on the ground of *existing possession* in the plaintiff. The case has been dissented from by the same High Court in later cases.⁴ The view expressed in I. L. R. 23 Calcutta 699, if accepted, would amount practically to a repeal of the whole Section, and cannot, therefore, be accepted as a sound one.⁵ The Lower Burma Chief Court⁶ has, however, followed the decision in I. L. R. 23 Calcutta 699.

But an auction-purchaser may, by his conduct, be *estopped* from pleading the bar under Section 66.⁷ Thus, where the real owner sells the property to a third person with the consent and attestation of the benamidar auction-purchaser and the third person brings a suit against the *benamidar*, the latter will be estopped from pleading that the suit is barred under Section 66.⁸

Where the true owner has perfected his title by adverse possession for twelve years, a suit by him against the certified purchaser for declaration of his title will not be barred as it is based on *title* by adverse possession⁹ and not on the ground *that the purchase was made on his behalf*. See Note 12 below.

11. Suits by third person.—Under Section 317 of the old Code, no suit was maintainable against the certified purchaser on the ground that the purchase was made “on behalf of *any other person* or on behalf of some one through whom *such other person claims*.” This raised a conflict of opinion as to whether a *third person*, such as a creditor of the real owner, could sue to enforce his claims against the property purchased on the ground that the purchase was *benami* for the real owner. The Calcutta High Court held that he could, and that the bar under the Section operated only on suits brought by the *beneficial owner* as plaintiff.¹ The Madras High Court held a contrary view in the undermentioned case,² but in a later case³ dissented from the earlier case and came to the same conclusion as that of the Calcutta High Court. The Allahabad High Court and the Oudh Judicial Commissioner’s Court took a view contrary to that of the Calcutta High Court.⁴

(‘20) AIR 1920 Nag 51 (51) : 16 Nag L R 87 (88). (Suit against the successor-in-title of certified purchaser.)

(‘16) AIR 1916 Oudh 255 (256).

2. (‘38) AIR 1938 Cal 602 (604).

See cases in foot-note (1).

3. (‘96) 23 Cal 699 (701).

4. (‘16) AIR 1916 Cal 762 (763) : 43 Cal 20.

(‘26) AIR 1926 Cal 542 (544) : 53 Cal 297.

5. (‘16) AIR 1916 Cal 762 (763) : 43 Cal 20.

6. (‘14) AIR 1914 Low Bur 275 (276) : 7 Low Bur Rul 260.

7. (‘13) 36 Mad 564 (569).

[See also (‘20) AIR 1920 Cal 48 (49). (Tenant from real owner cannot plead title of the certified purchaser.)]

8. (‘13) 36 Mad 564 (569).

[See also (‘31) 133 Ind Cas 551 (552) (Lah). (Benamidar attesting sale by real owner and attorned to the vendee also—But the decision rests on the basis that oral sale is valid in the Punjab and that the plaintiff had become complete owner already.)]

9. (‘38) AIR 1938 All 391 (393) : I L R (1938) All

556. (It is unnecessary for them to prove that auction purchase was made on their behalf.)

(‘29) AIR 1929 P C 228 (231) : 56 Ind App 330 : 51 All 675 (PC). (Section has no application to such a case.)

(‘34) AIR 1934 All 990 (992, 993).

(‘25) AIR 1925 Oudh 20 (24). (In determining title by prescription the fact that the purchase was *benami* can be taken into consideration.)

(‘92) 19 Cal 199 (201).

(‘20) AIR 1920 Nag 51 (51) : 16 Nag L R 87. (Hence plaintiff cannot be called trespasser.)

Note 11

1. (‘86) 12 Cal 204 (206).

(‘94) 21 Cal 519 (521). (Suit for declaration that property belonged to the debtor.)

2. (‘93) 16 Mad 290 (292).

3. (‘97) 20 Mad 362 (364).

4. (‘11) 33 All 382 (384).

(‘04) 26 All 82 (87, 88, 89) (FB).

(‘99) 21 All 238 (245). (Section is subject to no limitation other than such as is contained in the Section itself.)

The substitution, in the present Section, of the words "on behalf of *the plaintiff* or on behalf of some one through whom the *plaintiff claims*" and the introduction of the words "or interfere with the right of a third person to proceed against that property, on the ground that it is liable to satisfy a claim of such third person against the real owner" in sub-section (2) gives effect to the Calcutta decisions and removes the conflict mentioned above.⁵

12. Suit on grounds other than those mentioned in the Section. — A suit is barred under the Section only if it is based on the ground that the purchase was made *on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims*. The Section has no application if the relief is sought on certain facts which establish certain *other kinds of legal relations* between the parties which entitle the plaintiff to rely on them as involving and creating effectual legal claims in his favour.¹ In *Ganga Sahai v. Keshri*,² their Lordships of the Privy Council observed as follows :

"In their Lordships' opinion the provisions of that Section (Section 317 of the old Code) were designed to create some check on the practice of making what are called *benami purchases* at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons *otherwise beneficially interested in the purchase.*"

Illustrations

1. *A* sues and obtains a decree against *B*. In execution of the decree *B*'s house is sold in court auction and is purchased by *C*, the paid agent of *A*, with *A*'s money, but without his knowledge. *A* then sues *C* for possession, on the ground that the purchase by the agent enures to the benefit of the principal. The suit is not barred as it is based on a legal relationship of *principal and agent*, and not *merely* on the ground that *C* was a benamidar.³

2. *A* and *B* are joint mortgage decree-holders against *C*. *A* applies on behalf of himself and *B* under Section 231 of the old Code (O. 21 R. 15) to execute the decree and purchases *C*'s property in the court sale in his own name, the purchase money being set off against the *whole* decree amount. *B* then sues *A* for recovery of his share of the properties purchased by *A*. The suit is not barred, as *B* is beneficially interested in the purchase otherwise than merely on the ground that the purchase was made on *B*'s behalf.⁴

3. In execution of *A*'s decree against *B*, *C* purchases certain properties in court auction and then agrees with *A* to convey the property to him. *A* brings a suit for *specific performance* of the contract against *C*. The suit is not barred as the claim is based on an agreement and not on the ground that the purchase was made *on A's behalf*.⁵

('05) 8 Oudh Cas 306 (311). (Following 26 All 82 (F.B).)

5. See also the following cases :

('20) AIR 1920 Mad 422 (423).

('13) 35 All 138 (143). (Distinguishing from 26 All 82 (F.B) on the ground that the plaintiff did not claim through the real owner.)

The following cases of the Allahabad High Court are still good law under the present Section :—

('99) 21 All 29 (50). (Per Banerji J.)

('74) 6 N W P H C R 265 (267). (Case under the Code of 1859.)

('76) 1 All 235 (235).

('96) 18 All 461 (463).

Note 12

1. ('19) AIR 1919 Mad 942 (943). (Following 18 Mad 436.)

('16) AIR 1916 Pat 315 (317). (Claim independent of and prior to sale—Suit not barred.)

('01) 23 All 175 (178).

('32) AIR 1932 All 32 (33). (Real owner is entitled to subrogation of prior mortgagee's rights as against the certified purchaser.)

2. ('15) AIR 1915 P C 81 (82) : 37 All 545 : 42 Ind App 177 (PC).

3. ('19) AIR 1919 Mad 942 (943).

('95) 18 Mad 436 (437). (Sale under mortgage decree—Benami purchaser—Purchase on account of a subsequent usufructuary mortgage—Suit for conveyance and possession not barred.)

('94) 17 Mad 282 (285). (Purchase made by the defendant as agent of the plaintiff.)

('94) 21 Cal 375 (378).

[See however (1900) 22 All 434 (438, 440). (But this was a case when the certified purchaser was really not an agent in respect of the purchase as it was not within his general duty to purchase the properties.)]

4. ('15) AIR 1915 P C 81 (82) : 42 Ind App 177 : 37 All 545 (PC).

('24) AIR 1924 Oudh 218 (221). (Following AIR 1915 P C 81.)

('07) 29 All 557 (561).

5. ('19) AIR 1919 Mad 94 (95) : 42 Mad 615 (F.B).

('31) AIR 1931 Bom 578 (581). (Even though the basis of the agreement might be the benami nature of the original purchase at court sale.)

('88) 11 Mad 213 (214).

('88) 11 Mad 234 (236, 237).

4. *A* purchases certain properties in court auction with his own funds, but in the name of *B*. *A* continues in possession of the properties purchased for over twelve years. He then sues *B* for a declaration that he is entitled to the properties. The suit is not barred as it is based not merely on the ground that the purchase was made on behalf of *A* but on the ground of his having *perfected his title to the property by adverse possession*.⁶

13. Suits by joint purchasers. — It has been seen in the Illustration 2 to Note 12 above that where one of several joint decree-holders applies for execution of the decree on behalf of all and purchases the property, the purchase money being set off against the entire decree amount, the other decree-holders are entitled to sue the purchaser for recovery of their share in the property and that Section 66 is no bar thereto.¹ Where, without being decree-holders, two persons enter into a joint venture to buy a property at a court sale, the funds being provided jointly, but the sale certificate is issued in the name of one of them only, there is a conflict of decisions as to whether a suit by the other claiming half the property on the ground that the purchase was made for both is barred under Section 66. The general trend of decisions is to the effect that such a suit is barred.² This view proceeds on the basis that the Section applies to all cases where the suit is based on the ground that the purchase was made on behalf of the plaintiff, whether the allegation is that the purchase was made on behalf of the plaintiff exclusively or that it was made on behalf of the plaintiff and the certified purchaser jointly. But the contrary view was taken in the undermentioned case³ by the Bombay High Court. The reason given is that the Section applies only to *benami* purchases at execution sales and that in such a case, there is only a *joint* purchase and not a *benami* purchase. It was also held that in such cases there is a partnership and the plaintiff must be deemed as suing to enforce his right as a partner.

Where, out of two joint mortgagees *one alone* sues making the other a *pro forma* defendant and obtains a decree, in execution of which he purchases the property in his own name, a suit by the other joint mortgagee claiming a share of the property purchased does not fall within the principle of the decision in *Ganga Sahai v. Keshri*,⁴ and is barred by Section 66.⁵

Where *A* and *B* both applied to purchase a property at an auction-sale in a certain proportion, agreeing to pay the price in that proportion and actually paid the 25 per cent. of the purchase money in that proportion, but the balance was wholly paid by *B* and he obtained the sale certificate in his name, it was held that the payment by *B* was on behalf of *A* also, that *B*'s name in sale certificate was inserted *without A's consent* and that a suit by *A* for his share of the property purchased was not barred under Section 66 sub-section (2).⁶

(21) AIR 1921 Pat 39 (41). (Agreement before the sale—Distinguishing AIR 1919 Pat 523.)

6. ('29) AIR 1929 P C 228 (231) : 56 Ind App 330 : 51 All 675 (PC). (Reversing AIR 1921 All 165.) See the cases in Note 10 above.

Note 13

1. ('15) AIR 1915 P C 81 (82) : 42 Ind App 177 : 37 All 545 (PC).

('07) 29 All 557 (560, 561).

('10) 7 All L Jour 1091 (1092). (Following 29 All 557.)

('14) AIR 1914 All 259 (261).

[But see ('15) AIR 1915 All 316 (317). (Cannot be considered to be good law in view of the Privy Council decision in AIR 1915 P C 81 : 37 All 545).]

2. ('39) AIR 1939 Pat 207 (208) : 18 Pat 181.

('37) AIR 1937 All 176 (182) : I L R (1937) All 113. (Distinguishing AIR 1915 P C 81.)

('34) AIR 1934 Cal 322 (324) : 61 Cal 371.

('20) AIR 1920 Nag 147 (148).

('01) 23 All 34 (36).

3. ('26) AIR 1926 Bom 525 (525) : 50 Bom 600.

4. ('15) AIR 1915 P C 81 (82) : 37 All 545 (554) : 42 Ind App 177 (PC).

5. ('23) AIR 1923 All 405 (406).

[But see (1933) AIR 1933 All 854 (856). (The purchase would enure for the benefit of all persons interested in joint fund utilized for purchase of property unless there is anything definitely showing that such persons did not intend the purchase to be on their behalf also.)]

6. ('26) AIR 1926 Cal 719 (719) : 51 Cal 992.

14. Purchase by Hindu coparcener. — Under the Hindu law, every acquisition made by a Hindu coparcener, *with joint family funds*, becomes the common property of the family, in which the other members are entitled to share. Such acquisitions are not *benami* transactions, which are the result of *private agreements or undertakings*. The rights of coparceners to treat such acquisition as the common property of the family arise from the *operation of law*. A suit, therefore, by one coparcener to share in the property purchased by another at a court sale with joint family funds is not barred by Section 66, as it is based on a ground *other* than the one mentioned in the Section, namely, that the purchase *was made on behalf of the plaintiff*.¹

Where the managing member of a Hindu family makes a purchase with joint family funds but takes the sale in the name of a *third* person, there is a conflict of opinion as to whether any member of the family can sue the third person on the ground that the purchase was *benami* for the managing member and so enures for the benefit of the family. The Madras High Court has held that he can.² The reason is that a purchase by a managing member in the name of a third person cannot be considered to have been made on behalf of all the members of the family and so cannot be considered to have been made "*on behalf of the plaintiff*" within the meaning of the Section.³ The Allahabad High Court has held to the contrary basing its decision on the ground that a purchase by a managing member is made on behalf of all the members of the family and so is made on behalf of the plaintiff.⁴ It purported to follow the decision of the Privy Council in *Suraj Narain v. Ratan Lal*⁵ which was, however, a case under Section 317 of the old Code which barred a suit on the ground that the purchase was made "*on behalf of any other person.*" It is submitted that the view of the Allahabad High Court is not correct. The object of Section 66 is, as has already been seen, to put a stop to *benami* purchases at court sales,⁶ and when a managing member makes such a purchase in the name of a third person, he is doing something which is wholly wrong and cannot be presumed to be acting *on behalf* of the family.⁷

15. Suit for specific performance of agreement to sell. — Where *before* the date of a court-sale *A* and *B* agree that *B* should buy the property in his name *with funds supplied by A* and should convey the property to *A* thereafter, the agreement is really to buy the property *on behalf of A* and a suit by *A* for specific

Note 14

1. ('15) AIR 1915 Oudh 194 (195). (Following 12 Beng L R 317 (PC).)

('34) AIR 1934 Cal 567 (568): 61 Cal 440. (Karta purchasing property with family funds in the name of his son— Suit by nephew for recovery of his share in the property—Suit not barred.)

('74) 12 Beng L R 317 (330) (PC).

('17) AIR 1917 Oudh 143 (145). (The principle does not apply to separated members of a Hindu family and the Section will bar a suit between such members though some property is left undivided between them.)

('73) 19 Suth W R 223 (225).

('99) 9 Mad L Jour 298 (300).

[See also ('74) 22 Suth W R 199 (199): 1 Ind App 342 (PC). (Purchase at a revenue sale.)

('09) 31 All 282 (284).

(1900) 22 All 434 (438).

('12) 1912 Mad W N 1071 (1074).

('25) AIR 1925 Mad 448 (449). (Two Hindu brothers— Joint family — Purchase by one brother is not presumed to be *benami* for other.)]

2. ('22) AIR 1922 Mad 481 (482, 483): 45 Mad 856. ('93) 6 Mad 185 (137).

('97) 20 Mad 349 (353).

3. ('22) AIR 1922 Mad 481 (482, 483): 45 Mad 856.

4. ('21) AIR 1921 All 185 (187) : 43 All 711. (Manager of joint Hindu family purchasing property in the name of a female member — Purchase is *benami* — Suit by a male member against her is barred.)

('28) AIR 1928 All 619 (621): 50 All 512. (If plaintiff does not take up this position he has no title to the property at all.)

5. ('17) AIR 1917 P C 12 (17) : 40 All 159 : 44 Ind App 201 : 20 Oudh Cas 211 (PC).

6. See Note 2 above.

7. ('22) AIR 1922 Mad 481 (483) : 45 Mad 856.

performance of such an agreement will be one based on the ground that the property was purchased "on behalf of A" and is consequently barred by Section 66.¹

Where, *before* the court sale, B intends to buy the property for himself with his own funds but agrees to convey the same to A for consideration, the purchase by B is not a *benami* transaction at all and a suit by A for specific performance of the contract is one not based on the ground that the purchase was "on behalf of the plaintiff" and is outside Section 66.² If, however, the circumstances show that, notwithstanding the purchase was made with his own funds, B *never intended* to buy on his own behalf but intended to do so only on behalf of A, the case clearly falls within the mischief of Section 66.³

Where B agrees with A *subsequent* to the purchase (whether made on his own behalf or on behalf of A) to sell the property purchased, and A sues B for specific performance of that agreement, the suit is not barred by the Section.⁴ The reason is that the suit is based, not on the ground that the purchase was made "on behalf of the plaintiff," but on *agreement* which is not only not inconsistent with B's own title, but is rather the reverse.⁵

16. Suit against certified purchaser and persons claiming through him is barred. — Under Section 317 of the old Code a suit was barred only as against a certified purchaser but not as against any one claiming title under him. This was the view held by all the High Courts¹ except the Bombay High Court. That Court held that the words "certified purchaser" included his *representatives* also.² The substitution of the words "against any person claiming title under a purchase certified by the Court in such manner as may be prescribed" in the present Section for the words "against a certified purchaser" in Section 317 of the old Code has now set the conflict at rest and has given legislative effect to the Bombay view.³ Where the defendant is neither the certified purchaser nor his successor-in-title, but a third person, the Section

Note 15

1. See ('19) AIR 1919 Pat 523 (525, 526).
(('32) AIR 1932 Cal 170 (170, 171).)
2. ('23) AIR 1923 Nag 11 (13).
(('21) AIR 1921 Pat 39 (42).
[See also ('95) 18 Mad 436 (437). (In this case money was paid by the plaintiff and possession was delivered to him, but was subsequently ejected.)
(('35) 62 Cal L Jour 88 (92).
(('20) AIR 1920 Cal 101 (103).]
3. ('19) AIR 1919 Pat 523 (525, 526).
(('16) AIR 1916 Mad 1156 (1157).
4. ('35) 62 Cal L Jour 88 (93).
(('19) AIR 1919 Mad 94 (95); 42 Mad 615 (FB).
(('20) AIR 1920 P C 30 (32, 33); 43 Mad 643 : 47 Ind App 108 (PC). (Approving AIR 1919 Mad 94 (FB).)
- (('31) AIR 1931 Bom 578 (581, 582).
(('73) 10 Bom H C R A C 344 (345). (Defendant purchasing property on his own behalf.)
(('88) 11 Mad 213 (214).
5. ('19) AIR 1919 Mad 94 (95); 42 Mad 615 (FB).
(('30) AIR 1930 Bom 81 (83). (Following AIR 1919 Mad 94 (FB).)

Note 16

1. ('36) 40 Cal W N 470. (The words 'certified purchaser' in S. 260, Civil P. C., of 1859, which has to be strictly construed cannot be

held to include the heirs of the certified purchaser.)
(('98) 21 Mad 7 (8). (Suit against assignee of the certified purchaser.)
(('99) 21 All 196 (198).
(('99) 26 Cal 950 (954, 955).
1900) 5 Cal W N 341 (343).
(('98) 2 Cal W N 433 (447, 449).
(('04) 1904 Pun L R No. 28, p. 92.

Even after the new Code, the Calcutta High Court has held in cases arising under the old Code that a suit against a representative-interest of the certified purchaser is not barred — See the following cases:

- (('16) AIR 1916 Cal 394 (394).
(('20) AIR 1920 Cal 435 (437) : 47 Cal 1103.
(('14) AIR 1914 Cal 175 (176) : 19 Cal L Jour 330 (331).
(('17) AIR 1917 Cal 464 (465).
(('19) AIR 1919 Cal 979 (979).
2. ('11) 35 Bom 342 (347).
(('07) 31 Bom 61 (66).
3. ('35) AIR 1935 All 143 (146). (Decisions holding that, where the auction-purchaser is mere stake-holder and indifferent as to which party succeeds in the suit, S. 66 is not applicable, are not applicable to such a suit.)
(('38) AIR 1938 Cal 602 (604). (Section 66 applies also to assignee of benamidar.)

of course has no application.⁴ Where the real purchaser sues the certified purchaser and a third person on the ground that the purchase was made on behalf of the plaintiff; and the certified purchaser either is *ex parte* or admits plaintiff's title or does not contest the plaintiff's claim or executes a release deed in plaintiff's favour or is otherwise liable to him under a contract made after the sale which he duly admits, the Section does not bar it.⁵ The Section does not also apply to cases of contest between two persons each claiming to be the real purchaser under an admittedly benami court-auction-purchase.⁶

17. "Certified purchaser," meaning of. — In a case under Section 260 of the old Code of 1859 it was held by the Calcutta High Court that that Section applied to a suit against a purchaser at a court sale though the sale certificate was obtained by him only during the pendency of the suit.¹ A person entitled to get a sale certificate was considered as a certified purchaser as soon as his bid at the sale was accepted.² The Allahabad High Court, on the other hand, held in a similar case that until the certificate was actually granted he was not a certified purchaser but that as soon as the certificate was granted, he became a certified purchaser and the bar under the Section would become applicable.³

A sale certificate in the name of *A* "as mother and guardian of her infant son *B*" is a sale in favour of *B* who is therefore the certified purchaser.⁴

18. Waiver of right by auction-purchaser. — *A* purchases property at a court sale in the name of *B*. *B* obtains possession from the Court and *delivers it to A* and subsequently disturbs his possession. *A* sues *B* for a declaration of his title or for possession of the property. The suit is barred by Section 66. The reason is that a mere permission to hold possession cannot give or transfer a title from the *benamidar* to the real owner so as to enable him to maintain a suit on *title* against the *benamidar*.¹ After the Transfer of Property Act, no waiver or transfer of rights can be recognized in the case of immovable property in the absence of a registered instrument.²

('17) AIR 1917 Mad 324 (325).

('16) AIR 1916 Mad 657 (658).

('20) AIR 1920 Nag 51 (51) : 16 Nag L R 87.

('19) AIR 1919 Oudh 420 (425); 22 Oudh Cas 222.

(The words "certified purchaser" in the Section include persons standing in the shoes of the court purchaser.)

('16) AIR 1916 Cal 394 (394).

4. (1863) 1 Marsh 423.

('28) AIR 1928 Cal 448 (449) : 55 Cal 1070.

('29) AIR 1929 Pat 664 (674) : 8 Pat 585.

5. ('38) AIR 1938 Cal 874 (877). (Certified purchaser not contesting.)

('23) AIR 1923 Cal 302 (302, 303). (Do.)

('20) AIR 1920 Cal 932 (935). (Certified purchaser executing release in favour of plaintiff.)

('25) AIR 1925 All 47 (48). (Certified purchaser not contesting claim.)

('85) 8 Mad 511 (515). (Certified purchaser disclaiming any interest in the property and admitting plaintiff's claim.)

('81) 9 Cal L Rep 295 (296). (Certified purchaser admitting plaintiff's title.)

('03) 13 Mad L Jour 354 (355). (No contest between certified purchaser and real owner— The former admitting the latter's title.)

[See ('36) AIR 1936 All 750 (753). (In such a

case they are not persons 'claiming title' under a purchase certified by Court.)]

[See also ('98) 22 Bom 672 (678). (Certified purchaser and real purchaser—Co-plaintiffs— The former admitting the title of the latter.)

(1863) 1 Bom H C R 20 (21). (Suit by real purchaser against third party is maintainable if consent of the certified purchaser could be shown.)]

6. ('17) AIR 1917 Mad 365 (366).

Note 17

1. ('76) 25 Suth W R 493 (494).

2. ('76) 25 Suth W R 493 (494).

3. ('83) 5 All 478 (484) (FB).

4. ('69) 12 Suth W R 236 (238).

Note 18

1. ('01) 23 All 175 (179, 180).

('20) AIR 1920 Cal 852 (852).

2. *Registered instrument is not, however, always necessary as, e. g., in case of oral sales of property valued at less than Rs. 100 :*

('16) AIR 1916 Mad 657 (659).

[Note — The decision in 11 Mad 234 was before the Transfer of Property Act and the observations to the contrary are no longer law.]

[See also ('17) AIR 1917 Mad 324 (325).]

Where, however, the real owner is in possession and the certified purchaser sues him for possession, the real owner can defend his possession on the basis of the real title resting with him.³

19. Name inserted in the certificate fraudulently or without the consent of the real purchaser.—Sub-section (2) is an exception to the rule in sub-section (1). A certified purchaser is not protected if he is guilty of fraud or gets his name inserted in the sale certificate without the consent of the real purchaser.¹ The basis of this exception is that the real purchaser is really an innocent person and it is not the policy of the law to benefit a fraudulent certified purchaser as against an innocent party. Where the pleader of a party, by means of treachery and fraud, purchases at an inadequate price the property of the party in a court sale, Section 66 will not operate as a bar to a suit against him for the recovery of the property on the ground that he must be taken to have made the purchase as trustee of the plaintiff.²

20. Objection as to bar by Section 66, when can be raised.—A plea that a suit is barred by the provisions of Section 66 may be put forward and given effect to at any stage of the suit, even in appeal for the first time.¹

21. Benami transactions in general.—For principles applicable to benami transactions in general, see the undermentioned cases.¹

[See however ('81) 133 Ind Cas 551 (552) (Lah). (In the Punjab oral sale is valid and hence attestation and attornment by benamidar in favour of the real owner vendee renders S. 66 inapplicable.)]

3. See Note 8 above.

Note 19

1. ('39) AIR 1939 Rang 122 (123). (Fraud must be strictly pleaded and particulars of any fraud relied upon must be stated in the pleading.)

('84) AIR 1984 Cal 567 (567, 568) : 61 Cal 440. (Karta of joint family purchasing with family property in the name of his son fraudulently—Suit by nephew for his share not barred.)

('94) 17 Mad 282 (286). (Obiter.)

('70) 13 Suth W R 85 (85).

('87) 1887 All W N 220 (221).

(1900) 22 All 434 (440).

('15) AIR 1915 Cal 563 (563). (Manager of infant fraudulently purchasing property of ward.)

[See also ('16) AIR 1916 Mad 657 (658).

('70) 4 Beng L Rep 32 (33).]

2. ('96) 23 Cal 805 (813).

Note 20

1. ('17) AIR 1917 Oudh 143 (144). (Plea raised in second appeal.)

('32) AIR 1932 Cal 170 (170). (Plea goes to the root of the suit and does not depend upon disputed facts.)

Note 21

1. *Benami transaction — Test :*

('05) 30 All 253 (266) : 35 Ind App 104 (P C).

('89) 26 Cal 227 (230) : 26 Ind App 38 (P C). (The source of purchase money is not the only test of benami — The actual possession and receipt of rents also furnish a test of benami character.)

('82) 9 Cal L Rep 64 (65).

('96) 23 Cal 460 (476).

('96) 23 Cal 962 n.

('96) 23 Cal 962 (966).

('73) 20 Suth W R 112 (113).

('75) 23 Suth W R 42 (42). (Following 21 Suth W R 422.)

('87) 11 Bom 708 (715, 717, 718).

('14) AIR 1914 Cal 175 (176) : 19 Cal L Jour 330 (332).

('16) AIR 1916 Cal 532 (537, 538).

('08) 35 Cal 551 (558, 559).

('13) 18 Cal L Jour 616 (619, 620).

('06) 1906 Pun L R No. 109, p. 356 : 1906 Pun Re No. 3.

('04) 8 Cal W N 620 (621).

('14) AIR 1914 Bom 283 (284) : 38 Bom 10.

('16) AIR 1916 Cal 745 (746).

Party alleging his own fraud—Fraud carried out—Court will not help :

(1865) 3 Suth W R 92 (92). (Nor can his representatives or private purchasers from him plead his fraud.)

(1865) 4 Suth W R 37 (37). (Defendant alleging his own fraud.)

('33) AIR 1933 Mad 457 (459) : 56 Mad 646. (Defendant pleading his own fraud.)

(1862) 1 Hay 528.

(1865) 3 Suth W R 221 (222). (Following 3 Suth W R 92.)

67. [S. 327.] (1) The ^a*Provincial Government* may, by notification in the ^b*Official Gazette*, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the ^a*Provincial Government*, to make it impossible to fix their value.

(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in

('70) 13 Suth W R 87 (89, 90).

('67) 7 Suth W R 118 (118).

(1900) 27 Cal 231 (233).

('01) 28 Cal 370 (379, 380).

('06) 33 Cal 967 (982, 983).

('07) 31 Bom 405 (411).

('97) 20 Mad 326 (329).

('06) 29 Mad 72 (74). (Fraud need not be fully carried out.)

('08) 31 Mad 97 (99).

('08) 31 Mad 485 (487, 488). (Defendant alleging his own fraud to escape from the consequences of a decree fraudulently and collusively obtained.)

('08) S N U B R 3rd Qr. 1. (Benami transaction.)

('06) 3 Low Bur Rul 245 (247, 248). (Plaintiff alleging his own fraud — Suit should be dismissed whether fraud was carried out or not.)

('99) 23 Bom 406 (409, 413).

Real owner can sue:

('14) AIR 1914 Cal 674 (675). (No conveyance of title from benamidar necessary.)

('16) AIR 1916 All 36 (38) : 38 All 122. (Even if he affirms ownership in the benamidar in a previous suit.)

Benamidar can also sue:

('18) AIR 1918 P C 140 (143) : 46 Cal 566 : 46 Ind App. 1 (P C). (Whether real owner is party or not.)

('29) AIR 1929 Pat 664 (674) : 8 Pat 585. (Subject to equities against the beneficial or real owner.)

('98) 22 Bom 672 (679). (Even when the true owner's name is disclosed.)

('11) 34 Mad 143 (150). (Suit to set aside execution sale vitiated by fraud.)

('93) 20 Cal 388 (395). (Can execute decree in his name.)

('98) 21 Mad 30 (31). (Benamidar holder of a promissory note.)

Innocent transferee from benamidar — Real owner is estopped from asserting his rights:

('71) 15 Suth W R 19 (20). (Real owner consenting to the transfer.)

('73) 19 Suth W R 292 (296) (P C). (His heirs are also estopped.)

('66) 5 Suth W R 37 (38).

('05) 29 Bom 306 (312). (Per Batty, J.—Source of

purchase money is not the sole criterion.)

(1854) 6 Moo Ind App 53 (74) (P C). (Source of purchase money is the criterion—The knowledge and assent of the person in whose name the purchase is made is immaterial.)

('15) AIR 1915 P C 96 (97) : 42 Ind App 202 : 37 All 557 (P C). (Criterion is the source of purchase money.)

('13) 18 Cal W N 428 (429) (P C).

('87) 14 Cal 109 (117) : 13 Ind App 160 (P C).

(Actual possession and receipt of rents.)

[See also ('70) 13 Moo Ind App 395 (402) (P C).

('93) 20 Cal 296 (308) : 19 Ind App 203 (P C).

('76) 25 Suth W R 532 (534). (Real owner must make out a clear right to relief against the bona fide purchaser from the benamidar.)

('75) 24 Suth W R 79 (79).

('81) 5 Bom 154 (174). (Transaction made out to be benami—Courts will deal with it as English Courts of Equity.)

('71) 14 Moo Ind App 234 (244) (P C). (Decision as to benami nature must rest upon legal grounds and not on suspicion.)

Burden of proof is upon person alleging benami to prove it:

('83) 12 Cal L Rep 186 (193) (P C).

('70) 14 Suth W R 10 (11). (Where defendant is in possession for a long time, the ostensible owner, plaintiff, must prove his title.)

('80) 5 Cal L Rep 470 (474) (P C).

('73) 20 Suth W R 269 (269). (Purchase by father in the name of his son—Presumption is that it is on behalf of family.)

(1854) 6 Moo Ind App 53 (79) (P C). (Father purchasing property in the name of his son — Presumption is that the purchase is on behalf of family.)

Where the fraud is not carried out, true nature of transaction can be shown:

('70) 13 Moo Ind App 551 (559) (P C). (A pleading by two defendants against the suit of another plaintiff cannot amount to an estoppel as between them.)

('70) 13 Moo Ind App 585 (600) (P C).

('74) 21 Suth W R 422 (424).

('72) 18 Suth W R 485 (494). (Following 13 Moo Ind App 551 (P C).)

execution of decrees were in force therein, the "*Provincial Government* may, by notification in the "*Official Gazette*, declare such rules to be in force, or may, by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.

[1877, S. 327; See Ss. 54 and 68 to 72.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

b. Substituted by *ibid* for "Local Official Gazette."

1. Sub-section (2). — Sub-section (2) was inserted in the Section by the Code of Civil Procedure Amendment Act (I of 1914). There was an analogous provision contained in the corresponding Section (Section 327) of the former Code, and as the present Code originally omitted this provision it was held that the special rules which had been issued under the former Code were indirectly repealed from the date of the new Civil Procedure Code.¹ Even after the insertion of sub-section (2) by Act I of 1914, if no notification is issued under it, the special rules framed under Section 327 of the former Code do not apply.² But where rules are made after due notification under the sub-section, they are binding and a sale not in conformity with them is void.³

The words "with the previous sanction of the Governor-General in Council" were omitted by the Devolution Act (XXXVIII of 1920), Section 2 and Schedule I, Part I.

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVEABLE PROPERTY.

68. [S. 320, para. 1.] The "*Provincial Government* may declare, by notification in the "*Official Gazette*, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector.

Power to prescribe rules for transferring to Collector execution of certain decrees.

[1871, S. 320; see Ss. 54, 67 and 69 to 72.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

b. Substituted by *ibid* for "Local Official Gazette."

Section 67 — Note 1

1. ('13) 1913 Pun Re No. 89, p. 318. (Punjab Notification No. 1297-S is indirectly repealed.)
(‘10) 7 Ind Cas 495 (495): 1910 Pun Re No. 4 (Rev.).

2. ('21) AIR 1921 Lah 223 (224). (Property of an insolvent vesting in receiver before his death.)
3. See ('88) 1888 Pun Re No. 95, p. 253. (A case under the old Code.)

Synopsis

1. Object of the Section.
2. "Has ordered any immoveable property to be sold."
3. Notifications under the Section.
4. Retrospective effect of notifications.
5. Execution shall be transferred to the Collector.
6. Jurisdiction of Civil Court and of Collector. See Section 70 Note 2.
7. Liquidation of judgment-debt by temporary alienation of judgment-debtor's land. See Section 72 Notes 6, 7 and 8.

1. Object of the Section. — In *Huro Prasad v. Kali Prasad*, I. L. R. 9 Calcutta 290 (F. B.), Field, J., observed as follows:

"In different parts of India, the effect of sales in execution of decrees was to transfer landed estates from the old families to modern speculators. A strong opinion was entertained by certain members of the Government of India that these results of the administration of civil justice were impolitic and inexpedient; and it was suggested that some procedure might be devised by which the chief executive officer of the district would be enabled to liquidate debts of the encumbered landholders without the immediate sale of their estates, and so to preserve the old landed gentry of the country. The provisions of Sections 320 to 325C¹ were inserted in the Code of Civil Procedure, in order to give effect to these suggestions."^{1a}

The words "with the previous sanction of the Governor-General in Council" have been omitted by the Devolution Act (XXXVIII of 1920), Section 2 and Schedule I, Part I.

2. "Has ordered any immoveable property to be sold." — The Section contemplates cases in which *immoveable property* has been ordered to be sold. Hence a simple money decree in execution of which the Court has not ordered any *immoveable property* to be sold cannot be transferred to the Collector for execution under this Section.¹ For a similar reason, the Section does not apply to land which is not capable of being sold in execution, *e. g.*, land the sale of which in execution of a decree is prohibited under the law. Hence a decree cannot be transferred to the Collector for realising the decretal amount from such land even otherwise than by the sale of the land.²

3. Notifications under the Section. — Sections 68 to 71 have no application to the Punjab as no notification by the Provincial Government has been issued as contemplated by Section 68.¹

The Government of the United Provinces of Agra and Oudh have issued a Notification No. 576-1A-93, dated 26th March 1932, declaring that with effect from the 1st April 1932, the execution of decrees in cases in which the Civil Court has ordered any agricultural land situated in those provinces or any interest in such land

Section 68 — Note 1

1. Corresponding to the present Ss. 68, 70, 71 and Sch. III.

1a. See also ('35) AIR 1935 All 468 (469). (Object of Section 68 explained.)

('35) AIR 1935 Oudh 156 (161) : 10 Luck 459. (Object is to enable Collector to liquidate debts of encumbered land-holders without immediate sale of their estates and so to preserve old landed gentry of the country.)

Note 2

1. ('26) AIR 1926 Oudh 318 (319).

2. ('35) AIR 1935 Nag 133 (134, 135) : 31 Nag L R 239.

('26) AIR 1926 All 339 (339) : 48 All 392. (Prohibition under S. 16 of the Bundelkhand Land Alienation Act, 1903.)

Note 3

1. ('28) AIR 1928 Lah 475 (476). (Sale under S. 141, Punjab Tenancy Act. Paras. 58 to 69 of Instructions of the Court apply.)

to be sold, shall be transferred to the Collector. See the undermentioned decisions² relating to the above notification.

Sections 68 to 72 have been excluded from operation in the following cases —

- (1) Suits and proceedings under the Agra Tenancy Act (III of 1926): see Section 264 and Schedule II.
- (2) Suits for recovery of rent under the Bengal Tenancy Act (VIII of 1885) as amended by Act IV of 1928, Section 148, and, under the Orissa Tenancy Act (II of 1913): see Section 198.
- (3) Suits, appeals and other proceedings under the Madras Estates Land Act (I of 1908): see Section 192.

4. Retrospective effect of notifications. — Alterations merely in the form of procedure are; as has been seen in Note 3 to Preamble, retrospective in effect. Hence, rules made by the Provincial Government in pursuance of a notification under Section 68 for regulating the procedure of the Collector affect sales ordered before the coming into force of such rules as well as those ordered after, unless there be some strong reason to the contrary.¹ On the wording of the particular notification in the undermentioned case,² it was held by the Allahabad High Court that the notification did not apply to orders for sale passed before the date of the notification. Where agricultural land belonging to a judgment-debtor has been sold by a Civil Court in execution of a decree, and before the confirmation of the sale a notification under this Section is issued by the Provincial Government directing execution proceedings in such cases to be transferred to the Collector, the notification does not affect the validity of the sale held by the Civil Court.³

See also Section 70 Note 6 foot-note (1).

5. Execution shall be transferred to the Collector. — Where a notification under the Section affects only a portion of the immovable property ordered to be sold, the decree should be transferred to the Collector for execution as regards such portion of the land only.¹ Where a judgment-debtor stands by and allows a Court to sell certain land as not being covered by the Government notification under the Section, he cannot subsequently sue to set aside the sale on the ground that the land was covered by the notification and that therefore the *Court* had no power to sell the land.²

2. ('87) AIR 1937 All 550 (551) : I L R (1937) All 766. (The Collector ceases to have jurisdiction to sell or confirm the sale, if one has already taken place, after the Court passing the decree recalls under R. 3 of the U. P. Govt. Notification in respect of sale under S. 68—Anything done by the Collector during the subsistence of the order of recall, is without jurisdiction.)

('85) AIR 1935 All 468 (469). (The notification applies to pending execution proceedings.)

Note 4

1. ('35) AIR 1935 All 468 (869). (Notification No. 576-1A-93 applies not only to execution proceedings which may be instituted after it is issued but also to pending execution proceedings.)

('91) 1891 Bom P J 294, Reprint page 173. (Case under old Code.)

('33) AIR 1923 Oudh 274 (275). (Notification of U. P. Government directing execution to be transferred to Collector in cases of sales of agri-

cultural land.)

('34) AIR 1934 Oudh 16 (17) : 9 Luck 390. (U. P. Notification No. 576-1A-93, relating to agricultural land in Agra and Oudh.)

('34) AIR 1934 All 253 (255). (Date of preliminary decree is not the test and execution should be transferred to Collector.)

[See however ('93) 17 Bom 289 (293). (A statute is not retrospective where party had acquired a vested right.)]

2. ('82) 4 All 116 (120) (F B).

('82) 1882 All W N 12 (12).

3. ('34) AIR 1934 Oudh 143 (144, 145) : 9 Luck 554.

Note 5

1. ('06) 28 All 631 (632). (Recovery of money—Ancestral portion.)

2. ('22) AIR 1922 All 56 (57) : 44 All 380. (Allowing ancestral land to be sold as non-ancestral.) ('06) 28 All 273 (275). (Money decree—Ancestral property sold as non-ancestral.)

6. Jurisdiction of Civil Court and of Collector. — See Section 70 Note 2.

7. Liquidation of judgment-debt by temporary alienation of judgment-debtor's land. — See Section 72 Notes 6, 7 and 8.

69. The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section.

Provisions of Third
Schedule to apply.

[See S. 68 and Ss. 70 to 72.]

Synopsis

1. Applicability of the Section. See Section 68 Note 3.

2. Provisions of the Third Schedule shall apply.

1. Applicability of the Section. — See Section 68 Note 3.

2. Provisions of the Third Schedule shall apply. — The provisions of Sections 321 to 325C of the old Code have now been placed in the Third Schedule.

This Section and Section 70 give the Collector sole authority for finding the best means of satisfying the transferred decree. But this power does not extend so as to give him jurisdiction to determine whether the decree itself is satisfied or not. Such jurisdiction belongs to the Civil Court.¹

70. [S. 320, Paras 2 to 4.] (1) The ^a*Provincial Government* may make rules consistent with the aforesaid provisions —

Rules of procedure.

(a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for re-transmitting the decree from the Collector to the Court;

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector;

Section 69 — Note 2

1. ('12) 17 Ind Cas 142 (143) : 37 Bom 32.

('33) AIR 1933 Sind 112 (114, 115) : 26 Sind L R 506. (Mortgage decree.)

[See also ('38) AIR 1938 Nag 49 (50). (Application to set aside order of satisfaction to be disposed of by Court.)]

(c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

(2) A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or

Jurisdiction of Civil Courts barred.

by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

(a) Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

Synopsis

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|--|---|
| <ol style="list-style-type: none"> 1. Extent of power of Provincial Government to make rules. 2. Jurisdiction of Collector and Civil Court. 3. Ancestral property. 4. Suit to set aside orders of Collector. 5. Suit to set aside sale held by Collector. | <ol style="list-style-type: none"> 6. Power of Collector to set aside sale. 7. Appeal from orders of Collector. 8. Revision of orders of Collector. 9. Power of Collector to pass order under Section 476, Criminal Procedure Code. 10. Applicability of the Section. See Section 68 Note 3. |
|--|---|

1. Extent of power of Provincial Government to make rules. — A rule made by the Provincial Government under this Section providing that no suit shall lie to set aside a sale confirmed by the revenue authority is not *ultra vires*. Clause (b) of sub-section (1) of this Section authorises such a rule being made.¹ Under the former Code it was held that the power to prescribe rules for *regulating the procedure* of the Collector included a power to make rules providing for an appeal from his orders.²

Under Sections 35 and 37 of Madras Regulation V of 1804 the Local Government has power to make rules in regard to claims which have not merged into decrees and to extend to such claims the procedure laid down in Section 322 (a), (b) and (d) (Schedule III, Paras. 3, 4 and 6 of the present Code).³

For rules providing for appeals in the Punjab from the orders of the Collector or the gazetted subordinate of the Collector in certain cases, see *Punjab Gazette*, 1909, Part I, page 12.

2. Jurisdiction of Collector and Civil Court. — Section 69 provides that in all cases in which execution of the decree has been transferred under Section 68, it is the

Section 70 — Note 1

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| <ol style="list-style-type: none"> 1. ('20) AIR 1920 All 9 (10): 42 All 275. (Decree for sale of ancestral property.) | <ol style="list-style-type: none"> 2. ('90) 12 All 564 (569). 3. ('05) 28 Mad 489 (491). |
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In matters arising in execution, but not covered by the provisions of the Third Schedule or the rules framed under this Section, the Civil Court will continue to have jurisdiction.⁷

The Collector ceases to have jurisdiction to sell or confirm the sale when the Court passing the decree recalls, under the rules governing the matter, the proceedings.⁸

For jurisdiction of Collector and Civil Court in respect of partition of an undivided estate assessed to Government revenue or for separate possession of a share of such estate, see Section 54 Notes 5 and 7.

3. Ancestral property. — As an example of the working of this Section may be taken the Allahabad Government Notifications requiring that decrees for the sale of "ancestral" property must be transferred to the Collector for execution. In such cases the Civil Court has no jurisdiction to sell the property.¹ But the decision of the Court as to property being non-ancestral is final and cannot be attacked subsequent to the sale.²

As to what is and what is not ancestral property, see the undermentioned case.³

4. Suit to set aside orders of Collector. — A suit to set aside the order of the Collector is maintainable under two circumstances —

(1) *Where the order of the Collector is such that if it had been passed by the Court a suit would have been maintainable to set it aside,¹ except where the order is declared to be final or conclusive by the rules framed by the Provincial Government.^{1a}*

Thus, it was held under the former Code that the last clause of Section 312 (O. 21 R. 92) did not preclude a suit to confirm a sale and set aside the order passed

7. ('09) 3 Ind Cas 572 (574).

('07) 81 Bom 207 (215, 216, 217). (Can set aside sale.)

('96) 1896 Pun Re No. 83, page 261. (Can confirm sale by Collector.)

('13) 18 Ind Cas 1004 (1005) (All). (Re-transfer to Collector of execution proceedings.)

('95) 7 All 407 (409). (Delivery to the purchaser.)

('31) AIR 1931 All 320 (323). (Substitution of heirs.)

('14) AIR 1914 Bom 252 (253): 38 Bom 673. (Grievances under O. 21 Rr. 100 and 101.)

('86) AIR 1936 Bom 227 (233, 241): 60 Bom 516. (Power of determining whether land is liable to attachment is retained by Civil Court.)

('86) AIR 1936 Bom 189 (191): 60 Bom 688. (Permission to decree-holder to purchase when the judgment-debtor is a minor—Sub-rr. 11 and 15 framed by Bombay Government under S. 70 — In such cases, Government has not transferred the power to permit the decree-holder to buy.)

[See also ('38) AIR 1938 Nag 49 (50). (Application to set aside order of satisfaction—Collector to refer such questions to Civil Court.)]

[But see ('13) 19 Ind Cas 903 (904): 37 Bom 488. (Grievances of third persons to be before Collector.)]

8. ('37) AIR 1937 All 550 (551): 1 L R (1937) All 766.

[See also ('37) 20 Nag L Jour 242 (244). (It is not open to the Collector to proceed after the proceedings had been stayed by the Civil Court.)]

Note 3

1. ('82) 4 All 382 (384).

('33) AIR 1933 All 192 (195).

('06) 28 All 631 (632). (If portion of property ancestral so much portion should be transferred to Collector.)

('14) AIR 1914 All 339 (340): 36 All 33. (Ancestral grove with a house in it.)

('82) 4 All 115 (115) (FB). (Decree for sale of ancestral land in enforcement of an hypothecation of the land is a "decree for recovery of money.")

('85) 7 All 402 (403). (Riparian village ancestral, an accretion to it must be ancestral.)

[See also ('36) AIR 1936 Oudh 280 (283): 12 Luck 185.]

2. ('06) 28 All 273 (275, 276).

('96) 18 All 141 (144). (No application maintainable under O. 21 R. 90.)

('22) AIR 1922 All 56 (57): 44 All 380. (Suit not maintainable in absence of proof of fraud and injury.)

('33) AIR 1933 All 192 (196). (Can assail validity on grounds apart from those specified in O. 21 R. 90.)

3. ('16) AIR 1916 All 107 (107): 38 All 481.

Note 4

1. ('26) AIR 1926 All 575 (576): 48 All 568. (Setting aside sale after confirming and re-transmitting.)

('17) AIR 1917 Nag 19 (21). (Leasing village.)

('98) 20 All 379 (383) (FB). (Suit for declaration that sale is valid.)

[Contra ('09) 5 Nag L R 121 (124).]

1a. ('20) AIR 1920 All 9 (10): 42 All 275.

('23) AIR 1923 All 186 (187): 45 All 203 (FB).

[See also ('26) AIR 1926 Oudh 612 (612): 1 Luck 558. (It is not clear whether there were any rules giving finality to the orders.)]

adjustment of the decree.^{2a}

Under the former Code the expression used was "shall be deemed to be acting judicially *within the meaning of Act No. XVIII of 1850.*" The italicised words have been omitted in the present Section, presumably to negative the view³ that, except for the purposes of Act XVIII of 1850, the Collector's functions in execution proceedings were of a ministerial and not of a judicial character.

As to applicability of the Section, see Section 68 Note 3.

2. Powers of Collector. — See Schedule III Paragraph 1.

72. [S. 326.] (1) Where in any local area in which no declaration under Section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

[1877, S. 326; 1859, S. 244; See Ss. 54, 68 to 71.]

Synopsis

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| 1. Legislative changes. | 7. Temporary alienation of land of which sale in execution is prohibited. See Section 51 Note 4. |
| 2. "And the Collector represents to the Court." | 8. Collector to provide for such satisfaction in the manner recommended. |
| 3. "Collector," meaning of. | 9. Provisions of Sections 69 to 71 shall apply. |
| 4. Reference to the Collector by the Civil Courts. | 10. Appeal. |
| 5. Discretion of Court. | 11. Revision. |
| 6. Court may authorise only temporary alienation. | |

1. Legislative changes. — The corresponding provision in the Code of 1859 (Section 244) required that security for the amount of the decree must be given before the Section could be applied. This condition was deleted in the Code of 1877. The second sub-section was inserted in the Section in the Code of 1882. The only change of any importance made by the present Section is that it has omitted the expression "or management" which occurred after the words "temporary alienation." As to the applicability of the Section, see Section 68 Note 3.

2a. ('37) AIR 1937 Nag 217 (219).

('35) AIR 1935 Bom 158 (160); 59 Bom 345.

('36) AIR 1936 Bom 277 (279); 60 Bom 729.

3. ('91) 1891 All W N 189 (190, 191).

('83) 7 Bom 332 (336).

('87) 11 Bom 478 (481).

2. "And the Collector represents to the Court." — This Section does not authorize the Collector to effect a temporary alienation of the judgment-debtor's property on his own responsibility. The Collector can only make a representation to the Court which should then decide upon the matter after hearing the parties.¹ The Collector's proposal must provide for satisfaction of the decree within a reasonable period, otherwise the Court cannot act on his proposal.² His proposal for temporary alienation need not contain an express representation that the public sale of the land is objectionable. The very fact of his making the proposal for temporary alienation may be taken to show his opinion that the sale of the land is objectionable.³

As to the power of the Court to order the temporary alienation of property in cases not covered by this Section, see Note 4 to Section 51, *ante*.

3. "Collector," meaning of. — The term "Collector," not being defined anywhere in the Civil Procedure Code, is to be taken in the sense of the definition in General Clauses Act, Section 3 (10), *viz.*, as meaning the Chief Officer in charge of the revenue administration of a district.¹

4. Reference to the Collector by the Civil Courts. — Though this Section empowers the Court to sanction a temporary alienation on the representation of the Collector, the Court can refer the case to the Collector and enquire if he wishes to intervene.¹ If the Collector reports his inability to do so, the Court should go on with the execution application in accordance with law and cannot decline to proceed further with it.²

As to the Court's power to act without any representation from the Collector, see Note 4 to Section 51, *ante*.

5. Discretion of Court. — The Court is not bound to accept the Collector's proposal and, if after hearing the decree-holder's objections and the evidence that might be offered in support of them the Court is not fully satisfied that the proposal is feasible, it ought, in the exercise of its discretion, to refuse its sanction.¹ The Court

Section 72 — Note 2

1. ('86) 1886 Pun Re No. 114, p. 269.

('36) AIR 1936 Pesh 14 (15). [But Collector has no authority to suggest satisfaction of the decree in part by transfer of certain debts from the judgment-debtors to the decree-holders, or that mortgagee rights should similarly be transferred to the decree-holder — He has also no right to compel the decree-holder himself to take the lands on lease at a valuation fixed by the Collector.]

('35) AIR 1935 Pesh 113 (114). (He has however no authority to represent that a temporary alienation is objectionable and even if he represents that a public sale is objectionable, it is for the Court to decide whether his objection should be maintained.)

2. ('06) 1906 Pun Re No. 63, p. 233.

[But compare ('94) 1894 Pun Re No. 25, p. 61.

3. ('19) 51 Ind Cas 399 (402) : 1919 Pun Re No. 1 (Rev).

Note 3

1. ('15) AIR 1915 Lah 197 (198).

Note 4

1. ('10) 8 Ind Cas 391 (391) (Lah).

('37) 169 Ind Cas 511 (512) (Lah). (Application by a decree-holder for temporary alienation of judgment-debtor's land, referred by Court to Collector — Another decree-holder applying to Court for rateable distribution in temporary alienation before Collector made his proposal — Proper course to be adopted by Court is to refer that application also to the Collector and to ask him to suggest a method of temporary alienation which will provide as far as possible for satisfaction of both decrees.)

2. ('26) AIR 1926 Lah 682 (682).

Note 5

1. ('18) AIR 1918 Lah 361 (362). (Proposal to grant a 12 years lease on part of the property.)

('94) 1894 Pun Re No. 25, p. 61.

('86) 1886 Pun Re No. 114, p. 269.

('20) AIR 1920 Lah 456 (457) : 1 Lah 192 (FB).

('83) 9 Cal 290 (293). (Proposal to pay off the debt in 13 years.)

('35) AIR 1935 Lah 964 (965). (More than one application pending—Collector representing that public sale of property under attachment is objectionable—Proper procedure indicated.)

('35) AIR 1935 Pesh 113 (114). (Collector has no authority to represent that temporary alienation

must deal with the Collector's proposal in the exercise of its own judgment and not in deference to the opinion expressed by the Judge of the superior Court forwarding the Collector's recommendation to it.²

As to Court's power to sanction temporary alienation in absence of Collector's representation, see Note 4 to Section 51, *supra*.

6. Court may authorise only temporary alienation. — This Section permits only a temporary alienation of the judgment-debtor's land and does not empower the Court to allow payment of the decree amount by instalments.¹

As to form of authorisation, see Schedule I, Appendix E, Form No. 42.

7. Temporary alienation of land, of which sale in execution is prohibited. — See Section 51 Note 4, *ante*.

8. Collector to provide for such satisfaction in the manner recommended. — The Collector is not required to submit a detailed scheme to the Court when he makes a representation under this Section and the Court may give him an authority in general terms.¹

9. Provisions of Sections 69 to 71 shall apply. — By virtue of this provision, Para 2 of Schedule III applies to Section 72 and the Court cannot therefore direct a temporary alienation of property of which the decree orders the sale in pursuance of a contract specifically affecting it.¹ Similarly, under Para 2 of Schedule III, the judgment-debtor cannot grant a usufructuary mortgage of property which is under the Collector's management under this Section.² Under the same Paragraph the period during which the property is under the Collector's control under the present Section must be excluded in computing the limitation for execution against the property.³ So also, Section 71 must be read with this Section, and as Section 71 provides that the Collector must be deemed to be acting judicially, all objections relating to execution proceedings before the Collector under Section 72 must be disposed of by him.⁴

10. Appeal. — There is no right of appeal against the Collector's order making a representation or refusing to make a representation to the Court under the present Section.¹ But the order of the Court authorising the Collector to make temporary alienation is appealable.²

11. Revision. — Where a Court, without exercising its own judgment, merely accepts, as a matter of course, the Collector's recommendation, the order of the Court can be set aside in revision.¹

is objectionable — It is for Court to decide whether such objection should be maintained even if taken by Collector.)

2. ('74) 6 N W P H C R 40 (41).

Note 6

1. ('70) 2 N W P H C R 59 (60).

('70) 2 N W P H C R 347 (347). (Instalment satisfaction extending over 13 years.)

('74) 6 N W P H C R 39 (41). (Instalment satisfaction extending over 12 years.)

Note 8

1. ('94) 1894 Pun Re No. 25, p. 61.

Note 9

1. ('80) 2 All 856 (857).

2. ('90) 17 Cal 432 (436).

3. ('98) 20 All 383 (385).

4. ('28) AIR 1928 Lah 475 (476).

Note 10

1. ('94) 1894 Pun Re No. 25, p. 61. (Order of Collector making a proposal.)

('10) 8 Ind Cas 391 (391) : 1910 Pun Re No. 5 (Rev). (Order refusing to intervene.)

2. ('94) 1894 Pun Re No. 25, p. 61.

Note 11

1. ('35) AIR 1935 Lah 964 (965).

DISTRIBUTION OF ASSETS

73. [S. 295.] (1) Where assets⁴ are held by a Court⁴ and more persons than one have, before the receipt of such assets,¹¹ made application to the Court⁸ for the execution of decrees for the payment of money⁶ passed against the same judgment-debtor⁷ and have not obtained satisfaction thereof, the assets, after deducting the costs of realization,¹⁹ shall¹² be rateably distributed²² among all such persons:

Proceeds of execution sale to be rateably distributed among decree-holders.

Provided as follows:—

- (a) where any property is sold subject to a mortgage or charge,¹⁵ the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;
- (b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge,¹⁶ giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;
- (c) where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance¹⁷ thereon, the proceeds of sale shall be applied —
 - first, in defraying the expenses of the sale;
 - secondly, in discharging the amount due under the decree;
 - thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any); and
 - fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to

73 receive the same, any person so entitled may sue such person to compel him to refund the assets.¹⁸

(3) Nothing in this section affects any right of *the Crown*.¹⁹

[1877, S. 295; 1859, S. 270; See S. 64, O. 21 Rr. 52, 72, 89 and 90.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government."

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and object of the Section. 3. Essential conditions for the applicability of the Section. <ol style="list-style-type: none"> 4. There must be assets held by the Court. 5. What are assets. See Note 4. 6. Claimant for rateable distribution and attaching decree-holder must be holders of decrees for the payment of money. 7. Such decrees should have been obtained against the same judgment-debtor. 8. Claimant for rateable distribution must have applied for execution to the Court by which the assets are held. 9. Effect of dismissal of the application for execution. 10. Claimant attaching before judgment. 11. The application should have been made before the receipt of assets by the Court. 11a. "And have not obtained satisfaction thereof." 12. Jurisdiction of Court to inquire into the validity of the decree under which rateable distribution is claimed. | <ol style="list-style-type: none"> 13. Right of one decree-holder to impeach the decree of another. See Note 12. 14. Insolvency or liquidation, how far affects the right of rateable distribution. 15. Sale subject to mortgage — Mortgagee cannot get rateable distribution — Proviso (a). 16. Sale free of mortgage — Rights of mortgagee — Proviso (b). 17. Sale in execution of decree on mortgage — Mode of applying sale proceeds — Proviso (c). 18. Suit for refund of assets — Clause (2). 19. Priority of debts — Clause (3). 20. Debts due to Crown. See Note 19. 21. Debts due to Co-operative Society. See Note 19. 22. Mode of distribution. 22a. Appropriation of amount received by way of rateable distribution. 23. Application for rateable distribution is one for a step-in-aid of execution. 24. Appeal. 25. Revision. |
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Other Topics (Miscellaneous)

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| <p>Application for rateable distribution, conditions of. See Note 8.</p> <p>Distinction between "held" and "realised." See Note 4.</p> <p>Distribution of assets realised by rent decree. See Note 19.</p> <p>Effect of attachment before judgment. See Note 10.</p> <p>Effect of rateable distribution on debtor's surety. See S. 145 Note 8.</p> <p>Fund in Court — Rateable distribution of. See Note 11.</p> <p>Higher Court to determine claims for rateable distribution. See Note 8.</p> <p>Inter-relation between S. 73 and O. 21 R. 52. See Notes 11 and 19.</p> | <p>Limitation of suit for refund. See Note 18. O. 21 R. 72 does not affect S. 73. See Notes 4 and 11.</p> <p>Priority of attachment confers no prior right. See Note 2.</p> <p>Property declared not liable but sold by another decree-holder. First decree-holder entitled. See Note 19.</p> <p>Right of rival decree-holder to challenge decree. See Note 12.</p> <p>"Shall be rateably distributed." See Notes 7, 12 and 22.</p> <p>"To the Court." See Note 8.</p> <p>Transfer of assets whether necessary. See Note 11.</p> <p>Whether Small Cause Court can try suit for refund. See Note 18.</p> <p>Who can apply. See Notes 12 and 6.</p> |
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The rule enunciated in this Section is only a rule of *procedure* and provides a cheap and speedy mode of execution of several decrees obtained against the same judgment-debtor by rateably distributing the assets held by a Court amongst the several rival decree-holders. It does not, however, alter or limit the *substantive rights* of such rival decree-holders.⁵ A failure to participate in the assets under this Section does not deprive a decree-holder of the rights to execute his decree.⁶ As observed by their Lordships of the Privy Council in *Shankar Sarup v. Mejo Mal*,⁷ the scheme of the Section "is rather to enable the Judge as a matter of *administration* to distribute the price according to what seem, at the time, to be the rights of the parties, without this distribution importing a conclusive determination on those rights which may be subsequently re-adjusted in a suit."

See also the undermentioned case.⁸

3. Essential conditions for the applicability of the Section. — In order that a decree-holder may claim a rateable distribution of the assets of the judgment-debtor under this Section, the following conditions must exist¹ —

1. The assets must be *held* by the Court.
2. The decrees obtained by the decree-holder and the attaching-creditor must be *decrees for the payment of money*.
3. Such *decrees* should have been obtained *against the same judgment-debtor*.
4. The claimant for rateable distribution must have *applied for execution* to the Court by which the assets are held.
5. Such application should have been made before the receipt of assets by the Court.

If the above conditions are all fulfilled, the decree-holder will be entitled to participate in the rateable distribution. It is not necessary that he should have given notice of his claim to other decree-holders.²

Before passing an order under this Section, the Court should give the parties claiming to be interested, an opportunity of being heard, and of establishing their claims to participate in the distribution.³

4. There must be assets held by the Court. — The right to rateable distribution under this Section is conditional upon there being assets held by the Court.

('86) 12 Cal 317 (321).

('35) AIR 1935 Nag 214 (215): 31 Nag L R 423. (Rateable distribution under Civil P. O. and distribution of assets under Provincial Insolvency Act are made on same principle.)

5. ('79) 4 Cal 29 (32).

('84) 10 Cal 567 (576). (A suit is maintainable on such rights even without applying under this Section.)

('26) AIR 1926 Oudh 616 (617): 1 Luck 569. (Rateable distribution is a mode of execution of a decree for the payment of money prescribed by law.)

('67) 2 Agra 183 (185). (Section applies only to rival decree-holders claiming under different decrees and not to persons claiming under the same decree.)

6. ('73) 19 Suth W R 255 (260).

7. ('01) 23 All 313 (322): 28 Ind App 203 (P C). [See also ('35) AIR 1935 Cal 290 (295): 62 Cal 715 (FB).]

8. ('34) AIR 1934 Mad 426 (427): 58 Mad 59. (Distribution under this Section not a matter of equity—A Court has to deal with it only on terms of S. 73.)

Note 3

1. ('10) 11 Cal L Jour 69 (78).

('32) AIR 1932 All 411 (413): 54 All 516.

('05) 27 All 132 (135).

('35) AIR 1935 Cal 290 (290): 62 Cal 715 (FB).

('21) AIR 1921 Cal 801 (802).

('16) AIR 1916 Cal 264 (266).

('18) AIR 1918 Mad 512 (512).

('82) 6 Bom 16 (18). (Must have applied for execution.)

('11) 14 Cal L Jour 50 (52). (Application should be made before the whole purchase money is deposited.)

('27) AIR 1927 Bom 542 (551): 51 Bom 855. (Attorney who has got a lien on his client's property but who has neither got a decree nor applied in execution, cannot come under S. 73.)

[See ('34) AIR 1934 All 652 (653).]

2. ('05) 27 All 132 (134, 135).

3. ('97) 2 Upp Bur Rul 274.

('10) 13 Oudh Cas 282 (284). (The applications must be dealt with after notice to the rival decree-holders.)

Hence, where the property attached is purchased by the attaching decree-holder privately, no right to rateable distribution arises as in such a case no proceeds come into the hands of the Court.¹ The word "assets" means all a man's property, of whatever kind, which may be used to satisfy debts or demands existing against him,² in other words, which may be used to satisfy his *liabilities*.

The five per centum of the sale price which is deposited under O. 21 R. 89 for payment to the auction-purchaser as compensation is not an asset of the judgment-debtor available for rateable distribution among his judgment-creditors. The reason is that the five per centum is not deposited in payment of any *debt* due by the judgment-debtor to the auction-purchaser but a statutory payment in order to ensure the setting aside of the sale.³

Where the manager of a joint Hindu family is adjudicated an insolvent, all that vests in the Official Receiver is not the *interest* of the other members of the family in the family property but only the right or the capacity which the insolvent had of making such interest available for the benefit of joint creditors under certain conditions which are recognised by the Hindu law. So long, therefore, as this right is not exercised by the Receiver and the interests of the other members are not sold, it is open to the latter to transfer their shares voluntarily to others and it is open also to their creditors to attach and sell them in execution of their decrees against such members. Hence, proceeds realised by the sale of such shares in execution of decrees obtained against the other members will be "assets" available for rateable distribution among persons holding money decrees against such members.⁴

The expression "assets held by the Court" conveys the idea of assets realised or converted into *cash*, for until then, the assets cannot be said to be *held* by the Court.⁵

This Section applies also to cases where the Collector, to whom execution is transferred, sells the lands of the judgment-debtor and holds the assets,⁶ as in such cases the purchase money must be deemed to be received and held by the Court as soon as it is paid to the Collector.⁷ But where the immovable property of a person is sold by the Collector in execution of an award under the Bombay Co-operative Societies Act of 1925 (which provides for the enforcement of such award according to the law applicable to the recovery of arrears of land revenue) the sale proceeds of the property in the hands of the Collector are not assets held by a Court within the meaning of this Section.⁸

In order that the assets should be capable of being distributed under Section 295 of the old Code, they had to be realised either —

1. by sale in execution of a decree, or,

Note 4

1. ('37) AIR 1937 Pat 609 (610).

2. ('92) 16 Bom 91 (98).

('34) AIR 1934 Pat 685 (692): 13 Pat 446. (Any money belonging to a person other than the judgment-debtor or any money paid into Court by a third party under a misapprehension cannot be described as "assets.")

('37) AIR 1937 Pat 651 (651, 652). (Preliminary mortgage decree is "asset.")

('39) AIR 1939 Pat 392 (396): 18 Pat 404.

3. ('39) AIR 1939 Pat 392 (396): 18 Pat 404. (Obiter—Per Manohar Lall, J.)

4. ('39) AIR 1939 Cal 279 (281).

5. ('25) AIR 1925 Nag 157 (157, 159). (Voluntary deposit by judgment-debtor for payment to a particular decree-holder is not so—Case-law fully discussed.)

('25) AIR 1925 Cal 102 (104). (No order for rateable distribution is to be made of assets expected to be realised.)

('39) AIR 1939 Cal 530 (535). (The term 'assets' applies only to money.)

6. ('38) AIR 1938 All 666 (668).

7. ('20) AIR 1920 Bom 35 (37).

8. ('38) AIR 1938 Sind 157 (160): I L R (1939) Kar 104.

2. otherwise in execution of a decree. This was interpreted in two ways —

- (a) Such assets as were realised otherwise than by sale, *from the property of the judgment-debtor, e. g.,* under O. 21 R. 69, O. 21 R. 83 and Schedule III, Paragraphs 2 and 7.⁹ Thus, monies paid by the judgment-debtor to the warrant officer arresting him in execution of a decree were held not to be distributable under Section 295 on the ground that such monies were not realised *from the property of the judgment-debtor*.¹⁰
- (b) Such assets as were realised by any *process of execution expressly* provided by the Code.¹¹ This was a wider interpretation than the one in (a) above. Thus, monies paid into Court under a prohibitory order under Section 268 (O. 21 R. 46), though not realised *from the property* of the judgment-debtor, are still recovered under a *process of execution* under the Code and were therefore held to be distributable assets under Section 295.¹² See also the undermentioned cases.¹³

Monies not realised in either of these two modes, namely, by a sale in execution of a decree or "otherwise in execution of a decree" were not assets distributable under Section 295 of the old Code.¹⁴

The substitution of the words "where assets are held by a Court" in the present Section for the words "whenever assets are realised by sale or otherwise in execution of a decree" which occurred in the old Section, makes the Section very much wider than before.¹⁵ The words "assets held by a Court" will now include —

9. ('86) 8 All 67 (68). (Deposit by judgment-debtor in execution when his property is attached.)
(12) 36 Bom 519 (523). (Amount realised by Collector under Sch. III is "assets.")
(82) 6 Bom 588 (589, 590).
10. ('82) 6 Bom 588 (589, 590).
11. ('94) 21 Cal 809 (817).
(05) 28 Mad 380 (384, 385).
(86) 13 Cal 225 (228). (Money deposited in Court under S. 275 of the old Code : O. 21 R. 55 (a).)
12. ('92) 16 Bom 91 (98).
(04) 6 Bom L R 376 (378).
(96) 19 Mad 72 (74).
[See ('17) AIR 1917 Lah 410 (411).]
13. ('99) 26 Cal 772 (777). (Monies realised by receiver in execution.)
(90) 1890 All W N 194 (194, 195). (Rents and profits realised by Collector appointed in execution as receiver and paid by him into Court.)
(12) 11 Mad L Tim 38 (38) (Jour). (Money paid into Court while application for attachment of that money is pending is assets.)
(82) 5 Mad 123 (124). (Where a decree-holder, permitted under O. 21 R. 72 (S. 294) purchased the property in execution of his own decree, the whole purchase money payable by him cannot be set off against his decree amount but will be assets.)
(88) 11 Mad 356 (358). (A decree-holder can set off only a rateable share of his purchase price.)
(82) 6 Bom 570 (571). (Do.)
(86) 12 Cal 499 (504). (Do.)
(04) 28 Bom 264 (274). (Money in the custody of a public officer attached under O. 21 R. 52 and paid into Court by that officer is assets.)
(08) 31 Mad 502 (504). (Realisations under O. 21 R. 53 are assets.)
(12) 14 Bom L R 633 (634). (Salary attached and realised under O. 21 R. 48 are assets.)
(12) 15 Ind Cas 406 (407) (Mad). (Monies realised in execution of personal decree.)
(17) AIR 1917 Mad 739 (741). (Deposits under S. 310A (O. 21 R. 89) by a volunteer can be treated as assets rateably distributable.)
14. ('12) 15 Cal L Jour 49 (51). (Payment privately made by judgment-debtor to one of the decree-holders is not assets.)
(92) 1892 Pun Re No. 60, p. 223. (Property given as security for a decree.)
(03) 1903 Pun Re No. 6, p. 23. (Voluntary payment by judgment-debtor is not within S. 295.)
(97) 1 Cal WN 695 (696). (Money deposited under S. 310A (O. 21 R. 89) for setting aside a sale is not assets.)
(87) 10 Mad 57 (61). (Assets are not "assets" until the property has been sold.)
(85) 7 All 702 (710). (Essential condition of applicability of Section is that there should be a sale.)
(06) 33 Cal 639 (642). ("Realised" means realised in execution of a decree.)
(14) AIR 1914 Mad 641 (641). (Payment by judgment-debtor without any process in execution is not "assets" within S. 295 of the old Code.)
(86) 8 All 67 (68). (Deposit by judgment-debtor after attachment is not assets.)
(13) 37 Bom 138 (143). (Attaching creditor's debt privately satisfied—Other attaching creditors have no right of rateable distribution under S. 295 as there was no realisation by sale or otherwise in execution of decree.)
[See also ('03) 26 Mad 179 (181). (Assets meant the proceeds of the sale of the property sold in execution.)]
15. ('21) AIR 1921 Cal 749 (750).

1. all assets to which Section 295 of the old Code applied,¹⁶ and also
2. all monies obtained in any manner whatsoever by the Court whose duty it is to execute the decree under execution, for the purpose of satisfying the said decree.¹⁷

In order that Section 73 may apply, it is not therefore now necessary that the receipt of assets should have been under a *process* of execution, but it is still necessary that the assets should have reached the hands of the Court *in execution*, i. e., on the execution side.¹⁸ For example, O. 21 R. 1 provides that all monies payable under a decree shall be paid into the *Court whose duty it is to execute the decree*. A payment made by the judgment-debtor of the decree amount into Court is not one levied by any *process* in execution but is still one *in execution*. Such a deposit will, under the present Section, be "assets held by the Court."¹⁹ Similarly, money paid by a judgment-debtor under O. 21 R. 55 though made for the satisfaction of a particular debt, is subject to rateable distribution under this Section.²⁰ On the other hand, money paid in Court to avoid arrest *before judgment* under Order 38,²¹ or money paid to the decree-holder out of Court under a private arrangement,²² or money paid by

('32) AIR 1932 All 411 (412, 413) : 54 All 516.

('32) AIR 1932 Nag 156 (157) : 28 Nag L R 179.

('18) 40 Cal 619 (622). (Yet monies deposited under O. 21 R. 89 are not assets.)

('89) AIR 1939 Pat 392 (393) : 18 Pat 404. (Money voluntarily paid into Court by judgment debtor to satisfy the decree against him is "assets.")

16. See also cases in footnotes (6) and (7) ante.

('18) AIR 1918 Lah 75 (75, 76) : 1918 Pun Re No. 38. (Money realised by sale of moveables.)

('37) AIR 1937 Pat 651 (651, 652). (Preliminary mortgage decree obtained by judgment-debtor—Attachment by holder of money decree—Attaching decree-holder obtaining final decree for sale and bringing properties for sale—Sale proceeds are assets available for distribution.)

('38) 177 Ind Cas 269 (270) (Pat). (Sum of money brought into Court by a decree-holder by attachment amounts to assets held by the Court.)

17. ('19) AIR 1919 Mad 647 (647, 648) : 41 Mad 616. (Monies paid under O. 21 R. 83.)

('26) AIR 1926 Mad 307 (308) : 49 Mad 38. (Lands attached in execution acquired under Land Acquisition Act, and compensation money paid in Court, and the decree-holders' right to partake in it decided—Such money is assets.)

('34) AIR 1934 Nag 62 (63). (Supratdar failing to produce judgment-debtor's property—Decree holder accompanying process-server to attach his property—Supratdar making payment to decree-holder—Assets must be held constructively by Court.)

('26) AIR 1926 Mad 872 (875) : 49 Mad 570. (Deposit of 25 per cent. on default of balance becomes assets.)

('22) AIR 1922 Cal 19 (20, 21). (Money deposited after execution was taken.)

('21) AIR 1921 Cal 749 (750). (A voluntary payment by the judgment-debtor into the Court.)

('19) AIR 1919 Oudh 326 (328) : 22 Oudh Cas 194. (Rents realised by Receiver in execution and paid into Court are assets.)

('15) AIR 1915 Low Bur 92 (92). (Deposit of de-

cretal amount in Court—Amount is asset.)

('20) AIR 1920 Mad 731 (731). (Permission to bid and order to set off decree debt does not affect right to distribution.)

('31) AIR 1931 Bom 252 (254). (Do.)

('30) AIR 1930 Cal 761 (762). (Do.)

('31) AIR 1931 Mad 103 (105). (Do.)

('31) AIR 1931 Pat 359 (360) : 10 Pat 830. (Do.)

('31) AIR 1931 Pat 405 (408) : 11 Pat 250. (Do.)

('38) AIR 1938 Sind 144 (145).

('37) AIR 1937 Nag 80 (89) : I L R (1937) Nag 219. (Money realised by sale of attached property for arrears of revenue is available for rateable distribution.)

[See ('34) AIR 1934 Oudh 110 (111). (Money due to judgment-debtor attached by order of one Court—Transfer of execution to another Court—No fresh attachment necessary.)]

18. ('19) AIR 1919 Bom 152 (152, 153).

('16) AIR 1916 Mad 792 (794) : 38 Mad 221 (224). (Money paid in satisfaction of decree—Reversed on another point by ('21) AIR 1921 Mad 218 (221) : 44 Mad 100 (FB).)

('20) AIR 1920 Cal 785 (786, 787) : 47 Cal 515.

('30) AIR 1930 Sind 300 (300, 301) : 25 Sind L R 178. (Money paid into Court by judgment-debtor to avoid an attachment issued in execution.)

('39) AIR 1939 Bom 112 (113) : I L R (1939) Bom 133.

19. ('22) AIR 1922 Cal 19 (20, 21).

('39) AIR 1939 Pat 392 (393, 394) : 18 Pat 404.

('32) AIR 1932 All 411 (412) : 54 All 516. (Deposit into Court by judgment-debtor to avert sale.)

20. ('39) AIR 1939 Pat 392 (394) : 18 Pat 404.

21. ('20) AIR 1920 Sind 118 (119) : 14 Sind L R 164 (168). (Plaintiff acquires a lien on deposit under O. 38 R. 1 after passing of decree.)

('15) AIR 1915 Upp Bur 15 (16) : 2 Upp Bur Rul. 91. (A lien is created as soon as money is deposited.)

('19) AIR 1919 Mad 607 (609) : 41 Mad 1053. (Such money is earmarked for the suit.)

22. ('20) AIR 1920 Lah 94 (94).

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a defendant into Court pending suit to satisfy the plaintiff's claim,²³ or money paid into Court towards a decree, not against the judgment-debtor but against a third person,²⁴ are none of them obtained by the Court *in execution* and are not "assets held by the Court."

In *Sorabji v. Kala Raghunath*,²⁵ the Bombay High Court has however placed a very narrow construction on the words "assets held by the Court." The question there was, whether money paid into Court by a judgment-debtor under O. 21 R. 55 for payment of the amount due to the decree-holder who got the property attached was subject to rateable distribution. Scott, C. J., held that it was not, on the ground that the assets referred to in Section 73 should be assets received *in the process of execution*. This view has been followed by the Rangoon High Court²⁶ and by the Judicial Commissioners' Courts in Nagpur²⁷ and Sind.²⁸ In *Ebji Umersey v. Graham & Co.*,²⁹ which is also a case of the Bombay High Court, the question was whether money paid by the judgment-debtor under Section 55 (4) to the warrant officer arresting him, is an asset subject to rateable distribution. Macleod, J., sitting as a single Judge, held that it was not assets, on the ground that the Section was intended to apply to assets realised by the *sale of the property attached*.

The view of Scott, C. J., in *Sorabji v. Kala Raghunath*³⁰ has been expressly dissented from by the Madras, Calcutta and the Patna High Courts.³¹ It has also been dissented from in later cases of the Bombay High Court itself. In *Nathmal v. Moniram*,³² Pratt, J., while feeling himself bound as a single Judge to follow the decision of the appellate Bench in *Sorabji v. Kala Raghunath*,³³ disapproved of the view of Scott, C. J., expressed therein. In *Indaji Majaji v. Cooverji Nowroji*,³⁴ Mirza, J., though sitting as a single Judge, refused to follow the decision in *Sorabji v. Kala Raghunath*,³⁵ on the ground that the observations of Scott, C. J., in that case were *obiter dicta*. He entirely agreed with the dissentient views expressed by Pratt, J., in *Nathmal v. Moniram*.³⁶

It is submitted that the decisions in *Sorabji v. Kala Raghunath*³⁷ and *Ebji Umersey v. Graham & Co.*,³⁸ have not appreciated or given effect to the *deliberate* change in the language of the Section³⁹ and in view of the considered opinions to the contrary both in the same and in the other High Courts, the view expressed in those decisions and followed in Rangoon, Nagpur and Sind cannot be accepted as a sound one.

In some decisions⁴⁰ the view has been expressed that where a payment has been made for a *specific purpose* or specifically towards a particular decree, the money so

23. ('27) AIR 1927 Rang 278 (278, 279): 5 Rang 753. (Deposit under O. 24 R. 1.)

24. ('13) 1913 Pun L R No. 55, p. 215. (Money not paid towards any decree against the judgment-debtor is not assets.)

25. ('12) 36 Bom 156 (163).

26. ('27) AIR 1927 Rang 278 (278, 279): 5 Rang 753.

('15) AIR 1915 Upp Bur 15 (16): 2 Upp Bur Rul 91.

27. ('25) AIR 1925 Nag 157 (158).

28. ('20) AIR 1920 Sind 118 (119): 14 Sind L R 164 (165).

29. ('17) AIR 1917 Bom 275 (276).

30. ('12) 36 Bom 156 (163, 164).

31. ('19) AIR 1919 Mad 647 (648): 41 Mad 616 (617). (Money paid into Court under O. 21 R. 55.)

('26) AIR 1926 Mad 307 (303): 49 Mad 385. (Compensation paid by Collector under Land Acquisition Act.)

[But see ('15) AIR 1915 Mad 236 (236): 24 Ind Cas 617 (618). (Fund to credit of judgment-debtor held not assets.)]

('20) AIR 1920 Cal 785 (786): 47 Cal 515 (520, 521.)

('39) AIR 1939 Pat 392 (394): 18 Pat 401.

('21) AIR 1921 Cal 749 (750).

32. ('19) AIR 1919 Bom 152 (153).

33. ('12) 36 Bom 156 (163, 164).

34. ('26) AIR 1926 Bom 242 (245). (Money paid by judgment-debtor under O. 21 R. 43 is assets.)

35. ('12) 36 Bom 156 (163, 164).

36. ('19) AIR 1919 Bom 152 (153).

37. ('12) 36 Bom 156 (163, 164).

38. ('17) AIR 1917 Bom 275 (276).

39. Compare the old Section 295.

[See ('21) AIR 1921 Cal 749 (750).]

40. ('39) AIR 1939 Bom 112 (113, 114): 1 L R (1939) Bom 133.

paid is not liable for rateable distribution. It is submitted that this view is not sound in view of the wide language of the Section. In *Satnarain Prasad Choudhury v. Mahabir Prasad Choudhury*,⁴¹ Fazl Ali, J., observed as follows :

"Now Section 73 being imperative, it is obligatory upon a Court to distribute rateably the assets held by it (irrespective of how they came into its hands) among all the creditors who are entitled to the benefit of this Section. The assets are so distributable by the operation of law and there is nothing in this Section or any other provision of the Code to show that the Court must deal with them in accordance with the wishes of the judgment-debtor. When therefore there are several decrees outstanding against a judgment-debtor and all the requirements of Section 73 are complied with, the judgment-debtor cannot prevent rateable distribution by merely earmarking his payments for the benefit of one of the decree-holders."

In *Noor Mahomed v. Bilasiram*,⁴² Rankin, J., observed as follows :

"The money paid, with whatever motive, if paid to the Court, is paid upon terms of the Code whatever they may be. Those terms, as I read Section 73, have been laid down so that distinction in the form in which execution has been had, in the precise extent to which execution has been allowed to run, in the exact source or genesis of the fund in Court, are now no part of the definition of the assets that are subject to distribution rateably. The object of the new Code in using larger language can only be to avoid anomaly. To introduce a distinction on the strength of the voluntariness of the payment or the purpose of the debtor, is, I think, to cut down the language and intention of the Code upon a principle which is inapplicable to the subject-matter and which if applicable is very difficult to imply."

But, where a judgment-debtor has already assigned certain property to a particular decree-holder or created a charge on a certain property in favour of a particular decree-holder, such property is not liable to the claims of other decree-holders, for rateable distribution.⁴³ Similarly, where the assets in the Court represent security given for the satisfaction of a particular decree, the holders of other decrees are not entitled to rateable distribution out of such assets, the reason being that in such a case the decree-holder for whose benefit security has been given gets a lien on the assets for the satisfaction of his decree.⁴⁴

It has been held by the Bombay High Court⁴⁵ that where the assets held by the Court are derived from property which is not liable to be proceeded against in execution of the decree under which the claim for rateable distribution is made, the holder of such decree will not be entitled to share in such assets. But the decision of the Sind Judicial Commissioner's Court cited below⁴⁶ is inconsistent with this view.

(12) 36 Bom 156 (163).

(18) AIR 1918 Mad 704 (704).

41. ('39) AIR 1939 Pat 392 (393, 394): 18 Pat 404.

42. ('20) AIR 1920 Cal 785 (787): 47 Cal 515.

43. ('37) AIR 1937 All 424 (428). (Oral assignment of debt upheld.)

44. ('18) AIR 1918 Mad 442 (442): 41 Mad 327.

(18) AIR 1918 Mad 1158 (1159): 38 Ind Cas 481 (482). (Decree amount must in such cases be regarded as charged on the money deposited.)

(20) AIR 1920 Mad 409 (409). (Where something has been done for the credit of the suit the party who procures the thing is entitled to a preferential right.)

(19) AIR 1919 Mad 607 (609).

(15) AIR 1915 Lah 147 (150).

(37) AIR 1937 Mad 531 (532). (In this case the view was expressed that the question depends upon whether a charge is created on the pro-

perty given as security.)

(39) AIR 1939 Bom 112 (114): I L R (1939) Bom 133. (This decision proceeds on the ground that in such a case the money is paid for a specific purpose. Though the decision itself is right the reason is not sound in view of the above discussion.)

45. ('80) 4 Bom 429 (432). (House of agriculturist sold in execution of decree for rent—Other decree-holders are not entitled to rateable distribution.)

[See also ('38) AIR 1938 Bom 90 (90, 91): I L R (1938) Bom 98.]

46. ('38) AIR 1938 Sind 144 (145). (Salary paid into Court under attachment made before amendment of S. 60 by Act 9 of 1937 is liable to rateable distribution in favour of decree-holder whose suit was filed after the coming into force of the Act although if he himself had applied for attachment he would not have succeeded.)

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It is submitted that the above view of the Bombay High Court does not seem to be warranted by the language of the Section.

As to claims for rateable distribution in cases where a decree-holder is allowed to purchase property in execution of his own decree and to set off the purchase money against the decretal amount, see O. 21 R. 72, Note 5.

As to whether money deposited under O. 21 R. 89 for setting aside an execution sale is liable for rateable distribution, see Note 23 to O. 21 R. 89, *infra*.

5. What are assets. — See Note 4 above.

6. Claimant for rateable distribution and attaching decree-holder must be holders of decrees for the payment of money. — As already noticed in Note 3 above, it is one of the essential conditions for the applicability of the Section that the claimants for rateable distribution and the attaching decree-holder must be holders of *decrees for the payment of money*. Thus, persons in whose favour *orders* for the payment of money are passed are not entitled to the benefit of this Section.¹ The reason is that the definition of decree does not include an order.

As a general rule, every decree by virtue of which money is payable is to that extent a "decree for money."² Thus, a decree for the payment of mesne profits is a "decree for the payment of money" within the meaning of the Section. It is not necessary that the amount of mesne profits should have been *ascertained*; it is enough if the decree-holder has applied under O. 21 R. 42.³ The reason is that O. 21 R. 42 referred to above treats the attachment as a proceeding in execution of the decree and the application for attachment may, therefore, be treated as one for execution. Similarly, a judgment entered up under Section 86 of the Insolvent Debtor's Act is a "decree for the payment of money."⁴

There has, however, been a conflict of opinion as to whether a *mortgage decree* is a "decree for the payment of money" and whether such a decree-holder can claim rateable distribution under this Section.

In *Hart v. Taraprasanna*,⁵ it was held by the Calcutta High Court in accordance with the general rule stated above that a holder of a mortgage decree or of any decree under which money was payable and other relief granted, was the holder of a "decree for the payment of money" within the meaning of the Section. In *Vaidhianadaswamy v. Somasundaram*,⁶ a Full Bench of the Madras High Court held that a mortgage decree is one for the payment of money *whether there is a direction to pay personally or not*.⁷ This view was also adopted by the Punjab Chief Court in the undermentioned case.⁸ The Full Bench view has been distinguished in a later case⁹ wherein it was held that where a mortgage decree *expressly exempts the defendants from personal liability*, it is not a money decree under the Section. The Allahabad

Note 6

1. ('34) AIR 1934 Nag 243 (244).
2. ('85) 11 Cal 718 (729, 730). (Grant of any other relief in the decree is immaterial.)
3. ('34) AIR 1934 Mad 604 (605) : 58 Mad 233. ('82) 5 Mad 123 (124).
4. ('84) 8 Bom 511 (520).
5. ('85) 11 Cal 718 (729, 730).
6. ('05) 28 Mad 473 (477) (FB). (Approving 20 Mad 107 and 11 Cal 718.)
7. See also the following cases:—
8. ('16) AIR 1916 Mad 20 (22) : 39 Mad 570 (574).

(Mortgage decree with direction for personal decree in case of deficiency held to be a money decree.)

('02) 25 Mad 244 (286, 287) (FB). (Decree for recovery of balance after sale of mortgaged property is a money decree.)

('05) 28 Mad 224 (226). (Decree directing sale of mortgaged property in default and balance from other properties.)

8. ('08) 1908 Pun L R No. 121, page 370.

9. ('12) 23 Mad L Jour 699 (704).

High Court¹⁰ and later decisions of the Calcutta High Court¹¹ distinguishing *Hart v. Taraprasanna*,⁵ have held that a mortgage decree is not a decree for the payment of money even though it provides for the deficiency of the decree amount being realised, after sale of the hypotheca, *personally* from the mortgagor. The Lahore High Court also has in its recent decisions taken a similar view.¹²

It is submitted that the Madras view is not sound. The provisions of O. 21 R. 20 clearly show that the Legislature intended to make a distinction between a "mortgage decree" and "a decree for the payment of money."

A composite mortgage decree for sale including a personal decree for the balance is a decree for the payment of money within the meaning of this Section and the holder of such a composite decree is entitled to rateable distribution, when the net proceeds of the sale of the mortgaged properties fall short of the decretal amount.¹³

A *personal* decree obtained by a mortgagee independently of his mortgage,¹⁴ or for interest due on the mortgage,¹⁵ or for the balance due after the mortgaged property is sold¹⁶ and found insufficient to satisfy the mortgage debt, are all decrees for the payment of money. Again, a decree for money *personally* against *B* and against the *properties* of *C* and *D* does not thereby lose its character as a money decree against *B* for the purpose of claiming rateable distribution of the assets of *B* held by the Court.¹⁷

A mortgagee may also *waive* his lien on the mortgaged property and content himself with a mere money decree. In such a case he will, as a money decree-holder, be entitled to claim rateable distribution.¹⁸

7. Such decrees should have been obtained against the same judgment-debtor. — The third condition for the applicability of the Section is that the decree should have been obtained *against the same judgment-debtor*.¹ Where *X* obtains a decree against *A*, and *Y* obtains a decree against *B*, the decrees are not against the same judgment-debtor even if *A* himself is a judgment-creditor of *B*.²

But it is not necessary that *all* the judgment-debtors in each of the several decrees should be *identically* the same.³ It is sufficient if there is *one* judgment-debtor

10. ('94) 16 All 418 (420).

(1900) 22 All 401 (403). (Mortgage decree is not a money decree under S. 230 (S. 48) of the Code.)

('03) 25 All 541 (542, 543). (Combined mortgage decree under Ss. 88 and 90 of the Transfer of Property Act (O. 34 Rr. 4 and 6) is not a money decree under S. 230 of the Code.)

11. ('98) 25 Cal 580 (583).

('99) 26 Cal 166 (171). (Decree for certain sum, making the mortgaged properties liable for the realization of decree debt.)

(1900) 27 Cal 285 (289).

('13) 17 Cal W N 1039 (1041, 1042).

12. ('39) AIR 1939 Lah 303 (304). (Holder of mortgage decree cannot claim rateable distribution even for costs.)

[See also ('33) AIR 1933 Lah 48 (49) : 14 Lah 243.]

13. ('34) AIR 1934 Cal 764 (766) : 60 Cal 22.

14. ('24) AIR 1924 Pat 434 (436).

15. ('19) AIR 1919 Oudh 351 (352) : 22 Oudh Cas 150.

16. ('04) 31 Cal 792 (795, 796). (Such a decree under O. 34 R. 6.)

17. ('88) 10 All 35 (38).

18. ('70) 14 Suth W R 209 (210).

('74) 21 Suth W R 86 (87).

Note 7

1. ('15) AIR Cal 658 (660) : 42 Cal 1. (A decree against a person and a decree against a firm of which he is a partner not capable of execution against him individually are not decrees against the same judgment-debtor.)

('34) AIR 1934 Nag 62 (63, 64). (Judgment-debtor's property attached and left with supratdar—On his failure to restore, monies realised from him—Monies so realised are in the eye of law monies realised from sale of judgment-debtor's property and so the judgment-debtor is common and other decree-holders are entitled to rateable distribution.)

('01) 25 Bom 494 (496). (Decree against a judgment-debtor and a decree against his legal representative and estate are not decrees against the same judgment-debtor.)

('16) AIR 1916 Cal 264 (266).

[See also ('11) 12 Ind Cas 406 (406) (Mad).]

2. ('09) 5 Mad L Tim 126 (126).

3. ('03) 30 Cal 583 (586, 587) (FB).

('11) 10 Ind Cas 527 (529) (Cal).

('23) AIR 1923 Pat 521 (522, 523).

('24) AIR 1924 Cal 801 (804, 805) : 51 Cal 761.

('30) AIR 1930 Sind 300 (301) : 25 Sind L R 178.

('35) AIR 1935 Mad 399 (401).

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common to all the decrees.⁴ Thus, where *X* gets a decree against *A*; *Y* a decree against *A* and *B*, and *Z* a decree against *A*, *B* and *C*, the decrees are all "against the same judgment-debtor" with respect to the assets of *A* held by the Court.⁵ But if, in the illustration mentioned above, assets are realised from *C* or his property, *X* and *Y* are not entitled to claim rateable distribution.⁶

There will be a difference, however, in the *extent* of the share of the assets in which each of the decree-holders can claim rateable distribution according as the properties of the one common judgment-debtor or of such debtor and of others, are sold in execution. Thus, in the illustration mentioned above, if *A*'s property is attached and sold, *X*, *Y* and *Z* will share rateably in the *whole* of the proceeds. If the properties of *A* and *B* are sold, *X* will share in the assets *so far as it represents the share of A in the property*. *Y* and *Z* will share in the whole of the proceeds. If the properties of *A*, *B* and *C* are sold, *X* will share in the assets representing the share of *A* in the property, *Y* will share in the assets which represent the shares of *A* and *B* in the property and *Z* will share in the whole proceeds.⁷

From the above, it is clear that where *X* obtains a decree against *A*, and *Y* obtains a decree against *A* and *B* and the properties of both *A* and *B* are sold in execution of *Y*'s decree, *X* will only be entitled to a rateable distribution of the sale proceeds of *A*'s share in the properties, *A* alone being the *common* judgment-debtor under both the decrees. But, where *A* and *B* constitute a joint Hindu family of which *A* is the manager and *X* obtains a decree against *A* as *manager* of the joint family and *Y* obtains a decree against both *A* and *B* *eo nomine* as members of the joint family, both *A* and *B* would be judgment-debtors under both the decrees and *X* will be entitled to a rateable distribution of the proceeds obtained by the sale of the *entire* family properties and not only to a rateable share in the proceeds obtained by the sale of *A*'s share in the properties. The reason is that where a person is sued as manager of a joint Hindu family, it must be taken that he represents all the members of the family and they are constructively parties to the suit.⁸

Suppose *X* obtains a decree against *A*, a Hindu father and *Y* obtains a decree against *A* and his sons *B* and *C*, and suppose that the entire joint family properties belonging to *A*, *B* and *C* are sold in execution of *Y*'s decree. Is *X* entitled to claim a share in the *entire* proceeds? In other words, are *all* the judgment-debtors to be considered

4. ('24) AIR 1924 Cal 801 (804, 805): 51 Cal 761.
(07) 10 Oudh Cas 129 (131).

(11) 15 Cal W N 872 (874).

(35) AIR 1935 Mad 399 (400).

(36) AIR 1936 Mad 40 (41): 59 Mad 98 (F B).

5. ('03) 30 Cal 583 (585, 587) (F B). (Overruling 12 Cal 294.)

(38) AIR 1938 Lah 801 (802). (Decree against *A*, *B* and *C*—Another decree against *B* and *C* only.)

(81) 3 All 579 (580).

(83) 9 Cal 920 (921, 922). (Decree against *A*—Another decree against *A* and *B*.)

(03) 26 Mad 179 (181, 182). (One decree against father—Another decree against father and son.)

(18) AIR 1918 Cal 281 (282). (Two decrees each against two out of three executors one of them being common to both.)

(05) 29 Bom 528 (529). (Dissenting from 16 Bom 683.)

(05) 27 All 158 (160). (Decree against *S*—Another decree against *S* personally and as representative of *R*.)

(26) AIR 1926 Bom 150 (151). (Decree against *B* and *C*—Another decree against *C* alone.)

(99) 22 Mad 241 (244). (One decree against father and son, another decree against the son alone.)

(99) 3 Cal W N 368 (371). (First decree against *P* and *S*—Second against *P* and *R*—Third against *P*, *R* and *S*.)

(88) 10 All 35 (38). (A decree against three judgment-debtors and another decree against four judgment-debtors, three being common to both.)

(28) AIR 1928 Rang 96 (96, 97): 5 Rang 757.

(05) 8 Oudh Cas 86 (91). (The test is really to see whether rateable distribution has been applied for against the same judgment-debtor.)

[But see ('19) AIR 1919 Mad 758 (758). (Submitted not correct.)]

6. ('33) AIR 1933 Pat 277 (278).

7. ('03) 30 Cal 583 (586) (F B).

(05) 27 All 158 (160).

(05) 7 Bom L R 567 (568): 29 Bom 528.

8. ('36) AIR 1936 Mad 123 (125). (An extension of the principle in AIR 1936 Mad 40 (F B).)

to be the same under both the decrees? It has been held by the Madras High Court that it must be considered that both the decrees have been passed against the same judgment-debtors.⁹ This view is founded on the ground that in such cases both the decrees are executable against the same properties, that a liberal construction should be adopted in regard to the words "same judgment-debtor" in this Section and that without unduly straining the language of the Section, decrees executable against the same properties may be treated as decrees passed against the same judgment-debtors.¹⁰

The words "same judgment-debtor" will not include a person who does not occupy the same character in all the decrees.¹¹ Thus, where *X* obtains a decree against *A* in his personal capacity and *Y* obtains a decree against him as heir of *P*, the two decrees are not against the same judgment-debtor.¹² Similarly, a decree against *A* in his personal capacity and a decree against a firm of which *A* is a partner are not decrees against the "same judgment-debtor."¹³ The Calcutta High Court has, however, in the undermentioned decisions¹⁴ taken the view that a decree obtained against a person as the heir of a deceased person and another decree obtained against him in his personal capacity are decrees against the same judgment-debtor within the meaning of the Section. Similarly, the same High Court has held in the undermentioned decision¹⁵ that a decree passed against a firm is really one against the individuals constituting the firm and hence, the judgment-debtor under a decree against a firm and under a decree against the individuals constituting the firm are the same for the purpose of this Section.

A decree is passed against *A* during his lifetime. Another decree is passed against *A*'s heirs after *A*'s death. Are the two decrees against the same judgment-debtor? On this question, there is a conflict of decisions. The High Courts of Allahabad,¹⁶ Bombay¹⁷ and Calcutta¹⁸ have held that in such cases the decrees are not against the same judgment-debtor notwithstanding the fact that both the decrees are founded on a liability of the deceased. But, the Madras High Court has, in a recent Full Bench decision,¹⁹ held that the decrees are not against the same judgment-debtor. The Madras view proceeds on the ground that it is not necessary under this Section that the several decrees must be against the same persons *eo nomine* and that decrees which are capable of execution against the same estate may, without unduly straining the language of the Section, be regarded as passed against the same persons.

Where *A* and *D* each obtained a decree against *B*, and after *B*'s death *C* who was the legal representative of *B* purchased *A*'s decree with monies not belonging to *B*'s estate, *C* is not disentitled to claim rateable distribution, along with *D*, by reason only of his being the legal representative of *B*.²⁰

9. ('36) AIR 1936 Mad 948 (948).

('37) AIR 1937 Mad 504 (508, 509).

('08) 26 Mad 179 (181, 182).

[But see ('37) AIR 1937 Mad 253 (254). (Dis-sented from in AIR 1937 Mad 504.)]

10. ('37) AIR 1937 Mad 504 (508, 509). (Following AIR 1936 Mad 40 (F B).)

11. ('36) AIR 1936 Mad 40 (42) : 59 Mad 93 (F B).

12. ('14) AIR 1914 Low Bur 191 (191).

('04) 26 All 28 (34). (Decree against *Y*, heir to *P*—Decree against *Y* in his personal capacity, not against the same judgment-debtor.)

('19) AIR 1919 Oudh 326 (328) : 22 Oudh Cas 194 (199, 200). (Decree against three heirs of *M* as representing his estate—Decree against one of the heirs in his personal capacity.)

('36) AIR 1936 Mad 40 (42) : 59 Mad 93 (F B).

[See also ('20) AIR 1920 Mad 403 (404, 405).]

13. ('15) AIR 1915 Cal 658 (660) : 42 Cal 1 (9).

('37) AIR 1937 Lah 937 (938) : 18 Lah 637. (AIR 1915 Cal 658 Followed.)

14. ('36) AIR 1936 Cal 210 (212) : 63 Cal 923.

('85) 11 Cal 718 (728).

15. ('38) AIR 1938 Cal 316 (318).

16. ('39) AIR 1939 All 545 (547) : 1939 A W R (H C) 427 (430).

17. ('37) AIR 1937 Bom 461 (462, 463) : I L R (1937) Bom 795.

('01) 25 Bom 494 (496, 497).

18. ('35) AIR 1935 Cal 738 (739). (S. 146 cannot enlarge the scope of Section 73.)

('30) AIR 1930 Cal 454 (455).

19. ('36) AIR 1936 Mad 40 (41, 42) : 59 Mad 93 (F B). (33 Mad 465 should be deemed as over-ruled by this Full Bench decision.)

20. ('89) 13 Bom 171 (176).

8. Claimant for rateable distribution must have applied for execution to the Court by which assets are held. — In order to claim rateable distribution, a decree-holder must have applied under O. 21 R. 11 of the Code for execution of his decree.¹ Such an application is necessary, not only for the enforcement of his right to rateable distribution but also to control similar rights of rival decree-holders.² But it is not necessary for a decree-holder to make a specific application for rateable distribution.³

The application must be in *form, and in substance* one for execution.⁴ A mere omission to give certain particulars or other technical defects will not invalidate an application for execution for the purposes of Section 73.⁵ Nor is it necessary that attachment should be asked for or should follow the application for execution.⁶ Where an application for execution is presented to the Court before the receipt of assets by the Court but being defective is returned and is re-presented only after the receipt of assets, the application must be deemed to have been validly made on the date on which it was originally presented, and is sufficient for the purpose of this Section.⁷

The following have been held not to be applications for execution, for the purposes of Section 73 —

Note 8

1. ('16) AIR 1916 Mad 792 (793) : 38 Mad 221 (224).

('13) 14 Mad L Tim 533 (533). (Decree-holder's application for execution of attached decree obtained by the judgment-debtor is in substance an application for execution of his own decree.)

('13) 25 Mad L Jour 601 (601).

('23) AIR 1923 Pat 521 (524).

('25) AIR 1925 Nag 382 (383). (Mere prayer for rateable distribution is not sufficient.)

('81) 5 Bom 198 (201).

('89) 1889 Pun Re No. 93, page 330.

('81) 7 Cal 553 (555).

('12) 35 Mad 588 (589).

('17) AIR 1917 Mad 692 (692).

('29) AIR 1929 Nag 148 (150) : 25 Nag L R 94. (Mere prayer for rateable distribution is not valid.)

('21) AIR 1921 Nag 5 (5) : 17 Nag L R 143. (Application must conform with provisions of O. 21 R. 11 (2).)

('29) AIR 1929 Mad 703 (704) : 52 Mad 760. (Substantial compliance with O. 21 R. 11 is sufficient for purposes of S. 73.)

('16) AIR 1916 Cal 371 (371).

('05) 27 All 132 (135). (It is not necessary that it should be made in the course of proceedings initiated by other decree-holders or in such a way that they have a knowledge of it.)

(1900) 2 Bom L R 489 (491).

('81) 6 Bom 16 (17, 18). (Though it is possible that under certain circumstances the sale might be set aside.)

('26) AIR 1926 Mad 179 (180). (It is not necessary that the application should be such as to end in successfully obtaining satisfaction of the decree.)

('25) AIR 1925 Mad 587 (587). (No separate application for rateable distribution necessary.)

('11) 11 Ind Cas 187 (189) (Cal). (Where receiver has been appointed to the properties of judgment-debtor a decree-holder must get leave of Court before applying under this Section.)

('30) AIR 1930 Rang 342 (344) : 8 Rang 294. (Letter by Collector to Judge for money due under decree—Not sufficient.)

2. ('06) 33 Cal 639 (643).

3. ('33) AIR 1933 All 337 (338).

('37) 1937 Mad W N 480 (486). (The fact that a decree-holder claims payment of the whole amount to himself cannot deprive him of his right to a share, if that is all that he is entitled to under the law.)

4. ('13) 14 Mad L Tim 533 (533).

('11) 34 Mad 25 (27).

5. ('29) AIR 1929 Mad 703 (704) : 52 Mad 760. (Failure to give particulars.)

('28) AIR 1928 Nag 332 (333). (Application stating inability to obtain transfer certificate which is subsequently received, is sufficient compliance with O. 21 R. 11.)

('13) 14 Mad L Tim 533 (533). (Application to execute attached decree is really one to execute the decree-holders' own decree.)

('92) 15 Mad 372 (377). (Application for execution asking for attachment of property already vested in receiver and for rateable distribution also.)

('05) 1 Cal L Jour 315 (318). (Simultaneous execution applications not invalid.)

[See ('81) 7 Cal L Rep 537 (538). (List of property incomplete—Application is valid—No question of rateable distribution involved.)]

[But see ('28) AIR 1928 Mad 496 (497) : 55 Mad L Jour 120 (122). (Mere order of transfer is not enough if the decree is not actually received.)]

6. ('09) 9 Cal L Jour 210 (214).

('81) 7 Cal 34 (37, 38), (Illustrative case.)

('11) 13 Bom L R 1189 (1192).

('31) AIR 1931 All 92 (94) : 53 All 125. (Especially where property is attached and brought to sale under another decree.)

('30) AIR 1930 Mad 4 (11). (Do.)

7. ('36) AIR 1936 Mad 91 (92) : 59 Mad 303.

- (1) An application merely for rateable distribution.⁸
- (2) An application merely for attachment of property without anything more.⁹
- (3) An application to a superior Court to transfer to itself, an execution case from an inferior Court.¹⁰
- (4) An application to a Court for an order to another Court not to sell properties.¹¹
- (5) An application for payment out of Court, by a Judge's summons.¹²

Not only is an application for *execution* necessary, but such application must have been made to *the* Court, *i. e.*, the Court which holds the assets.¹³ Where all the decrees are of the same Court as the one which holds the assets, the application for execution must, of course, be made to that Court. But where the assets are held by Court *A* and the decree under which the claim for rateable distribution is being made has been passed by Court *B*, such claim cannot be allowed unless before the receipt of assets by Court *A* an application has been made to that Court for execution of the decree.¹⁴ (This is the *general* rule. In cases coming under Section 63, *ante*, an application to the Court *actually* holding the assets is not necessary: see below.) This necessarily involves the condition that the decree must have been *transferred* to Court *A*, for unless the decree is transferred to that Court no application can be made to it for execution of the decree. (See Section 38 *ante*.) But, it is not necessary that the copy of the decree must have *actually reached* Court *A*. It is enough if Court *B* has *ordered* the transfer of the decree to Court *A* and the decree-holder has applied to that Court for execution before the receipt of assets by it.¹⁵

Suppose now that *X* obtains a decree in a *superior* Court against *A* and applies for execution there. *Y* obtains a decree against *A* in an *inferior* Court. Then —

- (1) If *Y* has not applied for execution of his decree either in the superior or in the inferior Court, he will not be entitled to rateable distribution with *X*.¹⁶
- (2) If he gets his decree transferred to the superior Court and applies for execution *there*, he will of course be entitled to participate in the rateable distribution.¹⁷
- (3) If he has applied for execution to the inferior Court, he may get *his execution case transferred* to the superior Court. This will practically amount to his applying to the superior Court itself for execution and, consequently, he need not apply again to the superior Court, for execution.¹⁸
- (4) If he has applied for execution to the inferior Court but has neither got his execution case transferred to the superior Court nor has applied to

8. ('29) AIR 1929 Nag 148 (150): 25 Nag L R 94.

('10) 7 Ind Cas 856 (857): 34 Mad 25.

('33) AIR 1933 Oudh 75 (75). (Application merely for rateable distribution may be amended under O. 21 R. 17 into one for execution.)

('21) AIR 1921 Nag 5 (5): 17 Nag L R 143.

('25) AIR 1925 Nag 382 (383).

('89) 1889 Pun Re No. 93, page 330.

9. ('26) AIR 1926 Cal 249 (250).

('02) 6 Cal W N cexxiii (223). (Mere attachment is not enough.)

10. ('21) AIR 1921 Cal 87 (89).

11. ('10) 14 Cal W N 396 (399).

12. ('16) AIR 1916 Mad 792 (793): 38 Mad 221 (224).

13. ('12) 35 Mad 588 (589).

14. ('12) 35 Mad 588 (590, 591).

15. ('33) AIR 1933 Mad 627 (627): 56 Mad 692. (Dissenting from AIR 1928 Mad 496.)

('12) 35 Mad 588 (591).

16. (28) AIR 1928 Mad 496 (497). (An invalid application was made to the superior Court.)

17. For transfer of decree for execution, see Sections 38, 39 and 40.

(1900) 22 All 182 (186).

18. ('92) 16 Bom 683 (686, 687).

('96) 20 Bom 377 (379, 380).

('36) AIR 1936 Lah 519 (520, 521).

execution through Court *Z*. The property is sold and the sale proceeds are held by Court *Z*. In such a case, it has been seen above that *A* will be entitled to rateable distribution of the assets although he has not applied for execution to Court *Z*. Is *B* who has neither attached the property through Court *Y* nor applied for execution to Court *Z* entitled to a rateable share of such assets? It has been held by the Nagpur High Court in the undermentioned case²⁸ that *B* is entitled to a rateable share. The decision proceeds on the ground that in such a case the rateable distribution takes place under Section 63 which confers upon Court *Z* the power to determine all claims to the attached property including claims for rateable distribution and that under that Section the word "claims" does not mean merely claims of persons who have attached the property. It is submitted that the decision cannot be supported. As already pointed out, it is not a correct view to hold that in such cases Section 63 alone applies and that a reference to the provisions of Section 73 is not necessary. Under the latter Section an application to the Court holding the assets is necessary for making a claim for rateable distribution. But in the case of decree-holders who have already attached the property (from which the assets are derived) through Courts of inferior grade, a fresh application for execution to the Court of the superior grade which holds the assets is not necessary. The reason is that in such cases, the application to the Court of the inferior grade itself is to be treated as an application to the Court holding the assets, because the Court of the superior grade must be deemed to receive and hold the assets on behalf of all the Courts through whom the property has been attached. But this principle cannot apply to persons who have not attached the property through the inferior Court.

It has been held by the Bombay High Court²⁹ that the application for execution referred to by the Section is one which on the face of it is entitled to succeed. On this ground, it has been held that if the decree is on the face of it one which could not be executed against the property represented by the money in the Court, the Court cannot allow the holder of such decree to share in the rateable distribution of the money.³⁰

For the purposes of Section 73 an ordinary Civil Court and the same Court invested with Small Cause powers are distinct Courts.³¹ But where the decree of a District Munsif passed in the exercise of his ordinary jurisdiction is transferred for execution to the Small Cause side of the Subordinate Court, the holder of the decree so transferred is entitled to claim a share in the assets realised by the Subordinate Judge's Court in execution of a Small Cause decree as if both the proceedings are in the same Court.³²

9. Effect of dismissal of the application for execution.—To entitle a decree-holder to claim rateable distribution it is essential that there should be a subsisting

28. ('37) AIR 1937 Nag 80 (83) : I L R (1937) Nag 219.

29. ('38) AIR 1938 Bom 90 (90) : I L R (1938) Bom 98.

30. ('38) AIR 1938 Bom 90 (90) : I L R (1938) Bom 98. (Decree showing on face of it that the judgment-debtor is agriculturist—Decree-holder cannot claim rateable distribution of sale proceeds of the immovable property of the judgment-debtor. 4 Bom 429 and 23 All 106, Foll.)

31. See Section 33 of the Provincial Small Cause Courts Act, IX of 1887. (The decisions prior to Act, IX of 1887, were conflicting as there was no Section corresponding to Sec. 33

of that Act in Act X of 1869.)

See the following cases :

('85) 9 Bom 174 (176). (They are not distinct Courts but the same Court.)

('94) 18 Bom 61 (64). (Where a particular small cause suit is transferred to an ordinary Court, there are no two distinct Courts.)

('85) 9 Bom 237 (241). (Same Court if jurisdiction is locally co-extensive—If not, distinct Courts.)

('88) 12 Bom 486 (489). (Distinct Courts.)

('81) 3 All 710 (712). (Do.)

('84) 8 Bom 230 (234). (Do.)

32. ('92) 15 Mad 345 (347).

decree¹ and that his application for execution should be *pending* and *undisposed of* at the time of the receipt of the assets.² If the application had been *struck off* or *dismissed* before such date, he cannot participate in the distribution.³ It has, however, been held that although there may be a formal order dismissing an application for execution, where such order is not a judicial order but only an order for administrative or statistical purposes, the application must be deemed to be pending notwithstanding such dismissal and the applicant will be entitled to rateable distribution of the assets received subsequently.⁴ But, where an execution application has been struck off as wholly infructuous, it cannot be said to be pending merely because the attachment has been ordered to continue.⁵ A dismissal of the application *after* the date of the receipt of assets will not affect the right to rateable distribution which had accrued to the decree-holder earlier at the time of the receipt of assets.⁶

10. Claimant attaching before judgment.—An attachment before judgment confers no right on the party who obtains the attachment,¹ the only benefit which he gets by such attachment being that, when he applies subsequently for execution, he need not re-attach the properties.² A decree-holder who has obtained an attachment before judgment of his debtor's property will not thereby become entitled to get rateable distribution under Section 73 unless, like other decree-holders, he *applies for execution* after getting his decree.³

11. The application should have been made before the receipt of assets by the Court.—It has been seen in Note 1 above that the words "before the receipt of assets" have in the present Section been substituted for the words "prior to the realisation" in the old Section. The change was effected with a view to make the

Note 9

1. ('71) 15 Suth W R 219 (220). (Decree barred—No right to rateable distribution.)
- ('16) AIR 1916 Cal 264 (266). (Decree barred or satisfied—No rateable distribution.)
2. ('10) 5 Ind Cas 145 (145) : 33 Mad 264.
- ('82) 4 Mad 383 (385).
- ('10) 5 Ind Cas 820 (820) (Mad).
- ('85) AIR 1935 Rang 135 (137) : 13 Rang 514. (The word 'application' in S. 73 cannot be unqualified—It must mean an application made in accordance with law, not barred by limitation, not yet satisfied, and capable of being satisfied and it must also mean an application still subsisting and pending, and not already disposed of, whether on the merits or by default.)
- ('37) AIR 1937 Nag 16 (17); ILR (1937) Nag 420. [See also ('26) AIR 1926 Cal 957 (958). (Execution application duly made—Death of decree-holder before receipt of assets—No proceedings by legal representative till after receipt—*Held* legal representative not entitled to distribution.)
3. ('10) 7 Mad L Tim 110 (111).
- ('01) 23 All 106 (110).
- ('16) AIR 1916 Cal 264 (266). (Order declaring property not liable does not affect right when same property is sold by another decree-holder.)
- ('73) 21 Suth W R 66 (67). (Decision under Section 270 of Act of 1859.)
4. ('36) AIR 1936 Mad 437 (439). (Court granting time to judgment-debtor and dismissing execution—Dismissal is only order for administrative purposes.)

5. ('36) AIR 1936 Nag 277 (278) : I L R (1938) Nag 346. (Order is one of dismissal and not merely of adjournment.)
6. ('15) AIR 1915 Cal 16 (16). (Subsequent dismissal for default.)
- ('33) AIR 1933 Pesh 52 (53).
- ('37) AIR 1937 Pat 92 (93).

Note 10

1. ('15) AIR 1915 All 275 (276) : 37 All 575 (579, 581). (The object being only to prevent the judgment-debtor from removing any part of the property from the jurisdiction of the Court.)
- ('06) 33 Cal 639 (643). (It simply safeguards the property so as to enable the plaintiff to realise his decree if he gets one.)
- ('16) AIR 1916 Cal 371 (372). (No interest in property is created.)
- ('31) AIR 1931 Mad 570 (571). (Potential decree-holder has no right under the Section.)
- ('37) AIR 1937 All 424 (426).
2. ('06) 33 Cal 639 (643).
- ('39) AIR 1939 Rang 20 (21); 1938 Rang L R 565. See Order 38 Rule 11.
3. ('88) 12 Bom 400 (406, 407).
- ('26) AIR 1926 Rang 85 (86, 87).
- ('16) AIR 1916 Cal 371 (372). (Person attaching before judgment not obtaining his decree until realization of assets—No right to rateable distribution.)
- ('28) AIR 1928 Bom 545 (547).
- ('23) AIR 1923 Mad 505 (507) : 46 Mad 506.
- ('17) AIR 1917 Mad 692 (692).
- ('13) 1913 Mad W N 1021 (1021).

meaning perfectly clear and to avoid the necessity of judicial interpretations such as those given to the word "realisation" under the old Code.¹

In order to claim rateable distribution, a decree-holder must have applied for execution *before the receipt of assets by the Court*.² It, therefore, becomes important to ascertain the *exact point of time* at which assets are received by the Court.

The Section only requires that there must be an application for execution before the assets are received. It does not prescribe "any period" within the meaning of Section 10 of the General Clauses Act for the making of such application. Hence that Section does not apply to such cases and when assets are received by the Court during the vacation, an application for execution presented on the re-opening day cannot be considered to be in time for the purpose of this Section.³

Assets will be deemed to be received *by the Court* when they are received —

1. by the Court itself, or,
2. by a receiver appointed by the Court in execution,⁴ or,
3. by the officer conducting an execution sale under O. 21 R. 65,⁵ or,
4. by the Collector holding a sale under Schedule 3 of the Code.⁶

In the first case the *date of receipt* is, of course, the *actual* date on which the money is received by the Court. In the other three cases, the date of receipt will be the date on which the *several officers receive the amount* and not the date on which those officers *send the money* to the Court.⁷

Now the several classes of cases in which assets may be received by the Court and the *dates* on which such assets will be deemed to have been "received" may be considered :

('08) 81 Mad 502 (504, 505).

('99) AIR 1939 Rang 20 (21): 1938 Rang LR 565.

Note 11

1. See Note 4.

See also the following cases :

('06) 38 Cal 689 (642). ("Realised" means converted into cash in a form available for rateable distribution.)

('04) 28 Bom 264 (274). (Do.)

('88) 15 Cal 202 (209).

2. ('18) AIR 1918 Mad 512 (512).

('17) AIR 1917 Cal 13 (17) : 44 Cal 1072 (1087).

('10) 11 Cal L Jour 69 (73).

('02) 26 Mad 179 (180). (Land sold in parcels—Application after proceeds of sale of certain parcels paid into Court but before the deposit of sale proceeds of other parcels.)

('12) 35 Mad 588 (591, 592).

('15) AIR 1915 Cal 16 (16).

('16) AIR 1916 Cal 371 (371).

('20) AIR 1920 Bom 35 (37). (Application after whole of the purchase money deposited in Court—No right to rateable distribution.)

('21) AIR 1921 Nag 5 (5) : 17 Nag L R 143.

('25) AIR 1925 Oudh 287 (287).

('26) AIR 1926 Sind 77 (78).

('82) 4 Mad 383 (385).

('02) 1 Low Bur Rul 121 (123).

('29) AIR 1929 Lah 645 (647). (Application for execution after receipt of assets does not lie.)

('27) AIR 1927 Pat 252 (253).

('81) 6 Bom 16 (18).

('09) 13 Cal W N 1177 (1179). (All decree-holders

applying after receipt—Apart from Section 73 rateable distribution is proper.)

('09) 9 Cal L Jour 210 (214). (Application for execution after receipt of assets—No rateable distribution.)

('06) 38 Cal 92 (97).

('99) 26 Cal 772 (775). (Realisation by receiver—Application thereafter does not lie.)

('35) AIR 1935 Nag 214 (215) : 31 Nag L R 423.

('36) AIR 1936 Cal 390 (391). (Assets in custody of Court attached by different decree-holders—Section does not apply—Held that still on general principles, the assets must be distributed *pro rata*—AIR 1917 Cal 13, Foll.)

('36) AIR 1936 All 626 (628). (Fact that only a few minutes have passed after the receipt of assets by the Court when application is made is not sufficient to validate claim for rateable distribution.)

[See also ('91) 18 Cal 242 (244, 245). (Deposit of 25 per cent. is not realisation of assets.)

('13) 25 Mad L Jour 601 (601).]

3. ('37) AIR 1937 Nag 16 (17) : I L R (1937) Nag 420.

4. ('99) 26 Cal 772 (777).

5. ('17) AIR 1917 Cal 740 (743) : 44 Cal 789 (798).

6. ('20) AIR 1920 Bom 35 (37).

('38) AIR 1938 Nag 14 (16) : ILR (1939) Nag 285.

7. ('26) AIR 1926 Nag 380 (381).

('20) AIR 1920 Bom 35 (37).

('37) AIR 1937 Nag 16 (17) : ILR (1937) Nag 420.

- ### Illustration

But, it has been held by the Patna High Court that where a fund in Court to the credit of the judgment-debtor in some other matter, is attached by a decree-holder in *execution* of his decree, the money must be treated as "received" by the Court in execution of the decree as soon as it is so attached although there is no entry in the books *transferring* the money to the credit of the suit in which the decree has been passed.¹¹

- (730) AIR 1930 Mad 4 7-11-30
10. (23) AIR 1923 Mad 4 7-11-30
- [See however (1923) AIR 1923 Mad 4 7-11-30, wherein as a case of Swami Sastri sent to the Court with the attached the Court held that the mains to be sent to the Court for application for summary.
11. (1923) AIR 1923 Mad 4 7-11-30
12. (1923) AIR 1923 Mad 4 7-11-30
13. (1923) AIR 1923 Mad 4 7-11-30

decree-holder who applies for execution after the sale of parcels 1 and 2, but before the sale of parcels 3 and 4, will be entitled to rateable distribution of the sale proceeds of parcels 3 and 4, but not of parcels 1 and 2.¹⁴

- (d) Where *immovable property* of the judgment-debtor is sold in a *single lot* in execution of a decree, the assets will be deemed to be received, *not* on the date when the deposit of 25 per cent. of the purchase money is paid under O. 21 R. 84, but on the date when the *balance* of the purchase money is paid. Thus, a decree-holder who applies for execution after the 25 per cent. deposit is made but before the balance is paid is entitled to come in under Section 73,¹⁵ while one who applies *after the balance is paid* will not be so entitled, even if his application is before the date of the *confirmation* of the sale.¹⁶
- (e) Where immovable property of the judgment-debtor is sold in *several lots* in execution of a decree, there is a conflict of opinion as to whether the assets are deemed to be received, *when the entire* amount of the purchase money in respect of all the parcels are paid, or whether they are deemed to be received on the *several dates* on which the sale proceeds of the several lots are respectively paid into Court. The Madras High Court and the Nagpur Judicial Commissioner's Court have taken the former view.¹⁷ In the undermentioned case¹⁸ the Calcutta High Court followed the decision of the Madras High Court, but in a later case¹⁹ they have adopted the latter view. This later Calcutta case does not refer to the earlier case of the same High Court or to the decision of the Madras High Court. Nor does it give any reasons for its view. In view of the fact that the word 'assets' means, in such a case as this, the proceeds realised *by one order of sale*,²⁰ the later decision of the Calcutta High Court does not seem to be based on sound principle.
- (f) As to when assets are deemed to be realised in cases where permission to bid and set-off is given to a decree-holder, see Note 5 to O. 21 R. 72.
- (g) Where in pursuance of an order passed by a superior Court under Section 63 *ante*, assets realised in execution by an inferior Court are transferred to the superior Court, the assets are deemed to have been received within the meaning of this Section, when they are received by the superior Court and not when they are received by the inferior Court.²¹

Where the receipt of assets and the application for execution are made on the *same day*, there is no presumption as to the *order* of events and it is the duty of the

14. ('18) AIR 1918 Lah 75 (76) : 1918 Pun Re No. 33.

15. ('91) 18 Cal 242 (245).

'26) AIR 1926 Mad 872 (875) : 49 Mad 570. (Auction-purchaser making default in paying full amount—25 per cent. deposit is asset within Section 73.)

'12) 35 Mad 588 (589).

'21) AIR 1921 Pat 401 (402) : 5 Pat L Jour 415. (Application while sale is going on lies.)

'11) 15 Cal W N 872 (873, 874).

'26) AIR 1926 Nag 380 (383). (Receipt of assets

means the receipt of whole of the assets.)

('36) AIR 1936 Pesh 164 (165).

16. ('82) 6 Bom 16 (18).

('25) AIR 1925 Cal 966 (967).

17. ('03) 26 Mad 179 (181).

'26) AIR 1926 Nag 380 (383).

18. ('21) AIR 1921 Cal 801 (802).

19. ('25) AIR 1925 Cal 966 (967).

20. ('26) AIR 1926 Nag 380 (383).

('03) 26 Mad 179 (181).

21. ('27) AIR 1927 Bom 247 (250).

distributing Court to determine the question of priority.²²

11a. "And have not obtained satisfaction thereof." — Where the decree of any of the claimants for rateable distribution has been partially satisfied, only the unsatisfied portion of the decree should be taken into account in considering the question of rateable distribution.¹ Even if the partial satisfaction of the decree takes place after the application for rateable distribution has been made, such partial satisfaction must be taken into account.² In other words, rateable distribution should be made according to the amount due to each decree-holder *at the time of the distribution*.³

12. Jurisdiction of Court to inquire into the validity of the decree under which rateable distribution is claimed.—*A* and *B* obtain decrees for money against *C* and apply for execution before the assets are received by the Court. In the proceedings for rateable distribution *A* contends that *B*'s decree is collusive, fraudulent and is otherwise invalid. Can the Court go into this question? There is a preponderance of judicial opinion to the effect that the Court cannot go into the question.¹ The view is based on the ground that the Court distributing the assets is only an *executing* Court and as such cannot question the decree.² In *Dattatraya Govindseth v. Purshottam Narayanseth*,³ Macleod, C. J., observed as follows: "On general principles, the Court which would be merely a distributing agency would not have any power to deal with the question whether any of the decrees had been obtained by fraud or other improper means just as in an ordinary case of execution the Court which executes the decree cannot go behind the decree." But the question as to the validity of the decree can be gone into in a suit under sub-section 2 of the Section.⁴

Though an executing Court acting under this Section cannot question the validity of a decree under which a claim for rateable distribution is being made, yet, where on the face of it such decree is inexecutable against the property from which the assets held by the Court are derived, the Court cannot grant the claim for rateable distribution.⁵

13. Right of one decree-holder to impeach the decree of another.—See Note 12.

14. Insolvency or liquidation, how far affects the right of rateable distribution. — An order for rateable distribution under this Section is not affected

22. ('19) AIR 1919 Mad 758 (758).

('37) AIR 1937 Mad 504 (509).

Note 11a

1. ('34) AIR 1934 Mad 426 (427). (Following 3 Cal W N 368.)

2. ('34) AIR 1934 Mad 426 (428). (Following 3 Cal W N 368—Sale proceeds of attached property available to decree-holder but not drawn out by him—Decree must be treated as satisfied to the extent of the sale proceeds.)

3. ('35) AIR 1935 Nag 214 (215): 31 Nag L R 423.

Note 12

1. ('22) AIR 1922 Bom 31 (32): 46 Bom 635 (FB). (Overruling 13 Bom 154.)

('24) AIR 1924 Nag 39 (40): 19 Nag L R 172.

('26) AIR 1926 Pat 497 (498): 5 Pat 445. (Because the Court acts in its administrative capacity.)

('34) AIR 1934 Pat 545 (546). (Do.)

('18) AIR 1918 Mad 825 (826, 827): 40 Mad 841 (843, 845).

('27) AIR 1927 Mad 944 (944).

('35) AIR 1935 Cal 290 (294): 62 Cal 715 (F B). (16 Ind Cas 795; 22 Ind Cas 407: AIR 1914 Cal 575 and 11 Cal 42, Overruled.)

('38) AIR 1938 Bom 90 (90): ILR (1938) Bom 93. [But see ('12) 17 Ind Cas 940 (943) (Mad).]

2. ('35) AIR 1935 Cal 290 (294): 62 Cal 715 (FB).

('38) AIR 1938 Bom 90 (90): ILR (1938) Bom 93. [See also ('20) AIR 1920 Mad 605 (612): 43 Ind 381.]

3. ('22) AIR 1922 Bom 31 (32): 46 Bom 635 (FB).

4. ('16) AIR 1916 Mad 792 (793): 38 Ind 21 (223). (Applying 23 All 313 (P C).)

('20) AIR 1920 Mad 605 (613, 614): 43 Ind 389, 391, 392).

('06) 3 Cal L Jour 385 (386). (Suit filed after order for and before actual distribution.)

5. ('38) AIR 1938 Bom 90 (90): ILR (1938) Bom 93. (Holder of decree which shows on its face that it is against an agriculturist is not entitled to rateable distribution of assets realized by sale of the immovable property of the judgment debtor.)

by the *subsequent adjudication* of the judgment-debtor as an insolvent.¹ The reason is that from the time of the order of rateable distribution, the money must be treated as belonging, not to the judgment-debtor but to the decree-holders in whose favour the order was passed. The Official Receiver could, therefore, no more recover the money from the Court which passed the order than from the decree-holder.² As regards realisations *subsequent to the vesting order*, however, they will vest in the Official Receiver or Assignee and will not be available for rateable distribution.³

An application for rateable distribution presented *by* an insolvent (in regard to a decree passed in his favour before his adjudication) after adjudication and before his discharge is competent.⁴

15. Sale subject to mortgage — Mortgagee cannot get rateable distribution — Proviso (a). — Where a property is sold in execution of a money decree subject to a mortgage, the mortgagee is really not affected by such sale, but retains his rights to proceed against the property in enforcement of his mortgage.¹ He will not, therefore, as a mortgagee, be entitled to share in the proceeds of the sale along with other decree-holders.² If, however, he holds also a money decree, he is not barred from sharing, as a *money decree-holder*, in the rateable distribution.³ He can also *waive* his right on the mortgage and claim to participate in the assets as a *money decree-holder*.⁴ See Note 6 above.

A sale *subject to a mortgage* means a sale *expressly* made subject to the mortgage, *i. e.*, by the certificate of sale.⁵

16. Sale free of mortgage — Rights of mortgagee — Proviso (b). — A mortgagee has an alternative remedy under this Section of consenting to a sale of the property free of his mortgage and having the same right in the sale proceeds as he had against the property.¹ But the mortgage must be a *valid* one² and the sale must have

Note 14

1. (1900) 27 Cal 351 (353).
2. ('22) AIR 1922 Mad 31 (31, 32). (Because the money belongs to judgment-creditors from the time of such order.)
3. ('19) AIR 1919 Cal 43 (44).
4. ('92) 15 Mad 372 (377, 378).
5. ('16) AIR 1916 Oudh 274 (275): 18 Oudh Cas 268. (Sale proceeds realised before adjudication cannot be claimed by receiver.)
6. ('16) AIR 1916 Cal 918 (919): 43 Cal 586 (590). (Assets received before liquidation — Liquidator cannot claim against decree-holder.)
7. ('22) AIR 1922 Mad 31 (31, 32).
8. (1900) 27 Cal 351 (353, 354).
9. ('02) 29 Cal 428 (432) (F B). (Mere act of attachment will not give the creditor priority over the Official Assignee—Overruling 28 Cal 419.)
10. ('97) 21 Bom 205 (219). (Right of Official Assignee prevails over attaching creditors.)
11. ('16) AIR 1916 Oudh 274 (275): 18 Oudh Cas 268.
12. ('39) AIR 1939 Mad 196 (198).

Note 15

1. ('06) 3 Low Bur 258 (260).
2. ('67) 7 Suth W R 309 (311). (The mere fact that the mortgagee applies for and obtains the residue of the sale proceeds after all the judgment-creditors have been fully satisfied, does not take away his right to enforce his lien for the balance due.)
3. ('83) 5 All 566 (568). (Para. 1 of S. 73 has reference

only to sales in execution of simple money decrees.)

4. ('84) 10 Cal 567 (576).
5. ('88) 5 All 566 (568).
6. ('85) 11 Cal 718 (729).
7. ('66) 6 Suth W R Misc Rul 13 (13).
8. ('19) AIR 1919 Low Bur 124 (125).
9. ('70) 14 Suth W R 209 (209).
10. ('71) 16 Suth W R 306 (306, 307).
11. ('74) 21 Suth W R 86 (87).
12. ('19) AIR 1919 Oudh 351 (352): 22 Oudh Cas 150. (Simple money decree for interest due on the mortgage.)
13. ('70) 14 Suth W R 209 (210).
14. ('81) 5 Bom 470 (477).
15. ('74) 21 Suth W R 43 (44). (Case under the Code of 1859—Subject to a mortgage, in the proviso, means sold "with notice of the mortgage.")

Note 16

1. ('83) 5 All (566) (568).
2. ('30) AIR 1930 Mad 138 (141): 53 Mad 670. (Rule applies to mortgagee who is also a simple money decree-holder but the two debts must be distinct and not identical.)
3. [See ('37) AIR 1937 Oudh 270 (272). (Money decree-holder and mortgage decree-holder agreeing to sale in execution of money decree and to rateable distribution at the time of sale—Mortgage decree-holder entitled to same interest in sale proceeds as in property sold.)]
4. ('24) AIR 1924 Pat 434 (436).

*been validly held by the Court.*³ Where a *private* alienation is made with the sanction of the executing Court, this proviso does not apply.⁴

The *consent* of the mortgagee is necessary for a sale under this proviso. A sale without notice to the mortgagee and without his consent will not prejudice his rights in any way.⁵ If the mortgagee consents but the *fact* of mortgage or the *amount* of mortgage money is disputed, the Court should make a *summary* enquiry under O. 21, R. 66 (4) and state the result of the inquiry in the proclamation of sale.⁶

An order for sale under this proviso must have *specific* reference as to the person from whose encumbrance it will be sold free and there must be express direction or notice to purchasers that the property is to be so sold.⁷

Where a property is sold under this proviso the auction-purchaser becomes the *absolute owner* thereof, the mortgagee's rights being transferred to the sale proceeds in Court.⁸ But the mortgagee cannot thereby obtain an order for payment of the amount due to him under the mortgage.⁹ He must enforce his rights by way of *suit*.¹⁰

The words "any property" in clauses (a) and (b) of the proviso, as distinguished from "immovable property" in clause (c), shows that a mortgage of *moveables* is included therein.¹¹

17. Sale in execution of decree on mortgage — Mode of applying the sale proceeds — Proviso (c). — This proviso applies only where any immovable property is sold in execution of a decree ordering its sale *for the discharge of an incumbrance thereon*.¹ The words "an incumbrance" mean only the incumbrance *sued on* and not other incumbrances.² A executes a first mortgage in favour of X, a second mortgage in favour of Y and a third mortgage again in favour of X. X sues on the first mortgage, obtains a decree and sells the property. Y applies for payment to him out of the surplus remaining after the first mortgage sued on is paid off. He is entitled to be so paid in priority to the third mortgage of X.³ But the words of the proviso are general and apply not only to a pre-existing incumbrance, *i.e.* an incumbrance existing independently of the decree ordering the sale of the property but also to an incumbrance which is created by the decree itself, as for instance, a charge created by the decree ordering

3. ('99) 22 Mad 241 (245). (Sale in contravention of S. 99 of the Transfer of Property Act—S. 73 does not apply.)

('24) AIR 1924 Lah 132 (135). (Sale not by the Court but by private alienation.)

4. ('24) AIR 1924 Lah 132 (135).

('67) 8 Suth W R 501 (501).

5. ('19) AIR 1919 Upp Bur 18 (19) : 3 Upp Bur Rul 139 (140, 141).

('06) 3 Low Bur Rul 258 (260). (Where a money decree-holder applies for such sale, notice must be given to the mortgagee.)

(1865) 2 Suth W R Misc App 21 (21).

('06) 3 Low Bur Rul 275 (278).

('84) 10 Cal 567 (575).

6. ('19) AIR 1919 Upp Bur 18 (19) : 3 Upp Bur Rul 139.

('06) 3 Low Bur Rul 275 (277).

[See ('82) 6 Bom 584 (585).]

7. ('84) 10 Cal 567 (575).

8. ('06) 3 Low Bur Rul 258 (260).

9. ('20) AIR 1920 Low Bur 107 (108) : 10 Low Bur Rul 398.

('15) AIR 1915 Low Bur 100 (100). (If he is paid out, a suit for refund will lie.)

('97-01) 2 Upp Bur Rul 276.

[See ('11) 10 Ind Cas 552 (552) (Mad). (Nor is there any duty on him to draw the amount and apply it in part satisfaction of his claim—He will be entitled to interest on sale proceeds until recovery.)]

10. ('20) AIR 1920 Low Bur 107 (108) : 10 Low Bur Rul 398.

11. ('24) AIR 1924 Cal 990 (991).

Note 17

1. ('90) 1890 All W N 194 (195) : 13 All 76. (Collector receiving rents and profits as receiver — Property not sold—Proviso does not apply.)

('33) AIR 1933 Lah 48 (50) : 14 Lah 243. (Decree directing sale of mortgaged property and if sale proceeds are insufficient giving personal remedy is a mortgage decree.)

('15) AIR 1915 Cal 380 (381) : 19 Cal W N 535 (536). (Clause (c) applies only when the litigant has himself obtained a decree and applied for rateable distribution.)

2. ('90) 12 All 546 (547).

3. ('90) 12 All 546 (547).

3 expression "to compel him to refund the *assets*" in this clause, was inclined to hold that
9 the plaintiff cannot ask for *interest* on the assets till the date of the suit.

19. Priority of debts — Clause (3). — It has been seen in Note 2 above that under Sections 270 and 271 of the Code of 1859 the creditor who first attached the property had a statutory priority, over the others, to have his debt satisfied in full.¹ It has also been seen that the law was changed by the Code of 1882 and that now all the decree-holders are placed on the same footing regardless of the order of attachment.² *A* obtains a decree personally against *B*. *C* obtains a decree against *B* making him liable to the extent of the assets of his father in his hands. *C* cannot claim any priority against *A*.³

In cases not coming under Section 73 but under O. 21 R. 52 as, for instance, in a case where assets have been received *before* any of the contending decree-holders have applied for execution, there is a conflict of decisions as to whether such assets are liable to rateable distribution. As to this, see Note 6 to O. 21 R. 52.

In the undermentioned case⁴ a patnidar brought to sale a darpatni tenure in execution of a decree for arrears of rent of such tenure. After satisfaction of the decree, the surplus proceeds were left in Court. The patnidar then obtained another decree against the same darpatnidar for arrears of rent accruing for a subsequent period in respect of the same tenure. It was held that the patnidar had no further lien for rent after the sale of the darpatni tenure, that the decree for rent in his favour was only a *money* decree, and that he was not entitled to any priority in respect of such decree and that the surplus sale proceeds in Court were liable to be divided rateably among all persons who had taken out execution of money decrees against the same judgment-debtor and had not obtained satisfaction.

It is a general principle of law that claims of the Crown or State are entitled to precedence over all other claims.⁵ A judgment-debt due to the Crown is entitled to priority over all other decrees.⁶ But the clause does not confer any jurisdiction on the executing Court to entertain a claim on behalf of the Government in the absence of any *decree* in support of it.⁷ In *Oudh Commercial Bank Ltd. v. Secretary of State*,⁸ Bhide, J., of the Lahore High Court observed as follows :

"I am unable to see that this sub-section confers any jurisdiction on the executing Court to entertain a claim on behalf of the Government in the absence of any decree in support of it. The sub-section only saves the rights of the Government, independent of the Section, such as they might be and merely appears to have reference

Note 19

1. See also the following cases :

(1865) 2 Suth W R Misc App 48 (48).

('67) 8 Suth W R 415 (420).

('69) 5 Mad H C R 113 (114).

('71) 6 Mad H C R 348 (349).

('72) 17 Suth W R 23 (24, 25).

('74) 21 Suth W R 194 (195).

('78) 3 Bom 217 (219).

('87) 10 Mad 57 (61).

2. See also the following cases :

('16) AIR 1916 Mad 792 (794) : 38 Mad 221 (225).

('17) AIR 1917 Cal 13 (18) : 44 Cal 1072 (1085, 1090).

('21) AIR 1921 Cal 801 (804).

('21) AIR 1921 Oudh 176 (183).

('36) 40 Cal WN 1249. (Attachment of same decree for money by several decree-holders — Attachment effected prior to deposit of money under attached decree—Right of rateable distribution

— Decree-holder who starts the first execution cannot claim the benefit of the entire amount deposited by reason of O. 21 R. 53 (2), which Rule contemplates only cases where a decree for money is attached by a sole decree-holder.)

3. ('18) AIR 1918 Mad 512 (513).

4. ('80) 5 Cal 494 (497).

5. See ('37) AIR 1937 Rang 380 (382) : 1937 Rang L R 344.

6. ('68) 5 Bom H C R (O C) 23 (54).

('33) AIR 1933 Sind 368 (369) : 27 Sind L R 444.

('76) 1 Bom 7 (9). (Court-fee in pauper suits.)

('36) AIR 1936 Mad 602 (603) : 59 Mad 872.

(Court-fee in a pauper suit ordered to be paid by defendant — O. 33 R. 10 does not have the effect of restricting the right of the Government to the subject-matter of the pauper suit.)

7. ('35) AIR 1935 Lah 319 (320).

8. ('35) AIR 1935 Lah 319 (320).

- 22a. Appropriation of amount received by way of rateable distribution.**
1-24 — A decree-holder is not entitled to appropriate the sum he receives by way of rateable distribution in any way he likes. What he receives goes towards the payment of every rupee of his debt.¹

Illustration

A obtains a decree against *B* and *C*. The decree awards *A* a certain sum of money payable by *B* and also a further sum by way of costs payable by *B* and *C*. *A* receives a certain sum by way of rateable distribution under the decree. *A* is not entitled to appropriate the whole of this amount towards the amount of the *decree proper* and proceed against *C* for the entire amount of the costs on the footing that such amount has not been reduced by the rateable share received. Both the items in the decree debt must be deemed as reduced *pro tanto*.²

23. Application for rateable distribution is one for a step-in-aid of execution. — It has been seen in Note 8 above that a mere application for rateable distribution is not one *for execution*. Such an application however can be a *step-in-aid* of execution under Article 182 of the Limitation Act.¹

24. Appeal. — An order under this Section is not appealable as an *order*.¹ It will be appealable as a *decree* if the conditions of Section 47 are satisfied.² Where such an order determines questions between *parties*, *i. e.*, between the judgment-debtor on the one hand, and the decree-holder on the other, it will fall under Section 47 and become appealable as a decree.³ It follows that an order determining a question between *rival* decree-holders will not be appealable as a decree⁴ unless such question is *also* one between the judgment-debtor and the decree-holders, in which case it would be appealable.⁵ So also, an order under the Section which affects not only the rival decree-

Note 22a

1. ('39) AIR 1939 Mad 268 (269) : I L R (1939) Mad 301. (Bardwell v. Lydall, (1831) 7 Bing 489: 131 E R 189, Foll.)
2. ('39) AIR 1939 Mad 268 (269) : I L R (1939) Mad 301.

Note 23

1. ('29) AIR 1929 Nag 148 (150) : 25 Nag L R 94. ('04) 8 Cal W N 382 (385). ('01) 23 All 313 (323) : 28 Ind App 203 (P C).

Note 24

1. See Section 104 and O. 43 R. 1. ('92) 14 All 210 (211). ('98) AIR 1938 Lah 307 (308). ('86) AIR 1936 Lah 181 (181).
2. ('18) AIR 1918 Mad 1322 (1324). (Decision in respect of invalidity of execution or non-liability of fund for distribution is virtually one under Section 47.) ('27) AIR 1927 Lah 100 (101) : 8 Lah 35. (Order dismissing application for execution in toto.) ('15) AIR 1915 Cal 658 (659) : 42 Cal 1 (9). (Order rejecting an application for rateable distribution as between two rival decree-holders is not appealable.) ('21) AIR 1921 Pat 401 (402) : 5 Pat L Jour 415. (Order rejecting an application under S. 73.) ('09) 36 Cal 130 (133). ('24) AIR 1924 Cal 801 (803) : 51 Cal 761 (767, 771, 773.) ('35) AIR 1935 Lah 302 (303) : 16 Lah 990.
3. ('16) AIR 1916 Mad 20 (21, 22) : 39 Mad 570 (573). ('31) AIR 1931 Bom 252 (253).

4. ('22) AIR 1922 Mad 99 (99). ('68) 9 Suth W R 514 (516) (FB). ('29) AIR 1929 Rang 193 (200). ('29) AIR 1929 Lah 645 (647). ('32) AIR 1932 Lah 96 (96). ('14) AIR 1914 Mad 437 (437). ('09) 36 Cal 130 (132, 133). ('10) 12 Bom L R 365 (366). ('31) AIR 1931 Bom 350 (351) : 55 Bom 473. ('21) AIR 1921 Pat 401 (402) : 5 Pat L Jour 415. ('92) 14 All 210 (211). (1863) 1863 Suth W R Sp No. 116 (117) (FB). (1865) 2 Suth W R Misc 41 (42). ('66) 6 Suth W R Misc 74 (75). ('74) 21 Suth W R 194 (194). ('87) AIR 1937 Rang 134 (135). ('86) AIR 1936 Pesh 52 (53). ('86) AIR 1936 Mad 136 (137) : 59 Mad 399. ('38) AIR 1938 Lah 801 (803). ('35) AIR 1935 Lah 302 (303) : 16 Lah 990. ('36) AIR 1936 All 626 (628). (Order that a certain decree-holder is not competent to make an application for rateable distribution is not appealable.) [See also ('76) 1 All 333 (337) (FB).]
- [See however ('31) AIR 1931 Pat 359 (360) : 10 Pat 830. (Order not refusing rateable distribution but refusing execution of an order for rateable distribution, *held* appealable.)
5. ('12) 36 Bom 156 (163). ('34) AIR 1934 Pat 350 (351). (Decree in rent suit by one cosharer impleading other cosharers also—Decrees obtained by other cosharers also — Decision on question of rateable distribution in execution is appealable.)

holders *inter se* but also the surety for the judgment-debtor, an appeal will lie from the order under Section 47 read with Section 145 of the Code.⁶

25. Revision. — A wrong order of distribution can be contested in a suit under clause (2). This other remedy being open, the High Courts will not, as a general rule, interfere in revision in such cases.¹ This, however, does not mean that they *cannot* interfere in revision.² Where the lower Court acts without *jurisdiction* or declines to exercise jurisdiction,³ or the remedy by suit is so inconvenient as to practically amount to no remedy,⁴ or is manifestly wrong,⁵ or the result of the suit, if brought, would be definite success,⁶ a revision will lie. Where the Court sets aside the order, it can order the amount wrongly paid to be returned to Court.⁷

- (‘16) AIR 1916 Mad 20 (21, 22): 39 Mad 570.
 (‘81) AIR 1931 Bom 252 (253). (Following 36 Bom 156 and A I R 1915 Cal 658.)
 (‘31) AIR 1931 Bom 350 (351): 55 Bom 473.
 (‘82) AIR 1932 Lah 96 (96).
 (‘38) AIR 1938 Pesh 63 (65). (Order treating execution application as *ultra vires* on ground that agent who filed it had no *locus standi* — Such order affects judgment-debtor and hence is appealable.)
 (‘39) AIR 1939 Bom 112 (114): I L R (1939) Bom 133.
 6. (‘39) AIR 1939 Bom 112 (114): I L R (1939) Bom 133.

Note 25

1. (‘21) 60 Ind Cas 371 (372) (Lah). (Disallowing or allowing claim for rateable distribution.)
- (‘33) AIR 1933 Sind 329 (330): 27 Sind L R 190. (But order under this Section is not a ministerial act.)
- (‘08) 1908 Pun L R No. 119, p. 366 (367): 1906 Pun Re No. 128.
- (1897-1901) 2 Upp Bur Rul 274.
- (‘94) 4 Mad L Jour 87 (88). (Mere fact that decision is erroneous does not justify revision.)
- (‘97) 1 Cal W N 633 (635). (Mere mistake of law.)
- (‘05) 2 All L Jour 370 (371). (Error in the exercise of jurisdiction.)
- (‘12) 1912 Pun L R No. 176, p. 565.
- (‘12) 17 Ind Cas 389 (389) (Mad). (Wrong decision on question of law, no ground.)
- (‘05) 1905 Pun Re No. 65, p. 218: (1905) Pun L R No. 180, p. 468. (A misapprehension of law or fact, no ground.)
- (‘82) AIR 1932 Lah 96 (97).
- (‘36) AIR 1936 Pesh 52 (53).
- (‘36) AIR 1936 Oudh 185 (187): 12 Luck 52.
- (‘35) AIR 1935 Lah 971 (971).
- (‘34) AIR 1934 Mad 426 (427): 58 Mad 59.
- [See (‘33) AIR 1933 Pat 277 (278). (In cases where suit does not lie, revision is open.)]
2. (‘07) 10 Oudh Cas 129 (131).
- (‘33) AIR 1933 Lah 48 (49): 14 Lah 243.
- (‘33) AIR 1933 Pesh 52 (52). (Interference in revision even if other remedy is open is proper when circumstances justify such interference.)
- (‘15) AIR 1915 Mad 547 (547, 548).
- (‘09) 9 Cal L Jour 210 (215).
- (‘26) AIR 1926 Mad 179 (181).
- (‘28) AIR 1928 Mad 362 (362).
- (‘28) AIR 1928 Rang 163 (164): 6 Rang 582.

- (‘26) AIR 1926 Nag 380 (381). (Against an order rejecting an application.)
 (‘39) AIR 1939 Bom 112 (114): ILR (1939) Bom 133.
 3. (‘11) 15 Cal W N 872 (875). (Refusal to exercise jurisdiction — Fact that such refusal is based upon misapprehension of the true effect of statutory provision is immaterial.)
 (‘34) AIR 1934 Oudh 110 (111). (Disallowing rateable distribution in defiance of predecessor's order is illegal exercise of jurisdiction.)
 (‘07) 10 Oudh Cas 129 (131).
 (‘09) 32 Mad 334 (335). (Refusing to grant rateable distribution to a person who is entitled to it is declining to exercise jurisdiction.)
 (‘22) AIR 1922 Cal 19 (21).
 (‘14) AIR 1914 Upp Bur 15 (16). (Attachment of property situated outside Court's jurisdiction.)
 (‘09) 4 Ind Cas 52 (53) (Cal).
 (‘92) 15 Mad 372 (376). (Not entertaining application at all.)
 (‘69) 11 Suth W R 54 (55, 56). (Court setting aside its own order for rateable distribution without jurisdiction — High Court interfered — S. 15, Charter Act.)
 (‘35) AIR 1935 Pat 201 (202). (Taking wrong view of S. 73 is not declining to exercise jurisdiction.)
 (‘39) AIR 1939 Mad 196 (196). (Declining to entertain application due to misapprehension of the true effect of statutory rules contained in the Civil Procedure Code.)
 (‘38) 177 Ind Cas 269 (270) (Pat). (In execution a sum attached and brought into Court by one decree-holder — Court declining to order rateable distribution in favour of other decree-holder who had also taken out execution, on ground that sum was not assets in hands of Court — Sum held assets capable of distribution.)
 (‘36) AIR 1936 Mad 91 (93): 59 Mad 303.
 4. (‘05) 2 All L Jour 370 (371).
 (‘32) AIR 1932 All 411 (412): 54 All 516.
 (‘82) 4 Mad 383 (384).
 5. (‘26) AIR 1926 Mad 179 (181). (Manifest error.)
 (‘27) AIR 1927 Mad 1030 (1030).
 (‘27) AIR 1927 Mad 944 (944).
 6. (‘27) AIR 1927 Mad 944 (944).
 (‘09) 32 Mad 334 (336). (Refusal of rateable distribution application, because judgment-debtor has other properties.)
 7. (‘16) AIR 1916 Cal 264 (265).
 (‘31) AIR 1931 Pat 405 (408): 11 Pat 250.

RESISTANCE TO EXECUTION

74. [S. 330.] Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

[1877, S. 330; 1859, S. 228. See O. 21 Rr. 97 to 103.]

Synopsis

1. Legislative changes.
2. Scope of the Section.
3. "Decree for the possession."
4. Resistance must be by judgment-debtor or some other person on his behalf.
5. What is resistance.
6. Possession.
7. Appeal.

1. Legislative changes. — These are referred to and discussed in their appropriate places in the Notes below.

2. Scope of the Section. — The corresponding Section of the old Code related entirely to decrees for *possession*.¹ The scope of the Section has now been widened by making it applicable to cases where a *court auction-purchaser* is resisted or obstructed in obtaining possession of the property purchased by him.

The old Section contained the words "without prejudice to any penalty to which such judgment-debtor or other person may be liable under the Indian Penal Code or any other law for such resistance or obstruction." These words have been omitted in the present Section apparently as being unnecessary. The law, it is conceived, must be regarded as being the same under the present Section, notwithstanding the said omission.

In addition to the powers which Courts have under the ordinary law to punish disobedience of judicial orders, the High Courts in India can enforce obedience to their orders by taking proceedings for contempt.²

For detailed provisions, see O. 21 Rr. 97 to 103.

Section 74 — Note 2

1. ('98) 2 Cal W N 311 (314).
2. ('83) 7 Bom 1 (4). (Authority conferred on High Court by Charters and Letters Patent.)

('83) 7 Bom 5 (13).

PART III.

INCIDENTAL PROCEEDINGS

COMMISSIONS

Power of Court to issue
Commissions.

75. [New.] Subject to such conditions and limitations as may be prescribed, the Court may issue a commission —

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition.

[See Order XXVI.]

Synopsis

1. Issue of Commissions.
2. Commission to examine any person. See O. 26 Rr. 1 to 8.
3. Local investigation.
4. Commission to examine accounts. See O. 26 Rr. 11 and 12.
5. Commission to make partitions. See O. 26 Rr. 13 to 18.

Other Topics (Miscellaneous)

As may be prescribed — Order 26. See Note 1.

No delegation of judicial functions to Commissioner. See Note 1.

1. Issue of commissions. — This Section is new and defines and limits the power of the Court to issue commissions. The detailed provisions are set forth in Order 26, but they do not amplify the scope of this Section.¹ Where, therefore, it is not necessary for the purposes set forth in the Section to issue a commission, it is not competent for the Court to do so.²

Though the Court has power to issue a commission, it cannot make over the whole case³ or a material issue⁴ to the Commissioner for trial on the merits. Nor should

Section 75—Note 1

1. ('22) AIR 1922 Lah 47 (48); 3 Lah 209.
2. ('12) 13 Ind Cas 440 (443) (Cal).
3. ('26) AIR 1926 Lah 145 (146).
4. ('26) AIR 1926 Cal 57 (57, 58). (Party ordered to supply papers to Commissioner—Commissioner asked to decide whether papers supplied were adequate and if not, whether party was liable to pay money compensation—Order was held unobjectionable.)
5. ('93) 16 Mad 350 (351).
6. ('26) AIR 1926 Lah 145 (146).
7. ('28) AIR 1928 Bom 145 (147). (Question whether

one of the parties is personally engaged in agricultural labour cannot be referred to the Commissioner.)

('22) AIR 1922 Lah 47 (48, 49); 3 Lah 209.

('25) AIR 1925 Pat 576 (576). (In a mortgage suit where the defendant pleads that the debt has been discharged out of the usufruct of the property the Court cannot refer to the Commissioner, the question whether the plaintiff has been in possession.)

('30) AIR 1930 Cal 764 (765). (Issue whether disputed land is an accretion—Not to be delegated to Commissioner.)

it issue a commission to *two* persons⁵ or issue a *succession* of commissions covering the same ground.⁶

This Section and Order 26 deal with cases in which a Commissioner is appointed either by the Court *suo motu* or on the application by either party. These provisions do not apply to cases in which the parties consent or agree to the appointment of a Commissioner for any particular purpose. Hence, where in a suit for infringement of copyright a Commissioner is appointed by the consent of both the parties to record evidence, the evidence recorded by the Commissioner is admissible in evidence although the case does not come under the Rules in Order 26. But, the *opinion* of the Commissioner is no evidence and cannot be considered by the Court.⁷

2. Commission to examine any person. — See O. 26 Rr. 1 to 8.

3. Local investigation. — A Court ought not to hold a local investigation with a view to gather information on which it may base its judgment, though it may inspect the locality with a view to understand the evidence. Where additional information is required, the proper course is to appoint a Commissioner whose report may be used in evidence and who may himself be examined as a witness.¹

Where a matter has been referred to a Commissioner for local investigation, it is not safe for the Court to act as an expert and to overrule the report of the Commissioner whose integrity is unquestioned.²

For further notes, see O. 26 Rr. 9 and 10.

4. Commission to examine accounts. — See O. 26 Rr. 11 and 12.

5. Commission to make partitions. — See O. 26 Rr. 13 to 18.

76. [S. 386.] (1) A commission for the examination of any person may be issued to any Court (not being a Commission to another Court. High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

[1877, Ss. 383, 384, 385, 386 (2); 1859, S. 175; see O. 26 R. 4.]

(‘32) AIR 1932 All 264 (267). (Commissioner not to be asked to decide about occupation of a woman after hearing her singing nor can he take the help of assessors.)

(‘35) AIR 1935 Mad 888 (890).

5. (‘29) AIR 1929 Mad 661 (663).

6. (‘29) AIR 1929 Mad 661 (663).

(‘31) AIR 1931 Cal 170 (170). (Except where the prior commission was without notice to ag-

grieved party.)

7. (‘38) AIR 1938 All 266 (267, 268): I.L.R. (1938) All 370.

Note 3

1. (‘12) 14 Ind Cas 377 (379) (Cal).

[See also (‘32) AIR 1932 All 270 (271). (Appellate Court has such powers.)]

2. (‘24) AIR 1924 Cal 620 (622).

1. Jurisdiction of Court to issue commission for examination of witness.
— See O. 26 Rr. 1 and 4.

77. [New.] In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India.

Letter of request.

[See O. 26 Rr. 5 and 6.]

1. Scope of the Section. — This Section applies only where the witness resides outside British India. If he is resident in another Province, but in British India, the previous Section will apply.

78. [S. 391.] *Subject to such conditions and limitations as may be prescribed*, the provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by *or at the instance of* —

Commissions issued
by foreign Courts.

(a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of *the Central Government or of the Crown Representative*, or

(b) Courts situate in any part of the British Empire other than British India, or

(c) Courts of any foreign country.

[1877, S. 391.]

a. Inserted by the Code of Civil Procedure (Amendment) Act, 1932 (X of 1932), Section 2.

b. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Governor-General in Council."

1. Amendments after 1908. — The following amendments were introduced by the Code of Civil Procedure (Amendment) Act (X of 1932) :—

1. The words "subject to such conditions and limitations as may be prescribed" have been newly introduced before the words "the provisions."

2. The words "or at the instance of" have been added after the words "issued by."

3. The words "for the time being in alliance with His Majesty" which occurred in clause (c) have been omitted. In the case noted below¹ it was held that the Kingdom of Ava was not in a state of alliance with the British Government, within the meaning of Section 177 of the Code of 1859.

Section 78 — Note 1

1. ('68) 10 Suth W R 385 (385).

PART IV.

SUITS IN PARTICULAR CASES

SUITS BY OR AGAINST ^a[THE CROWN]^b OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

^b79. Subject to the provisions of sections 179 and 185 of the Government of India Act, 1935, in a suit by or against the Crown the authority to be named as plaintiff or defendant, as the case may be, shall be —

Suits by or against
^a[the Crown.]

(a) in the case of a suit by or against the Central Government, the Governor-General in Council before the establishment of the Federation of India, and thereafter, the Federation ;

(b) in the case of a suit by or against a Provincial Government, the Province ; and

(c) in the case of a suit by or against the Crown Representative, the Secretary of State.

[1877, S. 416 ; See O. 27.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government."

b. Section substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original Section 79.

Synopsis

1. Legislative changes.
2. Scope and applicability of the Section.
3. In what cases suit will lie against the Government.
4. Act of State. See Section 9 Note 57.
5. Suits against State Railways.

6. Cases in which Government is a necessary party.
7. Jurisdiction in suits against Government.
8. Form of suit against Government.
9. Information exhibited by the Advocate-General.
10. Procedure in suits by or against the Government. See Section 80 and Order 27.

1. **Legislative changes.**—The present Section was substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original Section 79, the change being necessitated by the Government of India Act, 1935 (25 & 26 Geo. V, Ch. 42). (See Sections 3 and 176 of that Act.) The old Section ran as follows :

"(1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council.

"(2) Nothing in this Section shall be deemed to limit or otherwise affect any information exhibited by the Advocate-General in exercise of the power declared by Section 111 of the East India Company Act, 1813."

It will be seen that under the old Section, *all* suits by or against the Government were to be instituted by or against the Secretary of State for India in Council. After the passing of the Government of India Act, 1935, such suits will fall under the three categories enumerated in clauses (a), (b) and (c) of the present Section and the Section has accordingly been changed so as to deal specifically with each such category.

2. Scope and applicability of the Section. — This Section declares the *procedure* where suits are to be brought by or against the Government; it does not deal with the question as to *what* are the claims and liabilities enforceable against the Government.¹ These must be determined only with reference to the provisions of the Government of India Act, 1935. (See Sections 172 to 180 of the Act.) The rule of procedure under this Section applies also to appeals.²

3. In what cases suit will lie against the Government. — Under the English Constitution a person aggrieved by an act or omission of a Government servant or department can seek his remedy only by a *petition of right*.¹ The liabilities of the Crown upon a petition of right extend to detention of land, chattels or money of the subject and to breach of contract.²

In India, Section 176 sub-section 1 of the Government of India Act 1935, provides as follows :—

"(1) The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by the Act of the Federal or Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed."

So, under the above sub-section, the test to see if a suit lies against the Crown is whether in the circumstances of the case, a suit would have lain against the Secretary of State for India in Council, if the Government of India Act of 1935 had not been passed. For this, Section 32 of the Government of India Act of 1915 must be seen. Sub-section 2 of that Section runs as follows :—

"Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858 and this Act had not been passed."

The above sub-section corresponds to the following provision in Section 65 of the Government of India Act of 1858 conferring the right of suit against the Government³ :

"... all persons and bodies politic shall and may have and take the same suits, remedies and proceedings legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company" (the East India Company).

Section 79 — Note 2

1. See ('03) 6 Bom LR 131 (146) : 27 Bom 189. (Case about the corresponding S. 416 of the Code of 1882.)

2. ('29) AIR 1929 Lah 10 (11) : 9 Lah 667.

Note 3

1. See Petition of Rights Act, 1860 (23 & 24 Vict., Ch. 34). Also Robertson on Civil Proceedings by or against the Crown, pp. 330, 419.

2. ('15) AIR 1915 Mad 434 (438) : 19 Ind Cas 353

(357) : 37 Mad 55.

3. ('76) 1 Cal 11 (14).

('03) 6 Bom LR 131 (146). (Confirming 27 Bom 189.)

('13) 18 Ind Cal 22 (24) : 40 Cal 391 : 40 Ind App. 48 : 7 Low Bur Rul 10 (PC). (Government of India not competent to pass any Act which would prevent a subject from suing the Secretary of State for India in any case in which an action would have lain against the East India Company.)

The East India Company was engaged in transactions partly in the exercise of *sovereign powers* delegated to it by the Crown and partly on its own account, which, without delegation of sovereign powers might be carried on by *private individuals*.⁴ Therefore, in so far as a person was aggrieved by an act done in the exercise of *sovereign rights*, the East India Company was liable in the same way as the Crown upon a petition of right. It follows that the Crown in India is also liable in respect of all such acts, that is, *detention of land, chattels or money and breach of contract*.⁵ In respect of *torts* by its servants in the exercise of sovereign powers, the Company was not, and the Crown in India will not be, liable unless it had *ordered or ratified* the tortious act.⁶ The reason is that the doctrine of principal and agent can apply where the acts done by the Officers of the Government are done in the performance of *duties imposed by the Legislature*, though the officers themselves are *appointed* by the Government; and in exercising or exceeding such authority they cannot be considered to have been the agents of the appointing authority so as to render the latter liable.⁷ In so far as the East India Company was engaged in transactions on its own account, which, without delegation of sovereign right can be carried on by *private individuals*, it was liable like any other private individual. The Crown in India will consequently

4. ('76) 1 Cal 11 (13).

[See also ('81) 3 All 829 (834).]

5. ('15) AIR 1915 Mad 484 (438, 439): 19 Ind Cas 353 (357, 359): 37 Mad 55.

('80) 2 All 756 (760, 761). (Breach of Contract.)

('85) 7 All 140 (144). (Suit to declare that certain land is not liable to assessment.)

('79) 4 Cal 103 (105). (Suit to declare right to hold property under any settlement that may be made.)

('90) 17 Cal 590 (604): 17 Ind App 40 (PC). (Suit to declare that certain lands are not liable to assessment.)

('66) 5 Suth W R 47 (48). (Suit to set aside order directing plaintiff to pay Government revenue at a certain rate.)

('69) 11 Suth W R 425 (425). (Suit for refund of income-tax illegally assessed lies.)

('82) 4 Mad 344 (357). (Suit for import duty illegally levied lies. Dissenting from 1 Cal 11.)

('92) 5 Mad 273 (283). (Recovery of money illegally collected—Suit lies. Dissenting from 1 Cal 11.)

(1862) 1 Hyde 37 (38, 40). (Specific performance of contract.)

('74) 21 Suth W R 327 (330) (FB). (Suit to set aside a settlement and for possession.)

(1864) 2 Hyde 153 (162). (Breach of contract.)

('72) 4 N W P H C R 146 (147). (Wrongful resumption of ferry—Suit against Government lies.)

('01) 28 Cal 540 (544, 545). (Wrongful attachment under S. 88, Cr. P. Code, of property of a third person.)

('72) 17 Suth W R 497 (499). (But an agent on behalf of Government, e. g., a Public Works Officer cannot bind the Government with a contract made by him in excess of his authority.)

(1861) 8 Moo Ind App 529 (554) (PC). (Act of Government officer binds Government when authorized to do so, or if ratified by Government.)

('13) 19 Ind Cas 353 (359, 361) (Mad). (The broad proposition that acts in the exercise of sovereign powers cannot be sued upon in any case has been dissented from in later cases and is no longer good law.)

('05) 28 Mad 72 (77, 82). (Injunction—Continuing wrong.)

('05) 28 Mad 213 (215). (Liability under Indian Post Office Act VI of 1898, S. 34.)

[But see ('67) 7 Suth W R 191 (193): Beng L R Sup Vol. 630. (Section 3 of clause 2 of Regulation VI, 1819.)

('75) 1 Cal 11 (26, 27). (Acts of officers appointed in connection with the collection of excise duties—No suit lies.)

6. ('15) AIR 1915 Mad 484 (441): 19 Ind Cas 358 (359): 37 Mad 55. (Liable.)

('03) 27 Bom 189 (211, 212). (Act of State.)

('05) 1 Cal L Jour 355 (359). (Acts of Judicial officers.)

('12) 16 Ind Cas 922 (925) (Cal). (Wrongful dismissal of a public servant.)

('06) 33 Cal 669 (674, 675). (Do.)

('15) AIR 1915 Mad 998 (998): 39 Mad 351. (Negligence of servants in keeping gravel on a military road.)

('04) 28 Bom 314 (325, 326). (Negligence of constable in respect of goods seized.)

('71) 7 Beng L R 688 (696). (Wrongful dismissal.)

('20) AIR 1920 Lah 362 (364): 1919 Pun Re No. 148. (Tortious act by Police Officers.)

(1877) 2 O P D 445 (453), Grant v. Secretary of State. (Compulsory retirement.)

[See also ('71) 1871 Pun Re No. 60 (Civil.)

('75) 1875 Pun Re No. 64 (Civil.)

('99) 26 Cal 792 (808, 809).]

[Compare also ('84) 7 Mad 466 (472, 473). (Where the dismissal was under colour of Municipal law.)]

7. ('84) 10 Cal 445 (461). (Contractor employed by Government and licensed by the Calcutta Municipality—Obstruction in public way—Corporation liable for breach of statutory duty—Secretary of State not liable.)

('15) AIR 1915 Mad 484 (441): 19 Ind Cas 353 (359): 37 Mad 55.

('20) AIR 1920 Lah 362 (364): 1919 Pun Re No. 148. ('03) 26 Bom 801 (807, 808, 809).

be liable in respect of those acts also *which might be done by private individuals without the delegation of sovereign rights.*⁸

It was held, before the Government of India Act of 1935, that contracts with the Secretary of State for India must conform to the provisions of Section 29 of the Government of India Act, 1915; and where they did not conform to such provisions they were not binding on the Secretary of State.⁹ It is obvious that the same principle will also apply now and the Crown will not be liable under any contract unless such contract conformed to the provisions of the Government of India Act of 1935.

4. Act of State. — See Section 9 Note 57 "Acts of State."

5. Suits against State Railways. — Before the passing of the Government of India Act of 1935, it was held that a suit against a State Railway must be brought against the Secretary of State for India in Council.¹ See now, Section 185 of the Government of India Act of 1935.

6. Cases in which Government is a necessary party. — The rules governing the joinder of ordinary persons as parties would also apply to the joinder of the Government as a party.¹ Thus in a suit to set aside a sale under the Public Demands Recovery Act (Bengal Act 1 of 1895), the Government is in the position of a decree-holder and as such is a necessary party.² Similarly, in a suit to recover possession of a *chur* which had been leased by the Government to the defendant, the Government as claiming a proprietary right in the land is a necessary party.³ See also the undermentioned cases⁴ showing in what cases Government was held to be a necessary party and in what cases not.

See also Note 25 to Order 1 Rule 10, *infra*.

('04) 28 Bom 314 (325, 326).

('82) 5 Mad 91 (105) (FB).

('16) AIR 1916 Mad 1157 (1159, 1160) : 39 Mad 781.

('03) 26 Mad 263 (264).

8. ('75) 1 Cal 11 (13, 14).

('15) AIR 1915 Mad 434 (438) : 19 Ind Cas 353 (357) : 37 Mad 55.

('67) 5 Bom H C R App 1 (23).

('11) 13 Ind Cas 370 (371) : 38 Cal 797.

('71) 3 N W P H C R 195 (197, 198). (Government bullock train—Goods stolen through negligence of servants—Government is liable.)

('11) 11 Ind Cas 58 (59) : 5 Sind L R 82. (Tort by Government Railway Company servants—East India Company did the railway business as a private individual—Hence suit lies.)

9. ('28) AIR 1928 Cal 74 (82) : 54 Cal 969.

Note 5

1. (24) AIR 1924 Bom 306 (306) : 48 Bom 297.

('01) 4 Oudh Cas 133 (136, 138).

('31) AIR 1931 Pat 326 (327) : 10 Pat 466.

('31) AIR 1931 Pat 393 (393, 394).

[See ('33) AIR 1933 Pat 630 (632). (If Secretary of State is not made party, there is no liability on the Railway Company.)]

Note 6

1. ('19) AIR 1919 P C 225 (228) (PC).

2. ('02) 31 Cal 159 (161).

3. ('79) 5 Cal L Rep. 154 (156).

4. *Government a necessary party* :

('66) 3 Mad H C R 134 (135, 136). (Suit to transfer registration—Collector is a necessary party.)

('92) 15 Mad 350 (350, 351). (Suit to compel mutation of names — Collector is a necessary party.)

('88) 15 Cal 460 (470) (FB). (Suit under S. 42 of the Specific Relief Act against person claiming to use a land as public road.)

Government not a necessary party :

('72) 17 Suth W R 145 (146).

('74) 22 Suth W R 52 (53, 54). (Held that Collector ought to have been made a party but as the lower Courts were wrong on the merits of case, the case was not remanded to have the Collector made a party.)

('92) 15 Mad 292 (293). (Suit for declaration of title against Municipality.)

('71) 8 Beng L R 524 (532). (Suit for declaration of plaintiff's right to share in the settlement of an accretion.)

('78) 2 Cal L Rep 467 (470). (Suit by A against B for possession of certain land as accretion.)

('98) 25 Cal 833 (843) : 25 Ind App 151 (PC). (Appeal arising out of a suit for annulling a sale of an estate for supposed arrear of revenue.)

('03) 7 Cal W N 377 (380). (Do.)

('83) 9 Cal 271 (276, 277). (Do.)

('87) 11 Bom 519 (523). (Suit against farmer of Abkari revenue for a refund of money illegally levied at his instance by the Collector.)

('82) 16 Bom 649 (652). (Suit for declaration that plaintiff is a Kadim Naik.)

('26) 96 Ind Cas 927 (927) (Lah). (Section 60, Excise Act—Suit by a claimant to property sold.)

7. Jurisdiction in suits against Government. — It was held, before the Government of India Act of 1935, that a suit against the Secretary of State for India could only be brought in the Court within the local limits of whose jurisdiction the cause of action arose and that the words "dwell," "carry on business" or "personally work for gain" which occur in Sections 16, 19 and 20 of the Code and Clause 12 of the Letters Patent, did not apply to the Secretary of State for India.¹ It is conceived that the same principle will apply to suits against the Crown after the passing of the above Act. (See Notes to Section 20.)

8. Form of suit against Government. — It was held, before the Government of India Act of 1935, that a suit against Government must be instituted against the Secretary of State for India in Council¹ and that it could not be brought against the "Secretary of State."² Where a suit was wrongly brought against an officer of the Government, it was held that the plaint should be amended by substituting the name "the Secretary of State for India in Council" for the name of the officer.³ Under the Code of 1859, a suit against the Agent to the Governor-General on the part of the Government was held to be a suit substantially against the Government.⁴

In the undermentioned case,⁵ a suit against the Government was dismissed and an appeal was filed against the decree dismissing the suit. The case was one in which under Section 179 sub-section 1 of the Government of India Act of 1935 the appeal should have been lodged against the Government of the Punjab or the Secretary of State. But the respondent to the appeal was named as the Secretary of State for India in Council. It was held that although this was inconsistent with the provisions of the above Section, the mere addition of the words "for India in Council" did not justify the dismissal of the appeal and it could only be construed as a misdescription of the respondent.

9. Information exhibited by the Advocate-General. — As seen in Note 1 *ante*, sub-section 2 of the old Section, which provided that nothing in the Section should be deemed to limit or otherwise affect any information exhibited by the Advocate-General in exercise of the power declared by Section 111 of the East India Company Act 1813,¹ has been omitted from the Section substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

10. Procedure in suits by or against the Government. — See Section 80 and Order XXVII.

Note 7

1. ('86) 14 Cal 256 (271, 272).
- (1862) 1 Hyde 37 (40, 41, 42).
- ('12) 15 Ind Cas 955 (959) (Cal).
- ('74) 6 N W P H.C.R. 47 (51).
- (1862) 1 Mad H.C.R. 286 (292, 293, 294). (Note—A Collector who, in his capacity as a district Magistrate was a member of a Municipality can be sued only in the District Court for acts done in his official capacity under Section 39 of the Bombay Act XIV of 1869. See ('76) 1 Bom 628 (629).)

Note 8

1. (10) 34 Bom 618 (631).
 - ('84) 7 Mad 466 (478) (FB).
 2. ('75) 1 Cal 11 (14). (21 & 22 Vic., Ch. 106.)
 3. ('82) 6 Bom 672 (673).
 - ('82) 6 Bom 670 (671). (Even High Court on appeal can allow amendment.)
 - ('04) 28 Bom 332 (337).
 4. ('68) 10 Suth W.R. 142 (143).
 5. ('39) AIR 1939 Lah 298 (298).
- Note 9
1. ('10) 12 Bom L.R. 274 (291, 294).

80. [S. 424.] No suit shall be instituted against *the Crown*, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been *delivered to, or left at the office of* —

Notice.

(a) *in the case of a suit against the Central Government, a Secretary to that Government ;*

(b) *in the case of a suit against the Crown Representative, the Political Secretary ;*

(c) *in the case of a suit against a Provincial Government, a Secretary to that Government or the Collector of the District, and*

(d) *in the case of a suit against the Secretary of State, a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government of the Province where the suit is instituted,*

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims ; and the plaint shall contain a statement that such notice has been so delivered or left.

[1877, S. 424. See O. 27.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the words "the Secretary of State for India in Council."

b. Substituted by *ibid* for "in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District."

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and object of the Section. 3. Applicability of the Section. <ol style="list-style-type: none"> 4. Act of State. See Note 57 to Section 9. 5. "Act purporting to be done by such public officer in his official capacity." <ol style="list-style-type: none"> 6. "Public Officer," who is. See Section 2 (17). 7. Suits against Municipalities. 8. Suits against Court of Wards. See Note 5. 9. Suits against Railway Administration. 10. Notice is a condition precedent to the institution of the suit. <ol style="list-style-type: none"> 11. Suits on contracts and suits for injunctions. 12. Object of notice. See Note 2. 13. Form and sufficiency of notice. | <ol style="list-style-type: none"> 14. Service of notice. 15. Waiver of notice and effect thereof. 16. Notice, if necessary, for amendment of plaint. 17. Fact of notice having been delivered to be mentioned in the plaint. 18. Institution of suit during currency of notice. 19. Variance between notice and plaint. 20. Effect of death of intending plaintiff after notice. 21. Exclusion of period of notice for purposes of limitation. 22. Cases in which the Government is a necessary party. See Section 79. 23. Jurisdiction to entertain suits against Government or Public Officer. See Section 79. |
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Other Topics (Miscellaneous)

Adding or substituting Secretary of State and notice. See Note 16.
 Administrator-General and Official Trustee. See Note 3.
 Common manager under Section 95, B. T. Act, VIII of 1885. See Note 11 and Section 2 (17).
 Cantonment Committee. See Section 2 (17).
 Dispensing with notice. See Note 11.

Notice to Collector. See Note 14.
 Notice to Public Officer. See Notes 2 and 14.
 Official Receivers. See Section 2 (17).
 One of several plaintiffs—Notice by. See Note 13.
 Provision mandatory. See Note 10.
 "Secretary of State in Council." See Note 2.
 Want of notice—Time for objection. See Note 15.

1. Legislative changes. — See foot-notes (a) and (b) below the text of the Section.

2. Scope and object of the Section. — This Section, like Section 79, enacts only a rule of *procedure*¹ and does not affect the *right to sue* the Secretary of State for India in Council, which is given by the Government of India Act, 1935 (See Note 3 to Section 79 *ante*.)

The object of the Legislature in requiring the notice under this Section is to afford the defendant an opportunity to reconsider his position with regard to the claim made, and to make amends or settle the claim, if so advised, without recourse to the trouble and cost of litigation.²

The terms of the Section are *imperative* and admit of no exceptions or implications.³ A suit, not complying with its provisions, cannot be entertained by any Court, and if instituted, must be rejected under O. 7 R. 11.⁴ The provisions of the Section cannot be relaxed merely because the Crown or the public officer happens to be only one of several defendants.⁵ Even where the Crown or the public officer is only a *pro forma* defendant, a notice under this Section is necessary.⁶ But in the undermentioned cases,⁷ the view was held that where a suit has been instituted against several

Section 80 — Note 2

1. ('37) AIR 1937 Lah 41 (49): I L R (1937) Lah 11.
2. ('01) 24 Mad 279 (282). (Notice proceeding from only two out of three joint plaintiffs valid.)
- ('32) AIR 1932 Lah 374 (376): 13 Lah 672. (Application under Para. 17 of Sch. II, C. P. C. asking the Court to file an agreement to refer a dispute to arbitration does not amount to a suit within this Section.)
- ('16) AIR 1916 Bom 296 (297): 40 Bom 392. (Defendant's agent threatening to demolish disputed property during currency of notice—Suit filed before expiry is good.)
- ('81) 7 Cal 499 (503). (The official trustee is a public officer.)
- ('98) 25 Cal 239 (244). (This Section applies to all kinds of suits.)
- ('05) 32 Cal 1130 (1134). (Objections as to notice required by this Section can be taken only by the Secretary of State.)
- ('07) 34 Cal 257 (282).
- ('81) AIR 1931 Cal 503 (504): 58 Cal 850. (Receiver appointed under O. 40 R. 1 with powers under R. 1 cl. 1 (d) is a public officer.)
- ('35) AIR 1935 Bom 229 (230).
- ('38) AIR 1938 Nag 415 (417): I L R (1939) Nag 206. [See ('81) 6 Cal 8 (10) (F B). (Decision under S. 87 of Bengal Act III of 1864.)]
3. ('27) AIR 1927 P C 176 (183): 54 Ind App 338: 51 Bom 725 (PC).
- ('33) AIR 1933 All 53 (54).
- ('33) AIR 1933 Lah 203 (207): 14 Lah 330.

- ('38) AIR 1938 Pat 127 (128). (Provisions of S. 80 cannot be relaxed in cases in which Crown happens to be only one of the defendants.)
- ('35) AIR 1935 Sind 206 (207): 29 Sind L R 404. (Two plaintiffs—Notice by only one plaintiff is not sufficient.)
- ('39) AIR 1939 Pat 32 (33).
- ('35) AIR 1935 Bom 229 (229, 230).
- ('38) AIR 1938 Mad 583 (584).
4. ('03) 25 All 187 (190, 193). (Notice issued by a person who dies before institution does not enure to the benefit of his legal representative.)
- ('38) AIR 1938 Pat 127 (128). (Rejection of plaint and not dismissal of suit is the proper course.)
- ('35) AIR 1935 Mad 389 (390). (Affirming, on Letters Patent Appeal, AIR 1931 Mad 175.)
5. ('39) AIR 1939 Pat 32 (33). (Public officer, one of the defendants.)
- ('38) AIR 1938 Pat 127 (129). (Crown, one of the defendants.)
6. ('36) AIR 1936 Pat 339 (339, 340): 15 Pat 353.
7. ('36) AIR 1936 Pat 339 (340): 15 Pat 353. (Name of Crown as *pro forma* defendant expunged from action and suit proceeded with against others.)
- ('39) AIR 1939 Pat 32 (33). (Decree against other defendants not affected.)
- [See also ('38) AIR 1938 Pat 127 (129). (Expunging name of Crown and proceeding with suit against other defendants held not possible where the name of Crown as plaintiff would entail a change in the nature of suit.)]

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defendants one of whom is the Crown or a public officer and notice under this Section has not been given, the *whole* suit is not bad but is bad only with reference to the Crown or the public officer.

The Section deals with two classes of cases —

- (1) Suits against the Crown.
- (2) Suits against Public Officers.

In the first class, notice under this Section must be given in *all* cases.⁸ In the second class, notice under this Section is necessary only where the suit is in respect of any act *purporting to be done by such public officer in his official capacity*.⁹

It has been held by the High Court of Lahore that an application under Para. 17 of the Second Schedule of this Code is not a *suit* within the meaning of this Section, so as to be governed by its provisions.¹⁰ See also Note 12 to Para. 20 of the Second Schedule, *infra*.

3. Applicability of the Section. — The provisions of this Section have been made inapplicable to the following cases —

- (1) Suits against the Official Trustee in which no relief is claimed against him personally. See Section 16 of the Official Trustees Act (II of 1913).
- (2) Suits against the Administrator-General in which no relief is claimed against him personally. See Section 41 of the Administrator-General's Act (III of 1913).
- (3) Suits of the class mentioned in Section 77 of the Punjab Tenancy Act (XVI of 1887). See Section 94 of that Act.

The provisions of this Section do not apply to a suit brought pursuant to an undertaking given under Section 14 of the Bombay City Land Revenue Act (II of 1876).¹

Every suit instituted under Section 42 (5) of the Burma Forest Act (IV of 1902) is subject to the provisions of this Section.

4. Act of State. — See Note 57 Section 9, *ante*.

5. "Act purporting to be done by such public officer in his official capacity." — In suits against public officers, notice under this Section is necessary only —

- (1) if the suit is in respect of any *act done* by such public officer, and
- (2) such act *purports to have been done* by such public officer in his official capacity.¹

Where a suit is not in respect of any *act done* by the public officer, no notice is

8. ('14) AIR 1914 Mad 502 (504) : 16 Ind Cas 947 (948) : 37 Mad 113. (Plaintiff asking for injunction.)

('15) AIR 1915 Cal 62 (63). (The Collector to whom notice is to be given is one in whose district the suit is instituted.)

('38) AIR 1938 Mad 583 (584).

('98) 25 Cal 239 (242, 243).

('16) AIR 1916 Bom 296 (297) : 40 Bom 392.

('11) 10 Ind Cas 639 (639) : 35 Bom 362. (Notice necessary even when asking for injunction.)

9. ('32) AIR 1932 Cal 275 (281) : 59 Cal 961. (Common manager of an estate is a public officer.)

10. ('32) AIR 1932 Lah 374 (376) : 13 Lah 672.

Note 3.

1. ('34) AIR 1934 Bom 162 (163).

Note 5

1. ('10) 7 Ind Cas 993 (993) : 35 Bom 42. (Under S. 3 of the Bhagdari Act (Bom. Act V. of 1862) collector declaring plaintiff's mortgage illegal and inoperative.)

('32) AIR 1932 Cal 275 (281) : 59 Cal 961. (Non-performance or breach of contract is an act under this Section.)

('30) AIR 1930 All 742 (744) : 53 All 44. (Report by Police Inspector of an offence under S. 332, I. P. C. is act done in official capacity.)

('39) AIR 1939 Nag 232 (233). (Liquidator appointed under S. 42, Co-operative Societies Act, 1912 by order of Registrar is public officer—Suit against him under O. 21 R. 63 in respect of attachment by him—Notice is necessary.)

necessary, though he is impleaded as a defendant in the suit.² Thus; where in a suit against a ward of the Court of Wards, on a breach of contract or on a bond, the Collector is impleaded as the guardian *ad litem* of the ward, in order to protect the ward's interests, no notice will be necessary under this Section,³ though where the suit is in respect of an *act done* by him as agent of the Court of Wards, notice will be necessary if the second condition is also satisfied.⁴ Similarly, where the Official Assignee or the Official Receiver is impleaded in a suit in which no *act* of the officer is in question, as for example, a mortgage suit or a suit for declaration of title, no notice will be necessary,⁵ though where the suit is in respect of an *act done* by him, notice will have to be given if the second condition is also satisfied.⁶ Similarly also, where the Official Trustee is impleaded in a suit relating to the rights of a *cestui que trust* and not to any *act done* by him, no notice is necessary under this Section.⁷ Where at the time when the act is done, the person doing the act is not a public officer within the meaning of Section 2 clause 17, this Section has no application.⁸

As regards the second condition that the act must be one *purporting to be done by the public officer in his official capacity*, it was held in the undermentioned cases⁹

2. ('34) AIR 1934 P C 96 (97) : 61 Ind App 171 : 61 Cal 470 (PO). (Mortgage by common manager appointed under S. 95, Ben. Ten. Act—Non-payment—Suit against succeeding manager—Notice not necessary—AIR 1932 Cal 275 reversed.)
- ('38) AIR 1938 Sind 1 (3). (Assuming the rights of a zamindar during pendency of suit, by common manager is not an 'act done'.)
- ('38) AIR 1938 Cal 191 (191). (Suit against Receiver for arrears of rent—Omission of Receiver to pay rent is not an act purporting to have been done by him in his official capacity—Notice not necessary.)
- ('38) AIR 1938 Nag 449 (451) : I L R (1939) Nag 200. (Mere assertion by Official Receiver of claim on behalf of insolvent's estate is not act contemplated by Section.)
- ('35) AIR 1935 Cal 726 (727). (Assessment by Municipality—Subsequent supersession of Municipality and public officer appointed by Government to perform duties of Commissioner—Suit for declaring assessment illegal and *ultra vires*—Notice under S. 80 is not necessary.)
3. ('88) 11 Mad 317 (318). (In such a case the suit is not against him at all and he defends on behalf of the minor only—1 Bom 318 explained.)
- ('89) 13 Bom 343 (347).
- ('81) 1881 All W N 175 (176).
- ('89) 1889 Pun Re No. 24, p. 79.
- ('31) AIR 1931 Sind 158 (159) : 25 Sind L R 200. [See also ('38) AIR 1938 Mad 612 (613). (Suit concerning title between plaintiff charity and temple represented by ward—Ward represented by Collector—Case held did not fall under S. 80.)]
4. ('81) 3 All 20 (22, 23, 24) (F B).
5. ('23) AIR 1923 Bom 392 (393). (Suit for declaration of title.)
- ('32) AIR 1932 All 657 (658, 659). (Suit for declaration and cancellation of gift deed as fraudulent—Official Receiver impleaded as donee's father was an insolvent.)
- ('34) AIR 1934 Nag 201 (202, 203) : 30 Nag L R 240.
- ('30) AIR 1930 Bom 11 (15). (Suit on mortgage of insolvent's property.)
- ('27) AIR 1927 All 132 (136) : 48 All 821. (Suit to enforce a charge.)
- ('37) I L R (1937) 2 Cal 265 (304). [See also ('38) AIR 1938 Nag 449 (451) : ILR (1939) Nag 200. (Rival claims by Official Receiver and other creditors—Interpleader suit by debtor—Mere setting up of a claim to property on behalf of estate which Receiver represents is not an act purporting to be done by a public officer in his official capacity—S. 80 is not attracted.)]
6. ('30) AIR 1930 Mad 458 (463, 464). (Official assignee taking possession of other's goods believing them to be insolvent's property.)
- ('32) AIR 1932 All 575 (577) : 54 All 879. (Contract of lease in respect of insolvent's property.)
- ('34) AIR 1934 Oudh 158 (161) : 9 Luck 577. (Act done by official liquidator.)
- ('24) AIR 1924 All 40 (43) : 46 All 16.
- ('20) AIR 1920 Bom 50 (50) : 44 Bom 895. (Same rule applies to receiver appointed under Provincial Insolvency Act.)
- ('31) AIR 1931 Cal 61 (63) : 57 Cal 1127. (Official Receiver—Failure to use reasonable diligence in collecting rents and profits.)
- ('37) AIR 1937 Lah 386 (387). (Suit attacking sale by Official Receiver—He is necessary party and suit is not maintainable without notice under S. 80.)
7. ('81) 7 Cal 499 (504).
8. ('35) AIR 1935 All 106 (109). (Deputy Magistrate who has been appointed as the returning officer by the District Magistrate for the purposes of an election and who is doing the election work of the municipality at the time cannot be said to be a public officer who is acting in that connection in his official capacity as such public officer.)
9. ('04) 26 All 220 (222). (Single Judge.)
- ('12) 13 Ind Cas 721 (774) (Cal).
- ('05) 32 Cal 1130 (1134). (Observations obiter.)
- ('81) 7 Cal 499 (504). (Obiter.) [See also ('83) 7 Bom 399 (406). (Case under Bombay District Municipal Act, VI of 1872—Meeting improperly convened.)
- ('90) 14 Bom 395 (402).

that this was limited to acts done *negligently* or *inadvertently* by the public officer and did not extend to acts done *mala fide* by him. The following cases,¹⁰ on the other hand, have held that the Section applies to all acts of public officers whether done *bona fide* or *mala fide*. In *Koti Reddi v. Subbiah*,¹¹ it was held that the words "any act purporting to be done by such public officer in his official capacity" mean any act *intended to seem* to be done by him in his official capacity. If, therefore, the act, whether done in good faith or not, was such as is ordinarily done by the officer in the course of his duties, and he desired that other persons should believe that he was so acting, the act is one *purporting* to be done by him in his official capacity within the meaning of the Section.¹² Having regard to the general principles of interpretation of statutes¹³ and to the dictum of the Privy Council in *Bhag Chand v. Secretary of State*¹⁴ that the Section does not admit of any implications or exceptions, the rulings referred to above which held that the act must be one done *negligently* or *inadvertently* cannot be considered to be good law.

But the words "act purporting to be done by such public officer in his official capacity" will not cover acts which are *outside* the sphere of his duties.¹⁵ Thus, where a public officer insults, uses defamatory language, or assaults his subordinate,¹⁶ or an investigating police officer assaults a witness,¹⁷ or a public officer seizes property which he has no authority to seize,¹⁸ the acts cannot be considered to be "acts purporting to be done" by him in his *official capacity* and notice under this Section is not necessary.

See also the undermentioned case.¹⁹

6. "Public Officer," who is. — See Section 2 (17), *ante*.

7. Suits against Municipalities. — By virtue of specific provisions, analogous to this Section, in the District Municipalities Act of the various Provinces, notice of action is made necessary in the classes of suits against the Municipality, specified therein. See also the undermentioned cases.¹

8. Suits against Court of Wards. — See Note 5 above.

- (76) 1 All 269 (271).
 ('82) 4 All 102 (107).]
10. ('18) AIR 1918 Mad 62 (70) : 41 Mad 792.
 ('34) AIR 1934 Pat 14 (16).
 ('97) 24 Cal 584 (588).
 ('06) 9 Oudh Cas 275 (280).
 ('24) AIR 1924 All 851 (852) : 46 All 884.
 (1900) 1 Low Bur Rul 152.
 ('07) 29 All 567 (568).
 ('81) 3 All 20 (23) (FB). (A Collector acting under S. 204, Act XIX of 1873, as agent of the Court of wards is a public officer.)
 ('24) AIR 1924 Cal 145 (148) : 50 Cal 992.
 ('97) 21 Bom 754 (772). (Official act is not necessarily a legal act—It may be an illegal one.)
 ('97) AIR 1937 Sind 281 (284) : 32 Sind L R 106.
 [See also ('11) 10 Ind Cas 1 (2) : 33 All 540.
 ('88) 15 Cal 259 (264).]
11. ('18) AIR 1918 Mad 62 (70) : 41 Mad 792 (FB).
 12. ('24) AIR 1924 All 851 (852) : 46 All 884.
 13. See Notes to Preamble to this Code.
 14. ('27) AIR 1927 P C 176 (183) : 51 Bom 725 : 54 Ind App 338 (P C).
 15. ('09) 1 Ind Cas 514 (515) : 36 Cal 28.
 16. ('10) 5 Ind Cas 467 (468) (All).
 17. ('28) AIR 1928 Bom 352 (362) : 52 Bom 832 (FB).

18. ('09) 1 Ind Cas 514 (515) : 36 Cal 28.

19. ('88) AIR 1938 Mad 221 (223). (Deed of release executed by Official Assignee on behalf of insolvent's estate—Suit against Official Assignee for damages for breach of covenant of title in deed—No claim against the Official Assignee personally — Held that the suit was not one in respect of an act done by the Official Assignee in his official capacity and no notice under this Section was necessary.)

Note 7

1. ('81) 6 Cal 8 (10) (FB). (Section 87 of the Bengal Act, III of 1864.)
 ('67) 7 Suth W R 92 (92). (Section 77 of Act III of 1864.)
 ('82) 6 Bom 580 (581). (Section 86, Bombay Act VI of 1873.)
 ('68) 9 Suth W R 535 (536). (Section 87 of Bengal Act, III of 1864.)
 ('68) 9 Suth W R 279 (280). (Do.)
 ('98) 22 Bom 283 (288). (Section 48 of the Bombay Act II of 1884.)
 ('78) 2 All 296 (298). (Sections 40 and 43 of Act XV of 1873.)
 ('01) 25 Bom 142 (150). (Section 48 of Bombay Act II of 1884.)
 ('98) 22 Bom 289 (294) (FB). (Do.)

9. Suits against Railway Administration. — The Indian Railways Act (IX of 1890) provides for notice of suit to be given in suits against the Railway Administration. See Sections 77 and 140 of that Act and the undermentioned cases.¹ Where, however, the Railway is administered by the *Government*, a notice under the Railways Act alone is not enough and will not be a substitute for the notice required under Section 80.² Conversely, in such cases, a notice under this Section alone will not be sufficient; a notice under the Railways Act also will be necessary.³

10. Notice is a condition precedent to the institution of the suit. — It has been seen in Note 2 above that the Section is mandatory and admits of no exceptions.¹ A Court is debarred from entertaining a suit instituted without complying with the requirements of the Section.² The only course open to the Court in a suit instituted without giving the notice required will be to reject it under Order 7 Rule 11.

11. Suits on contracts and suits for injunctions. — It was held by the High Court of Bombay in the undermentioned cases¹ that the Section has no application to suits founded on *contracts*. There was also a conflict of opinion in the various High Courts as to whether the Section applies to suits for *injunctions*.² It has now been authoritatively laid down by the Privy Council in *Bhag Chand v. Secretary of*

('82) 4 All 339 (342) (FB). (Section 48 of Act XV of 1873.)

('83) 7 Bom 399 (406). (Case under Bombay District Municipalities Act, II of 1884.)

('98) 22 Bom 605 (606). (Section 48 of the Bombay District Municipalities Act, II of 1884.)

('84) 8 Bom 421 (423). (Section 86, Bombay District Municipal Act, VI of 1873.)

('06) 29 Mad 539 (545). (Section 261 of Madras Act IV of 1884.)

('31) AIR 1931 Mad 808 (811): 55 Mad 207. (Municipal Councillor is not 'public officer' within Section 80, C. P. Code—As to notice, see Section 350 (1), Madras District Municipalities Act.)

Note 9

1. ('38) AIR 1933 Pat 45 (47): 12 Pat 67. (Company holding out particular official as competent to receive notice—Notice on him is good and notice to agent is unnecessary.)

('97) 24 Cal 306 (308). (Traffic Superintendent is not the Manager's Agent and notice to him is not notice to the Railway Administration.)

('06) 28 All 552 (553). (Do.)

('09) 3 Ind Cas 479 (479) (Mad). (Notice to the traffic manager was *held*, in the circumstances of the case, to be notice to the agent.)

('15) AIR 1915 Cal 584 (585). (Notice to the Goods Superintendent is no notice to the agent.)

('07) 31 Bom 534 (544).

('08) 35 Cal 194 (197). (Notice to the traffic manager is no notice to the agent.)

('02) 26 Bom 669 (688). (Carriage over two Railways—Notice to one sought to be made liable is enough—But notice to both must be given when both are intended to be made liable.)

('04) 26 All 207 (210). (Do.)

('08) 12 Cal W N 165 (166). (Carriage by two Railways—Notice to one cannot bind the other.)

2. ('28) AIR 1928 Bom 421 (424): 52 Bom 548.

('33) AIR 1933 All 53 (54).

('30) AIR 1930 All 476 (477): 52 All 837.

('31) AIR 1931 Pat 326 (328): 10 Pat 466.

('31) AIR 1931 Pat 393 (394).

('31) AIR 1931 Nag 96 (97).

3. ('35) AIR 1935 All 900 (902).

Note 10

1. ('03) 25 All 187 (190, 193).

('27) AIR 1927 P C 176 (183): 54 Ind App 338: 51 Bom 725 (PC).

2. ('27) AIR 1927 P C 176 (184, 185): 54 Ind App 338: 51 Bom 725 (PC).

('31) AIR 1931 Mad 175 (177): 54 Mad 416. (Suit dismissed also as against defendants not falling under this Section.)

Note 11

1. ('01) 25 Bom 387 (394). (Specific performance.)

('98) 22 Bom 637 (639). (Do.)

('95) 19 Bom 407 (417).

('96) 20 Bom 697 (699).

('10) 34 Bom 583 (589). (The Section applies to actions substantially in tort although they may be treated for certain purposes as actions ex contractu.)

('03) 27 Bom 424 (450). (Where no injunction can be claimed against the Secretary of State, notice is not dispensed with because the plaintiff asks for an injunction.)

2. ('24) AIR 1924 Bom 1 (11, 12): 48 Bom 87. (Overruled in AIR 1927 P C 176.)

('16) AIR 1916 Bom 296 (297): 40 Bom 392. (Suit for injunction. Notice *held* not necessary on facts only.)

('20) AIR 1920 Bom 419 (420): 44 Bom 555. (No.)

('12) 15 Ind Cas 539 (540) (Bom). (Yes.)

('12) 17 Ind Cas 876 (878): 37 Bom 243. (No.)

('11) 10 Ind Cas 639 (640): 35 Bom 362. (Yes.)

('98) 22 Bom 230 (231). (No.)

('98) 22 Bom 636 (637). (No.)

('09) 1 Ind Cas 514 (515): 36 Cal 28. (No.)

('09) 4 Ind Cas 1156 (1157): 3 Sind L R 175. (No.)

('06) 28 All 600 (603). (No.) (Per Knox J. Diss.)

('20) AIR 1920 Mad 723 (727). (Yes.)

0. State³ that the language of the Section is mandatory and admits of no implications or exceptions, that the Section is applicable to all forms of action and all kinds of relief, and that the view that the Section is inapplicable where the whole or part of the relief claimed is an injunction is not correct. But the decision of the Privy Council cannot be taken to mean that notice is necessary in every suit for injunction against the Secretary of State or a Public Officer,⁴ without regard to the fact whether the other conditions necessary for the applicability of the Section are satisfied. Thus, the Section will apply only when the suit is in respect of an *act done* by the Secretary of State or the Public Officer. The words "act purporting to be done" cover only a *past act*, and do not include a future act threatened to be done. A suit therefore *merely* for an injunction, *not based upon any past act* of the Public Officer, is not within the scope of the Section and no notice is necessary in such a case.⁵ But if the suit is laid on a past act of such Officer, the fact that an injunction is also prayed for will not take the case out of the operation of the Section.⁶ The High Court of Lahore, however, seems to be of the opinion that the Privy Council decision will apply even to suits *merely in respect of acts threatened to be done*.⁷

12. Object of notice. — See Note 2 above.

13. Form and sufficiency of notice. — It is not necessary that the notice should be in any particular or technical form.¹ It should not be strictly construed as if it were a pleading and it need not set out all the details and facts of the case.² But it must *substantially* fulfil its object in informing the parties concerned generally of the nature of the suit intended to be filed.³ Thus, it is essential that the notice should

('14) AIR 1914 Mad 502 (504): 16 Ind Cas 947 (949): 37 Mad 113. (Yes.)

('13) 19 Ind Cas 361 (361): 6 Sind LR 123. (Yes.)

('13) 19 Ind Cas 338 (340): 6 Sind LR 250. (Yes.)

('28) AIR 1928 Sind 76 (77): 22 Sind L R 63. (Yes.)

3. ('27) AIR 1927 P C 176 (184, 185): 54 Ind App 338: 51 Bom 725 (PC). (Followed in AIR 1932 Cal 168: 58 Cal 1288.)

('34) AIR 1934 P C 96 (97): 61 Cal 470 (PC). (This Section applies to suits based on contract. Approving AIR 1932 Cal 275 on this point.)

('33) AIR 1933 Sind 4 (5). (Official Assignee advertising for sale—Suit for partition and possession and injunction against him—Subsequent abandonment of prayer for injunction cannot validate suit.)

('27) AIR 1927 Bom 649 (650).

('20) AIR 1920 Cal 575 (579). (Suit against common manager appointed under Bengal Tenancy Act.)

('32) AIR 1932 Cal 275 (281): 59 Cal 961. (Do. On a simple mortgage bond).

('14) 22 Ind Cas 36 (36) (Cal). (Suit under Section 104-H of the Bengal Tenancy Act by tenure holders against Secretary of State as landlord.)

('30) AIR 1930 Lah 708 (709). (Declaratory suit.) [See also ('38) AIR 1938 Mad 221 (223). (The Section covers cases both in contract and in tort.)]

4. ('33) AIR 1933 Lah 203 (207): 14 Lah 330.

5. ('31) 34 Mad L W 993 (994). (Wherein AIR 1927 P C 126 was sought to be explained.)

('27) AIR 1927 Mad 166 (168, 170): 50 Mad 239.

6. ('27) AIR 1927 P C 176 (184): 54 Ind App 338: 51 Bom 725 (PC).

7. ('31) AIR 1931 Lah 703 (703): 12 Lah 260. (Suit to restrain threatened sale by Official Receiver.)

('37) AIR 1937 Lah 380 (382).

Note 13

1. ('89) 1889 Bom P J 50.

('34) AIR 1934 Pat 346 (348).

2. ('03) 27 Bom 189 (220).

('34) AIR 1934 Pat 346 (349).

('26) AIR 1926 Mad 408 (409).

('33) AIR 1933 Mad 105 (107, 108).

('38) AIR 1938 Nag 415 (418): I L R (1939) Nag 206. (Full details of the claim need not be given — Notice to be interpreted in the light of commonsense.)

3. ('03) 27 Bom 189 (206).

('34) AIR 1934 Cal 187 (189). (Notice saying that cause of action and relief are described in the annexed copy of plaint which forms part of notice though defective is substantial compliance.)

('34) AIR 1934 Pat 346 (348, 349). (Notice given jointly by several plaintiffs in different suits—Sum of all amounts not exceeding amount mentioned in notice—Notice is not illegal merely because notified claim is split up.)

('93) 17 Bom 307 (310).

('26) AIR 1926 Mad 408 (409).

(1878) 3 C P D 423 (428), Smith and Co. v. West Derby Local Board.

(1845) 13 M & W 361, Jones v. Nicholls.

('83) 13 Cal L Rep 195 (199).

state the *cause of action* and the *relief* claimed;⁴ the phrase "cause of action" need not in this connexion be narrowly construed and the notice is sufficient if it informs the defendant substantially of the ground of complaint.⁵ Where a claim is made in the notice for a larger amount of money as due from the defendant, the fact that in the suit the claim is reduced to a smaller amount does not change the cause of action for the suit or make the notice invalid.⁶ Where the cause of action has not arisen at all, a notice under the Section is not valid.⁷ A notice which does not state the cause of action or the intention to file a suit,⁸ or a notice merely objecting to, and asking for, the reconsideration of the order complained of,⁹ or a mere objection to an entry in the settlement roll under the Bengal Tenancy Act,¹⁰ or a mere report to the Deputy Commissioner,¹¹ will not constitute a valid notice under the Section.

It is also essential that the notice should *state* the names, descriptions and places of residence of *all* the plaintiffs.¹² But, there is a conflict of decisions as to whether a notice otherwise sufficient under the Section is invalid on the ground that it has not been *given* by all the plaintiffs. According to one view such notice is sufficient¹³ while the other view is that such notice is not sufficient.¹⁴

A notice given by a *pleader* on behalf of his client is sufficient for the purpose of this Section.¹⁵

14. Service of notice. — As is clear from the language of the Section, a notice, in the case of the Secretary of State in Council, must be delivered to, or left at the office of a Secretary to the Local Government or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office.¹ This delivery or

('91) 14 Mad 386 (390).

('29) AIR 1929 Sind 61 (63).

('38) AIR 1938 Pat 556 (557) : 17 Pat 345. (*Held* that in this case there was sufficient indication of the cause of action.)

4. 2 Camp 196, *Sabin v. De Burgh*.

[See ('30) AIR 1930 Cal 721 (721). (Notice and plaint at variance as to relief.)]

[But see ('38) AIR 1938 Nag 415 (417) : I L R (1939) Nag 206. (Where the defendant knew the nature of the suit that would be brought—Non-mention of relief claimed in the notice does not make it bad.)]

5. ('28) AIR 1928 Cal 74 (83) : 54 Cal 969. (But it must be stated with precision.)

('04) 8 Cal W N 913 (916).

('03) 25 All 187 (191).

('01) 24 Mad 279 (282).

('37) 41 Cal W N 92.

('38) AIR 1938 Pat 556 (557) : 17 Pat 345. (To state a cause of action it may be sufficient to give a legal description by which a particular cause of action is known, such as damages for breach of contract and damages for negligence.)

6. ('37) 41 Cal W N 92. (Though the notice should, in every case, state with precision the cause of action, the mere reduction of the claim does not make the notice defective.)

[See also ('38) AIR 1938 Nag 415 (417) : I L R (1939) Nag 206. (Alternative and lesser claim not mentioned in notice cannot derogate from

plaintiff's right to have suit tried on issue claimed in the notice.)]

7. ('28) AIR 1928 Cal 74 (83) : 54 Cal 969.

8. ('12) 16 Ind Cas 445 (446) (Bom).

9. ('67) 7 Suth W R 92 (92).

10. ('13) 22 Ind Cas 36 (36) (Cal).

11. ('28) AIR 1928 Rang 250 (251).

12. ('12) 16 Ind Cas 849 (850) : 40 Cal 503.

('35) AIR 1935 Bom 229 (230). (The word "plaintiff" in S. 80, in singular must be construed in plural.)

[See ('31) AIR 1931 Cal 61 (64) : 57 Cal 1127.]
[See also (1825) 4 B & O 681, *James v. Swift*.]

13. ('12) 16 Ind Cas 849 (850) : 40 Cal 503.

('01) 24 Mad 279 (282). (Notice by two out of three plaintiffs.)

[See also ('39) AIR 1939 Oudh 196 (202). (Notice by transferor, one of co-plaintiffs, is enough for continuance of suit by other transferee co-plaintiff after former's death—Decree passed is not a nullity.)]

14. ('35) AIR 1935 Sind 206 (207) : 29 Sind L R 404.

('35) AIR 1935 Mad 389 (390). (Affirming A I R 1931 Mad 175 — Entire suit is bad and cannot be proceeded with even by plaintiff who has complied with Section.)

15. ('28) AIR 1928 Bom 338 (339).

Note 14]

1. ('84) 1884 All W N 58 (58). (District means one in which the suit is instituted.)

leaving of the notice may be either personal or by *post*.² "Collector of the District" means the Collector of the District *where the suit is instituted*. A suit instituted at Sealdah based on a notice given to the Collector of Purneah is untenable.³

15. Waiver of notice and effect thereof. — A notice under the Section is given for the benefit of the defendant and there is nothing to prevent him from waiving the notice or from being estopped by his conduct from pleading the want of notice.¹ Thus, where objection as to notice was taken in the written statement, but no issue was raised on the point and no objection was taken subsequently at any stage of the trial in the Court of first instance, it was held that the notice was waived.² Where no objection is raised in the Court of first instance, it cannot be pleaded for the first time in special appeal.³ But the mere failure to raise the objection in the written statement cannot *per se* be regarded as a waiver, if it was raised practically before the trial had commenced and before any prejudice could have been caused to the plaintiffs by the lateness of the stage at which the objection was raised.⁴

An objection as to notice cannot be taken by a defendant other than the Secretary of State or other public officer for whose benefit the notice is intended,⁵ or by a transferee from the Secretary of State.⁶

16. Notice, if necessary for amendment of plaint. — Where an amendment of the plaint is necessitated by the discovery of facts previously unknown to the plaintiff and the relief asked for in the plaint is not altered by the amendments, a further notice under the Section is not necessary.¹ But where the amendment introduces a *new cause of action* not specified in the original notice, as for example where a suit based on negligence is sought to be amended into one based on nuisance, a further notice is necessary.² Similarly, where a plaint against a person is sought to be amended by substituting the Secretary of State in the place of the original defendant,³

2. ('91) 1891 Pun Re No. 71, p. 341.
[See ('31) AIR 1931 Cal 503 (504) : 58 Cal 850.
(Service on son of public officer — Invalid —
O. 48 R. 2 does not control this Section.)]
3. ('15) AIR 1915 Cal 62 (63).
(('84) 1884 All W N 58 (58).

Note 15

1. ('07) 34 Cal 257 (282). (Per *Mookerjee, J.*)
(('90) 1890 Pun Re No. 155, p. 504.
(('33) AIR 1933 Mad 917 (919).
(('33) AIR 1933 Sind 1 (3).
(('17) AIR 1917 Cal 614 (615). (Plaint amended—
Defendant in additional written statement, not
objecting to want of further notice of two
months—Objection was deemed to have been
waived.)
[But see ('37) AIR 1937 Sind 291 (291, 292) : 32
Sind L R 67. (Provisions of S. 80 as to notice
are mandatory and cannot be waived at the
whim of the officer concerned.)]
2. ('07) 34 Cal 257 (282).
(('31) AIR 1931 Cal 175 (178). (Objection taken
after two years and only in a supplementary
written statement and pressed after plaintiffs'
right became barred—Waiver.)
[But see ('38) AIR 1938 Mad 583 (584). (Trial
Court through negligence omitting to frame
issue on point of want of notice—Government

Pleader also through negligence omitting to
make application regarding it but all along
resisting suit—Point regarding notice cannot be
deemed to have been waived by the Secretary
of State.)]

3. ('76) 1 All 269 (271).
(('34) AIR 1934 Pat 354 (355). (Plea of want of
notice not taken for over two years—Another
suit on the same cause of action impossible—
Plea must be taken to have been waived.)
(('34) AIR 1934 Nag 201 (202) : 30 Nag L R 240.
4. ('25) AIR 1925 All 241 (243) : 47 All 291.
5. ('12) 16 Ind Cas 849 (850) : 40 Cal 503.
(('05) 32 Cal 1130 (1134).
(('33) AIR 1933 Pat 49 (49).
6. ('07) 10 Oudh Cas 49 (54).

Note 16

1. ('03) 30 Cal 36 (72). (Confirmed in 32 Cal
605: 32 Ind App 93 (P C). Suit against Secre-
tary of State—Sub-Collector subsequently added
as defendant—No separate relief claimed against
him for any act done by him — No notice is
necessary.)
2. ('07) 34 Cal 257 (281).
(('12) 13 Ind Cas 370 (372) : 38 Cal 797.
3. ('10) 4 Oudh Cas 133 (138).

0 23 Act.¹ The period of the notice will include both the day of serving the notice and the day on which the suit is filed.²

But it has been held that Section 15 (2) of the Limitation Act has no application to periods of limitation *not prescribed by the Limitation Act* itself, but by any special law such as the Bengal Tenancy Act.³ In such cases, therefore, the period of notice cannot be excluded in computing the period of limitation prescribed by such special law.⁴ Nor can the period of notice be excluded where there is no cause of action at all against the Secretary of State or public officer and the latter is erroneously impleaded as a defendant in the suit.⁵

See also the undermentioned case.⁶

22. Cases in which the Government is a necessary party.—See Section 79.

23. Jurisdiction to entertain suits against Government or public officer.
— See Section 79.

1 81. [Ss. 427, 428.] In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity —
Exemption from arrest and personal appearance.

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

[1877, Ss. 425, 428; 1859, S. 72. See O. 27 R. 8.]

1. Scope of the Section. — The exemption from arrest or attachment under this Section is only with reference to arrest or attachment before judgment and not in execution (see O. 27 R. 8). Clause (b) may be compared with Section 133 of the Code which empowers the Provincial Government to exempt from personal attendance any person whom the Government considers, in view of his rank, to be entitled to such exemption.

Note 21

1. ('17) AIR 1917 Lah 212 (212) : 1917 Pun Re No. 52.

('05) 32 Cal 277 (281).

('37) AIR 1937 Sind 281 (284) : 32 Sind L R 106.

(Suit against joint tort-feasors—Notice required as against one only—Limitation against the other also is extended.)

('39) AIR 1939 All 277 (278) : I L R (1939) All 392.

2. (1840) 6 M & W 49, Young v. Higgon.

3. ('18) AIR 1918 Cal 278 (280) : 45 Cal 934.

('19) AIR 1919 Cal 1001 (1002).

('19) AIR 1919 Cal 949 (949).

('21) AIR 1921 Cal 661 (671).

4. See cases in foot-note (3).

5. ('19) AIR 1919 Oudh 26 (27) : 22 Oudh Cas 342.

6. ('36) AIR 1936 Nag 21 (22) : 31 Nag L R Sup 79. (Suit against Railway Company—Notice under S. 80 not necessary—Period of notice cannot be excluded from limitation.)

Synopsis

1. Scope and applicability of the Section.
2. Alien enemy.
3. Suits by alien enemies.
4. Service of summons in a foreign country.
5. Contracts with alien enemies.
6. Limitation.

Other Topics (Miscellaneous)

"Alien enemies residing in British India with the permission of the Central Government." See Notes 1 and 3.

"Permission"—Express or implied. See Note 3.

"Person" includes "corporation." See Note 1 and also O. 29 Notes.

Suits against alien enemies not prohibited. See Note 1.

1. Scope and applicability of the Section. — Sections 83 to 88 of the Code deal with suits by aliens and by or against Foreign Rulers and Rulers of Indian States. This Section deals with the question as to when aliens may sue in the Courts of British India.

Alien friends are on the same footing as if they were subjects of His Majesty. Thus, an alien prince is competent to sue in a British Indian Court.¹ A foreign corporation can, in its corporate character, sue in British Indian Courts, even if it is not registered under the Indian Companies Act.²

An alien enemy residing in British India with the permission of the Central Government may also sue in British Indian Courts.³ The Section, however, does not preclude suits against aliens not so residing, or affect their *right of defence* in such suits.⁴ As to who is an alien enemy, see Note 2.

2. Alien enemy. — The words "alien enemy" include not only the subjects of a state at war with Great Britain but also British subjects and subjects of a neutral State who are voluntarily residing in a hostile country.¹ The test, therefore, to determine whether a person is an alien enemy, is his place of *residence* or the place where he *carries on business* and not his *nationality*.² In *Janson v. Driefontein Consolidated Mines, Ltd.*,³ Lord Lindley observed as follows:

"When considering questions arising with an alien enemy, it is not the nationality of a person but his place of business during the war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts."

Section 83 — Note 1

1. ('88) 1888 Pun Re No. 191, page 491. (Raja of Faridkot is competent to sue in the British Courts under one or other of old Ss. 430-433.)

('15) AIR 1915 Mad 116 (116). (Temple to which suit land belonged in French India — Plaintiff French subject — Suit land in British India — Suit maintainable in British India.)

2. ('03) 30 Cal 103 (105, 106).

3. ('15) AIR 1915 Low Bur 33 (34). (License to trade granted by Government.)

('17) AIR 1917 All 374 (375) : 39 All 377.

4. ('14) AIR 1914 Sind 107 (108) : 8 Sind LR 329. ('17) AIR 1917 All 374 (375) : 39 All 377. (Application to British Indian Court for service of summons against alien enemy in the alien enemy country.)

('17) AIR 1917 Cal 838 (841) : 43 Cal 1140. (Suit against non-resident alien enemy maintainable in British India even during war with enemy country.)

Note 2

1. ('17) AIR 1917 Low Bur 66 (67).

2. ('20) 1920 Lah 4 (5) : 1 Lah 276.

(1802) 6 R R 724, M'Connell v. Hector.

(1915) 1 K B 857 (868), Porter v. Freudenberg.

('20) AIR 1920 Bom 285 (286, 291, 292) : 44 Bom 61. (Neutral subject having a commercial domicile in an enemy country and with no intention of removing that domicile to a neutral country is an alien enemy.)

3. (1902) 1902 App Cas 484 (501).

('23) AIR 1923 Nag 121 (122).

The residence, however, must be a *voluntary* one. A prisoner of war kept in the enemy country cannot be regarded as an alien enemy.⁴ But the residence need not be a permanent one, provided it is not of a temporary character.⁵ A person residing in a hostile country for a *substantial period* of time acquires the disabilities of an alien enemy during the period, unless such residence is with the consent of the Crown.⁶

3. Suits by alien enemies. — An alien enemy *residing in a foreign country* cannot sue in British Indian Courts.¹ Thus, where some of the partners are resident in a hostile country, the firm cannot maintain an action in British Indian Courts.² An alien enemy residing in *British India* can sue in such Courts if such residence is with the permission of the Governor-General in Council.³ The permission need not be express, but may be presumed from the circumstances. Where the alien enemy has resided in British India from before the outbreak of war and continues to remain after such outbreak without being ordered to remove himself, permission may be presumed.⁴ Where a German lady filed a petition for divorce in the Allahabad High Court, while England was at war with Germany, the fact that she was not interned was construed as an implied permission to reside, by the Government of India.⁵

The Sind Judicial Commissioner's Court has, however, in the undermentioned case⁶ taken the view that the permission must be express. The observation is *obiter* and is against the trend of authorities and cannot be considered sound.

4. Service of summons in a foreign country. — A summons can be transmitted by a British Indian Court to the Foreign Office through the High Court in England for being served on the defendant residing in any enemy country.¹

5. Contracts with alien enemies. — It is a universal principle of public law that commercial intercourse between States at war with each other is interdicted.¹ But this prohibition is, however, confined to intercourse which is *inconsistent* with the state of war between the belligerents, including any act or contract which tends to increase the resources of the enemy. A lease granted after the commencement of hostilities, by an alien enemy in British India on behalf of one who is not shown to be an enemy subject, the rent whereof is intended to be used in this country and by persons who are not enemies, is enforceable.² A debtor indebted to an alien enemy is not entitled to a suspension of interest on his debt from the date the war began to the date when the enemy obtained a licence to trade in British India.³

4. ('20) AIR 1920 Lah 4 (6) : 1 Lah 276.

5. ('20) AIR 1920 Lah 4 (6) : 1 Lah 276.

6. (1916) 2 App Cas 307 (328), Daimler Co. v. Continental Tyre & Rubber Co. (Per Lord Shaw.)

Note 3

1. ('20) AIR 1920 Lah 4 (6) : 1 Lah 276.

2. ('20) AIR 1920 Lah 4 (5) : 1 Lah 276.

3. (1917) 33 T L R 20, Candilis & Sons v. Victor & Co.

[See however (1919) 1919 App Cas 59 (64, 77, 133), Rodriguez v. Speyer Brothers. (Firm dissolved on outbreak of war as one partner became alien enemy—Firm can maintain suit during war in respect of pre-war debt due to it.)]

3. ('17) AIR 1917 All 374 (375) : 39 All 377.

('15) AIR 1915 Low Bur 33 (34).

4. ('18) AIR 1918 Mad 1294 (1295).

(1916) 1 K B 284 (301, 302, 304, 305), Schoffenius v. Goldberg. (Internment of registered alien enemy does not operate as cancellation of the registration—He has right to sue.)

(1794) 2 Anst 462, Denhigny v. Dayallon. 100 Mass 561, Kershaw v. Kelsey.

[See also (1902) 1902 App Cas 484 (495, 498), Janson v. Driefontein Consolidated Mines, Ltd.]

5. ('17) AIR 1917 All 374 (375) : 39 All 377.

6. ('14) AIR 1914 Sind 107 (108) : 8 Sind L R 329.

Note 4

1. ('17) AIR 1917 All 374 (375) : 39 All 377.

Note 5

1. 8 Wall 185, United States v. Lane. (Cited in AIR 1918 Mad 1294.)

2. ('18) AIR 1918 Mad 1294 (1295).

3. ('20) AIR 1920 Bom 294 (295) : 44 Bom 1.

This Section does not apply to proceedings under Section 184 of the Companies Act of 1913.⁵ The reason is that if the Court makes an order under Section 184 and places the name of a Native Prince or Chief upon the list of contributories, it does not thereby enforce a jurisdiction against that Native Prince or Chief. But proceedings under Sections 186 and 187 of the Companies Act of 1913 are proceedings in a Civil Court within the meaning of Section 141 and by virtue of that Section, this Section applies to such proceedings.⁶

4. Consent when to be obtained. — The consent referred to in the Section must be obtained *before* the institution of the suit. A consent obtained after the institution of the suit will not validate the institution thereof.¹ Where the plaintiff wishes to amend the plaint by adding a new relief, it is necessary that sanction under this Section should be obtained.² Where the defendant becomes a Ruling Chief or Sovereign Prince subsequent to the institution of the suit, it has been held that the suit cannot be *continued* without the sanction.³ The reason is that the words "to sue" in the Section include every step from the presentation of the plaint to the recovery of judgment.⁴

5. "And is to be sued with reference to such property or for money charged thereon" — Sub-section (2) (c). — Sub-section (2) (c) of the old Section referred only to cases where the Prince or Chief was to be sued with reference to the *possession* of immovable property or for money charged thereon. The substitution of the word "property" for the word "possession" has widened the scope of the Section by including all cases with reference to the *property* in the possession of the Prince or Chief.

A suit for maintenance or for maintenance coupled with a prayer for the creation of a charge therefor on certain properties, is not a suit for "*money charged*" on those properties within the meaning of clause (c).¹

6. Suit by tenant of immovable property — Sub-section (5). — A suit for a declaration of a hereditary *proprietary right* to remain in possession of lands without payment of rent¹ or a suit by the plaintiff as co-sharer against the Ruling Chief *as a cosharer* for a share of the profits² is not a suit brought "*as a tenant of immovable property*" within the meaning of sub-section (5) and is not maintainable without the sanction required by the Section.

Sub-section 5 refers to a *suit* against a Sovereign Prince or Chief and does not dispense with the consent required under sub-section 3 for *execution* proceedings against such Prince or Chief.³

7. Waiver of objection to want of consent. — It is a general principle of law that parties can waive irregularities in *procedure*.¹ Similarly, a person for whose benefit a *privilege* has been conferred can waive the privilege. The question has arisen

5. ('36) AIR 1936 All 826 (829): 58 All 742 (F B).

6. ('36) AIR 1936 All 826 (829): 58 All 742 (F B).

Note 4

1. ('97) 21 Bom 351 (366).

('09) 1909 Pun Re No. 21, page 45.

('69) 11 Suth W R 116 (116).

2. ('13) 22 Ind Cas 889 (891) (Cal).

3. ('21) AIR 1921 Pat 23 (24): 6 Pat L Jour 185.

4. ('97) 21 Bom 351 (365).

('21) AIR 1921 Pat 23 (24): 6 Pat L Jour 185.

Note 5

1. ('83) 9 Cal 535 (555).

('78) 3 Cal L Rep 417 (420): 4 Cal 674. (Maintenance grant directed to be paid out of the revenues of a certain zamindari does not form charge on the zamindari.)

('83) 12 Cal L Rep 473 (474).

Note 6

1. ('20) AIR 1920 Oudh 203 (204).

2. ('24) AIR 1924 All 422 (424): 46 All 355.

3. ('35) AIR 1935 Cal 664 (665, 666).

Note 7

1. ('87) 9 All 191 (203): 13 Ind App. 134 (PC).

as to whether the objection on the ground of want of sanction under this Section can be waived by the native Prince or Chief. Before the decision of the Privy Council in *Gaekwar Baroda State Railway v. Hafiz Habib-ul-Haq*,² there was a conflict of decisions on this question. It was held by the Bombay High Court that such objection could be waived by the defendant Prince or Chief and that contesting the suit on the merits without protest amounted to such waiver.³ The Calcutta,⁴ Lahore,⁵ Patna⁶ and Allahabad⁷ High Courts also took a similar view. According to the High Court of Patna, even an application for adjournment would amount to a waiver of the privilege.⁸ But it was held that the fact that the Sovereign Prince or Ruling Chief waived his privilege in one suit did not preclude him from pleading it in another suit.⁹ The Madras High Court, however, dissented from the view that the privilege could be waived.¹⁰ The ground on which that view was based was that the recognition of cases of waiver as excepted from the provisions of international law cannot be imported into the clear language of the Code.

The above conflict has been set at rest by the decision of the Privy Council referred to above, by which it was held that the provisions of this Section are imperative and cannot be waived. Their Lordships of the Privy Council observed as follows: "Further, as already pointed out, the provisions relating to this matter are statutory. They are contained in Sections 86 and 87, Civil Procedure Code; they are imperative and having regard to the public purposes which they serve, they cannot, in their Lordships' opinion, be waived in the manner suggested by the High Court."

8. Defence of set-off. — No consent is necessary. — Where a person does not actually sue as plaintiff but only puts forward a claim of set-off in his defence to a suit by a Ruling Chief, no sanction is necessary to raise such a claim.¹

9. Inquiry into the validity of consent. — The introduction of the words "unless it appears to the consenting authority" effects an important change in the pre-existing law. Its effect is to show that the opinion of the consenting authority is final on the question whether any of the clauses (a) to (c) is satisfied in a given instance.¹ The cases² which, before the passing of the present Code, held that it is open to or incumbent on the Courts to examine the correctness of the decision of the Government are no longer law.

10. Effect of non-compliance with the Section. — A suit against a Sovereign Prince or Ruling Chief instituted without the *previous* sanction of the Government

2. ('88) AIR 1938 P C 165 (167, 169): I L R (1938) All 601: 65 Ind App 182: 32 Sind L R 531 (P C). (A I R 1934 All 740 reversed).

3. ('97) 21 Bom 351 (374, 376).

4. ('18) AIR 1918 Cal 985 (986). (Submission to jurisdiction—Objection to jurisdiction cannot be taken in appeal.)

5. ('03) 1903 Pun Re No. 40, page 129. (Objection to jurisdiction taken only in appeal and disallowed.)

6. ('21) AIR 1921 Pat 23 (24): 6 Pat L Jour 185. (If plaintiff ignores the bar and persists in the suit and defendant acquiesces in the procedure, waiver presumed.)

7. ('34) AIR 1934 All 740 (761): 56 All 828. (Reversed by the Privy Council in A I R 1938 P C 165).

8. ('21) AIR 1921 Pat 23 (25): 6 Pat L Jour 185.

9. ('83) 9 Cal 535 (556).

10. ('16) AIR 1916 Mad 835 (835): 39 Mad 661. (Privilege under S. 86 not waived if after pleading it defendant also pleads on merits of the case.)

Note 8

1. ('21) 62 Ind Cas 778 (779) (Lah).

Note 9

1. ('35) AIR 1935 Oudh 164 (164).

2. *Vide* Report of the Special Committee Notes to clause 86 (2).

('83) 9 Cal 535 (555).

('86) 1886 Pun Re No. 51, page 97. (Taking mortgage over immovable property and letting it out on lease is not trading under clause (a).)

('07) 29 All 379 (381). (Suit for arrears of pay held not to fall under cl. (c) and could not be maintained by virtue of consent of Governor-General in Council.)

('97) 21 Bom 351 (362). (The power of Court to question the decision of the Government was assumed in this case.)

1. Legislative changes. — The following are the main changes introduced in the Section —

1. For the words "payment or property" the words "debt, sum of money, or other property, moveable or immoveable," have been substituted.
2. For the words "whose only interest is that of a mere stake-holder" are substituted the words "who claims no interest therein other than for charges or costs."¹

The other provisions in the old Code relating to interpleader suits have been enacted in Order 35 of the First Schedule.

2. Scope and applicability of the Section. — Where *X* is under a liability for any debt, sum of money, or other property, claimed adversely by *A* or *B* or more, and he desires protection against a wrong payment or delivery, he can file a suit under this Section. The only way, in fact, in which he can protect himself is by filing such a suit; otherwise if he litigated with the claimant separately, he would have to pay the costs of the successful claimant.¹ It is necessary that the liability to some one must be admitted and there must be no collusion² and no interest in the subject-matter other than for charges or costs. A suit under this Section is called an interpleader suit because the plaintiff is really not interested in the matter, but only the defendants interplead as to their claims. In fact each of the defendants so interpleading is virtually in the position of a *plaintiff* and his claim will be governed by the rules of the Limitation Act.³

In order to determine whether a suit is an interpleader suit under the Section, the Court must have regard to *all* the prayers in the plaint. The mere fact that the plaintiff requires the defendants to interplead as regards one of the reliefs claimed would not necessarily make it an interpleader suit.⁴

Where a party in the position of a mere stake-holder is made a *defendant* in a suit, his proper course is to deposit the money (if it is a suit for money) into Court and ask that the parties really interested may be substituted for himself as defendants.⁵ Such deposit by him is a valid discharge for him and if the Court paid it to a wrong person he is not responsible.⁶ This Section is not applicable to suits and other proceedings under the Agra Tenancy Act (III of 1926) and the Madras Estates Land Act (I of 1908).

3. Claims must be bona fide and adverse to one another. — The claims of the defendants must be *bona fide* ones, though they need not have a common origin.¹ The Court must be satisfied that there is a real question to be tried. A mere pretext of conflicting claims is not sufficient.²

The defendants must also claim the money or property *adversely* to one another *from the plaintiff*.³ A decision given on the claims of the co-defendants in an interpleader suit will operate as *res judicata* between them.⁴

Section 88 — Note 1

1. The words have been taken from the Rules of the Supreme Court, O. 57 R. 2 (a).

Note 2

1. (1874) L R 9 Ch 736 (738), *Laing v. Zeden*. ('97) 20 Mad 155 (156). (Land acquisition proceedings—Conflict as to right to receive compensation—Collector can institute an interpleader suit.)
2. See O. 35 R. 1 Cl. (c).
3. ('25) AIR 1925 Mad 497 (562) : 48 Mad 1.
4. ('08) 32 Bom 592 (597). (1861) 4 De G. F. & J. 183 (186), *Vyvyan v. Vyvyan*.

5. 2 Ind Jur (N S) 113.

('90) 14 Bom 498 (505, 506). (If he so deposits he will be entitled to his costs.)

6. ('89) 2 C P L R 9 (14).

Note 3

1. (1864) 32 L J Q B 14 (15, 16), *Mynell v. Angell*.
2. 18 Ves 376 (377), *East India Co. v. Edward*. 2 Jo & Lat 380 (389), *Cochrane v. O'Brein*. 4 Russ 215 (221), *Wright v. Ward*.
- 7 De G M & G 112, *Meyers v. United & Co*.
3. ('22) AIR 1922 Cal 138 (139).
4. ('28) AIR 1928 Oudh 155 (179).

It is, however, not necessary that the plaintiff must show the existence of an apparent title in each of the defendants claiming the property in dispute.⁵ Nor is it necessary that the claims should be *legal* claims or rights. *Equitable* claims and rights can be entertained and given effect to.⁶

4. Claims must be with reference to the same subject-matter. — The rival claims must be with reference to the *same* debt, sum of money, or other property,¹ but not necessarily to the *same extent*.² It is thus not necessary that each of the defendants should claim the *whole* of the subject-matter of the suit.³

The "same debt, sum of money, or other property" would not, it is conceived, include a claim for unliquidated damages⁴ though it might include a chose in action.⁵

5. Plaintiff should claim no interest in the subject-matter. — The plaintiff must be in an impartial position. If he has, in some way, identified himself with one of the parties in the sense that it will make a difference to him which of the two succeeds, an interpleader suit will not lie.¹ Thus, a person who has taken an indemnity from one of the claimants, cannot file a suit under this Section,² though he will not be refused relief, if he has merely a natural affinity for one side rather than the other.³ A right of *lien*, *e. g.*, for wharfage, demurrage or freight, is not an interest in the property for the purposes of this Section.⁴

6. "Charges or costs," meaning of. — The words "charges or costs" include costs of suit, freight, warehouse rent, dock rent, wharfage, demurrage and other charges.¹ A lien can be declared for such charges in an interpleader suit,² but

5. (1848) 7 Hare 57 (66), East and West India Dock Co. v. Littledale.

6. (1875) L R 10 C P 554 (558, 559, 561), Duncan v. Oashin.

(1875) L R 10 C P 645 (652, 654, 657), Eryelback v. Nixon.

(1901) L R 1 K B 108 (115), Jennings v. Mather.

Note 4.

1. ('10) 37 Cal 552 (557).

(1895) 2 Q B 249 (251, 252), Greatorox v. Shackle.

(1835) 2 M & W 844 (846), Farr v. Ward.

2. (1841) Cr & Ph 197, Hoggart v. Outta. (Cited in 1 Mad H C R 360.)

(1878) 3 CPD 450 (456), Attenborough v. London & St. Katherine's Dock Co. (Cited in 18 Bom 231.)

3. (1863) 1 Mad H C R 360 (361).

4. (1879) 48 L J Q B 276 (277), Wright v. Freeman.

[See 6 Dowl 517, Walter v. Nicholson.]

5. (1890) 24 Q BD 275 (278), Robinson v. Jenkins.

Note 5

1. ('27) AIR 1927 Rang 91 (93) : 4 Rang 465.

(1863) 1 H & O 718 (723), Best v. Haye (Lien for storing the goods, claimed by a warehouseman, upon the goods stored, or a lien upon the proceeds of goods sold at auction claimed by way of commission by an auctioneer is not an interest in the subject-matter.)

(1878) 3 C P D 450 (457, 459), Attenborough v. London & St. Katherine's Dock Co. (Do. Cited in 18 Bom 231 (250).)

(1893) 62 L J Q B 396 (397, 398), Murietta v.

South American Co. (Cited in AIR 1927 Rang 91. Agreement by stake-holder to pay smaller amount in the event of success of one of the parties to the suit—Suit by stake-holder is not an interpleader suit.)

('10) 37 Cal 552 (557). (Tenant suing landlords to whom he has executed kabuliyats.)

('94) 18 Bom 231 (235). (Inclusion of a prayer that defendants should be restrained from suing the plaintiff in respect of the subject-matter of the suit. Suit not bad as an interpleader suit.) For other cases of interest, see O. 35 R. 5 and Notes thereto.

[See (1867) 3 Oh App 74 (77), Prudential Assurance Co. v. Thomas.]

2. ('27) AIR 1927 Rang 91 (93) : 4 Rang 465.

(1815) 1 Mer 405 (406), Burnett v. Anderson. (Cited in 10 Bom 350 (356).)

3. ('27) AIR 1927 Rang 91 (93) : 4 Rang 465.

4. ('94) 18 Bom 231 (234, 235).

(1878) 3 CPD 450 (454), Attenborough v. London & St. Katherine's Dock Co.

Note 6

1. (1878) 3 C P D 450 (466), Attenborough v. London & St. Katherine's Dock Co.

('94) 18 Bom 231 (236).

5 Sim 19 (21), Mason v. Hamilton. (Wharfage and warehouse rent.)

3 Moo & Se 180, Cotter v. Bank of England. (Cited in 18 Bom 231. Claim for freight and charges made by a bank with which bullion is deposited—Held no interest.)

2. (1863) 1 Mad H C R 360 (361). (Lien for costs.) ('94) 18 Bom 231 (235).

PART V.

SPECIAL PROCEEDINGS

ARBITRATION

89. [New.] (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.

[1882, Cf. S. 506; 1877, S. 506; 1859, Ss. 312 and 313.]

Synopsis

1. Scope of the Section.
2. Applicability of the Arbitration Act.
3. "Any other law for the time being in force."
See Note 9 to O. 23 R. 3.
4. Agreement to refer to arbitration.
5. Suit on award.

1. Scope of the Section. — In their Statement of Objects and Reasons, the Special Committee state as follows :—

"We are of opinion that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration and insert them in a new and *comprehensive* Arbitration Act. There are perhaps difficulties as to this at present. We have determined therefore to leave the arbitration clauses much as they are in the present Code but we have placed them in a Schedule in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act."¹

Schedule II of the Code deals with arbitrations under three heads² :—

- (1) Where the parties *to the litigation* desire to refer to arbitration any matter in difference between them *in the suit*, in that case all proceedings from first to last are under the supervision of the Court. Sch. II, Paragraphs 1 to 16 deal with such matters.
- (2) Where the parties *without recourse to litigation* agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court, in that case all *further*

Section 89 — Note 1

1. See Statement of Objects and Reasons.

2. ('02) 29 Cal 167 (182) : 29 Ind App 51 : 1902 Pun Re No. 25 (PG).

proceedings are under the supervision of the Court. Paras. 17 to 19 of Schedule II deal with such matters.

- (3) Where the agreement of reference is made and the arbitration itself takes place *without the intervention of the Court* and the assistance of the Court is only sought in order to give effect to the award. This is dealt with by Paragraphs 20 to 23 of Schedule II.

This Section declares that all references to arbitration and all proceedings thereunder shall be governed by the provisions of Schedule II except as otherwise provided by (a) the Indian Arbitration Act, 1899³ and (b) by any other law for the time being in force.

2. Applicability of the Arbitration Act. — The Indian Arbitration Act applies only to arbitration by agreement without the intervention of a Court of Justice,¹ and even this only in cases in respect of the subject-matter of which a suit could be instituted in a Presidency Town.²

By Section 2 of the Act, the Local Government may declare the Act applicable to local areas other than Presidency Towns as if they were Presidency Towns.³

3. "Any other law for the time being in force." — See Note 9 to O. 23 R. 3.

4. Agreement to refer to arbitration. — A mere agreement to refer to arbitration in a pending suit cannot amount to an adjustment under O. 23 R. 3.¹ See also Note 9 to O. 23 R. 3.

5. Suit on award. — An award is the outcome of the submission of the parties to be bound by a submission agreed to by them and so can be specifically enforced like any other contract.¹ Under the old Code an award could be enforced summarily under Section 525 or in a regular suit. Section 89 of this Code has not altered the law on this point.² See Notes to Sch. II, Para. 20.

3. ('09) 4 Ind Cas 1150 (1151) : 3 Sind L R 162.

(When arbitration is in force, application to stay proceedings must be under the Arbitration Act and not under Sch. II.)

('28) AIR 1928 Bom 275 (277) : 52 Bom 420. (S. 19 of the Arbitration Act and para. 18 of Sch. II, C. P. Code, if mutually exclusive—Provisions not inconsistent.)

('31) AIR 1931 Lah 644 (645) : 13 Lah 59. (Appeal provision in C. P. Code relating to Sch. II not applicable to proceedings under Arbitration Act.)

('36) AIR 1936 Lah 374 (375). (S. 89, C. P. Code, covers all references to arbitration whether the reference is or is not made without the intervention of the Court, and whether an award does or does not follow.)

('39) AIR 1939 Rang 300 (302) : 1939 Rang L R 280 (F B). (S. 89 is intended to be exhaustive.)

('35) AIR 1935 Pat 243 (248) : 14 Pat 799. (S. 89 is mandatory and hence when a suit is pending, the matter in dispute may be referred to arbitration only in accordance with Sch. II.)

[See also ('12) 17 Ind Cas 902 (902) : 6 Low Bur Rul 88. (The procedure for filing an award

under the Arbitration Act is different from that under the Code.)]

Note 2

1. ('22) AIR 1922 Cal 404 (406) : 49 Cal 608. (Indian Arbitration Act does not apply to arbitrations in the course of litigation.)

('09) 4 Ind Cas 133 (133) : 34 Bom 372.

('08) 35 Cal 199 (200, 201).

2. See S. 2 of the Arbitration Act.

('31) AIR 1931 Mad 170 (171) : 54 Mad 198.

3. See Section 2 of the Arbitration Act, IX of 1899.

Note 4

1. ('03) 30 Cal 218 (227, 228).

('11) 12 Ind Cas 372 (375) : 36 Mad 353.

('14) AIR 1914 Bom 184 (186) : 38 Bom 687.

('30) AIR 1930 Bom 98 (104) : 54 Bom 197.

('35) AIR 1935 Cal 239 (241, 242) : 62 Cal 229.

Note 5

1. See Section 30, Specific Relief Act.

2. ('21) AIR 1921 All 384 (386) : 43 All 108.

('37) AIR 1937 Rang 459 (462) : 1937 Rang L R 225.

SPECIAL CASE

90. [S. 527.] Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

Power to state case for opinion of Court.

[1877, Ss. 527, 528; 1859, S. 328. See S. 104 (1), Cl. (b); O. 36, and Sch. II, para. 11, C. P. C. and S. 36, Bombay Court of Wards Act, I of 1905.]

Synopsis

1. "In the manner prescribed."

2. Re-opening of case.

1. "In the manner prescribed." — "In the manner prescribed" means prescribed by Rules in the First Schedule. The Section is based on Sections 527-551 of the old Code, which are now arranged in Order 36. Parties may enter into an agreement and avail themselves of the provisions of Order 36 for the purpose of obtaining the opinion of the Court on a case stated by them.¹

2. Re-opening of case. — Where a special case is settled by consent it can only be re-opened by mutual consent.¹

SUITS RELATING TO PUBLIC MATTERS

91. [New.] (1) In the case of a public nuisance² the Advocate-General, or two or more persons⁴ having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration⁶ and injunction⁷ or for such other relief⁸ as may be appropriate to the circumstances of the case.

Public nuisances.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.⁹

Synopsis

1. Scope and object of the Section.

2. "Public nuisance," meaning of.

3. Obstruction to public highway.

4. "The Advocate-General or two or more persons."

5. Remedies for a public nuisance.

6. Declaration.

7. Injunction.

8. "Such other relief."

9. Saving of rights, existing independently of this Section — Sub-section (2).

Section 90 — Note 1

1. ('30) AIR 1930 Bom 232 (233) : 54 Bom 825.
[See also ('07) 31 Bom 472 (476).]

('21) AIR 1921 Bom 204 (205) : 45 Bom 138.]

Note 2

1. ('18) AIR 1918 Bom 88 (90) : 43 Bom 281.

Other Topics (Miscellaneous)

Effecting of adding relator with the Advocate-General.
See Note 4.

Instances of nuisance. See Note 2.

Nature of proceedings under this Section. See Note 4.

Religious processions. See Note 3.

Special damage. See Note 5.

1. Scope and object of the Section. — Under the Common law a private person cannot maintain a suit in respect of a public nuisance unless he is able to show that he suffered *special damage thereby*.¹ This Section provides an exception to that rule and enacts that such a suit can be maintained even *without proof of special damage* provided the consent of the Advocate-General is obtained and the other conditions of the Section are satisfied.²

The Section enacts only a rule of *procedure* and does not, as is made clear by sub-section (2), deprive any person of any right which he may have independently of its provisions, as for instance, a right to sue in respect of a public nuisance on proof of *special damage*.³

2. "Public nuisance," meaning of. — The words "public nuisance" have not been defined in the Code. But by virtue of Section 3 (44) of the General Clauses Act, the words mean a public nuisance as defined by the Indian Penal Code.¹ Under Section 268 of the Indian Penal Code, "a public nuisance" is an act or illegal omission which causes any common injury, danger or annoyance to the public or to the people in

Section 91 — Note 1

1. ('21) AIR 1921 Cal 271 (272). (Special damage does not mean serious damage but damage of special nature.)

('26) AIR 1926 Cal 549 (550). (Particulars and details of special damage must be given in the plaint.)

(1900) 27 Cal 793 (797).

('35) AIR 1935 Pesh 190 (190).

('15) AIR 1915 Mad 336 (336). (Special damage of substantial character must be alleged and proved.)

('12) 16 Ind Cas 962 (963) (Mad). (Highway — Obstruction—Damage—Cause of action.)

('86) 9 Mad 463 (465).

('19) AIR 1919 Cal 209 (210).

('18) AIR 1918 Nag 159 (159). (Special degree of inconvenience suffered is not special damage.)

('15) AIR 1915 Cal 276 (277).

('01) 5 Cal W N 285 (286).

('95) 22 Cal 551 (557).

('88) 15 Cal 460 (467) (FB).

('74) 22 Suth W R 462 (463). (Suit in respect of a public road.)

('74) 21 Suth W R 408 (409).

('72) 18 Suth W R 58 (58).

('69) 12 Suth W R 160 (160).

('69) 12 Suth W R 275 (276).

('69) 11 Suth W R 445 (445). (Encroachment on a public lane, remedy is in Criminal Court.)

('71) 24 Suth W R 414n (414n).

('09) 11 Bom L R 372 (373).

('03) 5 Bom L R 116 (117). (S. 30, C. P. C., is no bar where special damages are proved.)

('70) 6 Beng L R (App) 73 (74).

('76) 1 All 249 (250).

('76) 1 All 557 (559).

('06) 33 Cal 905 (910).

2. ('37) AIR 1937 Pat 481 (482) : 16 Pat 190. (Action by an individual will not lie except the one indicated by Section 91.)

('36) AIR 1936 Oudh 154 (155). (Suit by some Mahomedans for demolition of certain constructions alleged to have been constructed by defendant on the ground of obstruction to tazias — Plaintiff not claiming to have suffered special damage—Suit is not maintainable without permission of Advocate-General.)

('38) AIR 1938 Mad 338 (338, 339). (Channel constructed through village site — Public nuisance — Special damages not proved — Suit must be with permission of Advocate-General.)

('37) AIR 1937 All 78 (79).

('18) AIR 1918 Cal 497 (497). (S. 336 of the Calcutta Municipal Act does not control this Section—See also the Report of the Special Committee.)

3. ('37) AIR 1937 All 78 (79).

('24) AIR 1924 All 599 (602, 603) : 46 All 470.

Note 2

1. ('37) AIR 1937 All 78 (79).

('36) AIR 1936 Oudh 154 (155).

[See also ('88) 10 All 44 (46).]

general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

The essence of the definition is that the injury, danger or annoyance must be to the *public*, or to the *people in general* who occupy the property in the vicinity or who use such public right.² Thus, the obstruction of a public highway,³ or the pollution of public waterways,⁴ or the storage of inflammable or other material likely to endanger life or health,⁵ or the causing of annoyance to the public in any other way,⁶ is a public nuisance. Acts, however, which offend the sentiments of merely a particular class of persons,⁷ or annoyance caused to particular persons only,⁸ do not constitute public nuisances. Thus, the placing of a Muhammadan symbol in the neighbourhood of Hindu temple,⁹ or the carrying on of a tinman's trade causing annoyance to the inhabitants of three sets of chambers only,¹⁰ is not a *public* nuisance. Similarly, where a suit is brought on behalf of the members of one community to vindicate their right to take out processions along a certain route, the suit is not one for the removal of a public nuisance within the meaning of this Section, but is a suit for remedying the infringement of a special right exercised by that community.¹¹

Whether a particular thing or act is an actionable nuisance at all, is to be decided with reference to the circumstances of each case.¹² In *Sturges v. Bridgman*,¹³ Thesiger, L. J., observed as follows: "Whether anything is a nuisance or not is to be determined not only by an abstract consideration of the thing itself but in reference to its circumstances. What would be a nuisance in Belgram Square would not necessarily be so in Bermondsey."

No length of time can legitimate a public nuisance.¹⁴ Nor will the fact that a person or company is acting under statutory powers enable such person or company to

2. ('84) 7 Mad 590 (591, 592).

(1828) 1 Russ 319, *Rex v. Lloyd*.

[See also ('88) 11 Mad 42 (43). (Right which vests in plaintiff and others jointly and severally, e. g., a right to graze in a tank bed, is not a public right.)]

3. See Note 3.

[See also ('89) 1 Weir 238 (239). (Allowing cattle to stray on public roads.)]

4. See (1861) 3 H L 326, *Stockport Waterworks v. Potter*.

5. (1826) 2 Car & P 485 (485), *R. v. Neil*. (Trade of varnish maker—It would be enough if the smell is injurious or offensive to the senses.)

('07) 34 Cal 73 (78). (Keeping a stack of bones for a time sufficient to cause them to become rotten.)

('82) 1 Weir 242 (242). (Infecting the atmosphere by deposit of sweepings.)

6. ('88) 10 All 44 (46). (Wilfully killing cattle in a public street so that the groans and blood of beasts could be heard and seen by every passer-by would amount to a public nuisance.)

('15) AIR 1915 Nag 79 (80, 89): 11 Nag L R 132. (A slaughter-house for butcher's meat is an offensive trade.)

('91) 14 Mad 364 (365). (Keeping a gambling house and permitting disorderly behaviour.)

('02) 25 Mad 118 (129). (Opening a burial ground and using it in such a way as to render living

nearby unhealthy.)

('83) 1 Weir 243 (244). (Taking fighting rams in a market place.)

7. ('84) 7 Mad 590 (591).

('88) 12 Bom 437 (439). (Exposing meat in a varandah of a house, which is repulsive to the feelings of Jains who pass by it to go to their temple.)

('08) 30 All 181 (187). (Slaughtering of kine by Moslems though it would hurt the susceptibilities of others.)

('16) AIR 1916 Nag 81 (82): 12 Nag L R 130.

[See also ('37) AIR 1937 Pesh 81 (81).]

8. (1900) 22 All 113 (115). (Soliciting passers-by on a public road for purposes of prostitution.)

('39) AIR 1939 All 586 (588).

[See (1828) 1 Russ 319, *Rex v. Lloyd*.

('37) AIR 1937 All 78 (79).]

9. ('84) 7 Mad 590 (591).

10. (1823) 1 Russ 319, *Rex v. Lloyd*.

11. ('34) AIR 1934 All 941 (943).

12. ('12) 17 Ind Cas 574 (574) (All). (Placing a cot temporarily on a public road is not a public nuisance.)

13. (1879) 11 Oh D 852 (865).

14. ('71) 16 Suth W. R Cr 6 (11).

(1812) 3 Camp 224 (227), *R. v. Cross*.

cause or continue a nuisance, unless the creation thereof was expressly contemplated by the Statute.¹⁶

There are two kinds of public nuisances, actual and constructive, or public nuisances in fact and public nuisances in law. What is meant by a constructive public nuisance or a public nuisance in law is that which is only wrong because it contravenes the provisions of an Act such as the building rules of a Municipal Act. Section 91 is restricted in terms to public nuisances in fact and a constructive public nuisance can be no ground for a suit under that Section.¹⁰ As to actionable private nuisance, see Pollock on Torts and the undermentioned cases.¹⁷

3. Obstruction to public highway.—An obstruction to a public thoroughfare is a public nuisance.¹ The public is entitled to the full width of the public highway, however wide it may be, and any obstruction thereto infringes the right of the public to that extent.² Thus, the building of a construction over any part of a public street,³ or the cutting of trenches across it⁴ necessarily causing obstruction to persons who may have occasion to use the street, is a public nuisance. Similarly, an *excessive user* of the highway incompatible with the reasonable exercise of rights by other members of the public,⁵ or an illegitimate user of the road amounting to trespass, will amount to a public

(1806) 7 East 195, *Weld v. Hornby*. (Though it may supply a defence to an action by a private person.)

(1825) 4 B & C 598 (602, 603), *R. v. Montague*.
15. ('73) 10 Beng L R 241 (252).

(1865) 6 B & S 631 (648), *R. v. Bradford Navigation*. (Canal company empowered by statute to take the water in certain brooks — Water becoming polluted by drains, etc., before reaching the canal and becoming a public nuisance—*Held* company were liable to be indicted for the nuisance as there was nothing in the Act compelling them to take the water, or authorizing them to use it so as to create a nuisance.)

(1895) 1 Ch 287 (320), *Shelfer v. London Electric Lighting Co.* (Nuisance caused by electrical undertakings have no statutory protection.)

(1899) 2 Ch 217 (257), *Jordeson v. Sutton, etc. Gas Co.* (So also nuisance caused by gas works.)

(1869) L R 4 H L 171, *Hammersmith v. Brana*. (Proceedings for nuisance cannot be taken in the case of railway authorized by Acts in respect of the use of locomotives on railways.)

(1832) 4 B & Ad. 30 (42), *R. v. Pease*. (Establishment of railway line or the like specifically authorized by Statute—No nuisance.)

(1885) 11 App Cas 45 (53, 58), *L. B. and S. C. R. v. Truman*. (Where a Legislature directs a duty to be done, it must be deemed to have weighed the balance of convenience between public benefit and private rights and to have laid down that the latter should give way to the former.)

(1899) App Cas 535 (546), *Canadian Pacific Ry. Co. v. Parke*. (There is no distinction between misfeasance and non-feasance when the Legislature authorises a particular thing to be done.)

16. ('10) 5 Ind Cas 213 (224) (*Bom.*).

17. (1865) 11 H L C 642 (650), *St. Helen's Co. v. Tipping*. (In civil law there is a distinction between an action for a nuisance in respect of an act producing a material injury to property

and one brought in respect of an act producing only personal discomfort — As to the latter a person must in the interests of the public generally submit to the discomfort of the circumstances of the place and the trade carried on around him, as to the former the same rule would not apply.)

(1861) 7 H & N 160 (169): 3 H L 326, *Stockport Waterworks Co. v. Potter*. (Do.)

('24) AIR 1924 All 392 (393): 46 All 297. (Flour mill and oil engine were working near a lady doctor's house and when there was evidence that there was no material physical discomfort, it was *held* there was no nuisance.)

(1867) 2 Oh App 478 (484), *Crossley v. Lightowler*. (The fact that many other persons pour filthy matter into a stream and so render the water unfit for use does not justify a manufacturer in adding to the pollution.)

(1852) 4 De G & Sm 315 (322, 325), *Walter v. Selfe*. (The law will not allow a man to sue for trifling or temporary annoyance.)

('84) 10 Cal 445 (476, 480). (Where a statute imposes a duty on a person a suit will lie for damages, if he fails to perform it and the plaintiff has been injured in consequence.)

Note 3

1. ('16) AIR 1916 Nag 81 (82): 12 Nag L R 130.
(‘01) 23 All 159 (162).

2. ('97) 20 Mad 433 (434).

3. ('36) AIR 1936 Oudh 154 (155).

(‘97) 20 Mad 433 (434).

4. (1883) 53 L J Ch 853 (856), *Nicol v. Beaumont*.

5. (1805) 6 East 427 (430), *Rex v. Russul*. (A waggoner constantly unloading waggons so that no carriage could pass.)

(1812) 3 Camp 224 (226), *Rex v. Cross*. (A public conveyance waiting for an unreasonable length of time so as to obstruct traffic.)

nuisance.⁶ So also acts committed on or adjoining a highway, interfering with or endangering the safe user thereof, will amount to a public nuisance.⁷

A navigable river is a public highway and any act which interferes with the right of the public to freely navigate is a public nuisance.⁸ A slight encroachment will not necessarily constitute a public nuisance. There must be some evidence that the encroachment causes one of the results specified in Section 268 of the Indian Penal Code.⁹

A village pathway is not a public highway and a suit for relief in respect thereof is not governed by this Section.¹⁰ The right of a person to have access to his land abutting on a public highway is a public right,¹¹ but a right, acquired by prescription of immediate access from private property to a public highway is a private right.¹² See also the case cited below.¹³

Every class or community has a right to conduct a religious procession with its appropriate observances along a highway so that the procession does not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace.¹⁴ A suit in respect of an obstruction to such a right is one respecting the infringement of a *civil right* of an individual and not one relating to a public nuisance. No special damage need be proved to maintain such a suit.¹⁵

6. (1812) 3 Camp 230 (231), *Rex v. Jones*. (Sawing timber in a street.)

(1834) 6 Car & P 636 (648), *Rex v. Carville*. (Exposing pictures for sale in street.)

(1888) L R 21 Q B D 191 (197, 198), *Ex parte Lewis*. (Holding public meetings.)

(1889) 1 Weir 232 (233). (Obstruction to part of a highway over the whole width of which the public had a right to pass.)

(1870) L R 9 Eq 418 (422), *Turner v. Ringwood Highway Board*. (An obstruction is not the less a nuisance because it is on a part of the street not commonly used.)

7. 1 Russ Cr 732 (732). (Keeping swine near a street.)

(1898) 2 Q B D 320 (325), *Harold v. Watney*. (Defective fence adjoining highway.)

8. (1887) 14 Cal 656 (658). (Placing a bamboo stockade across a tidal navigable river.)

[But see ('93) 20 Cal 665 (670). (Jags erected on the silted side of the river which was not ordinarily used for the purposes of navigation.)

(1871) L R 6 Ch App 572 (577), *Attorney-General v. G. E. Ry. Co.* (The withdrawal of waters from navigable rivers so as to impede navigation.)

('05) 32 Cal 930 (934). (Erection of a bund in a river making it unfordable.)]

9. ('93) 20 Cal 665 (669). (Diss. from 14 Cal 656.)

10. ('18) AIR 1918 Cal 212 (213).

('19) AIR 1919 Cal 123 (124). (Special damage need not be proved.)

('21) AIR 1921 Cal 405 (406). (Do.)

('29) AIR 1929 All 790 (790). (S. 91 is inapplicable to issues arising on encroachments on village roads in abadi belonging to the zamindar kept open by right of easement.)

[See also ('04) 31 Cal 839 (847).

('30) AIR 1930 Cal 286 (287); 57 Cal 526.]

[But see ('37) A I R 1937 Pat 54 (54, 55).]

11. ('13) 21 Ind Cas 601 (602) (Mad).

[See ('35) AIR 1935 Pesh 190 (190).]

12. ('24) AIR 1924 All 715 (716) : 46 All 573.

[See also ('35) AIR 1935 All 789 (790). (Sanction not required for suit relating to encroachment of a private easement.)]

13. ('39) 20 Pat L Tim 414 (415). (Suit by particular class of public claiming right of way over village path — Suit is maintainable without sanction and proof of special damage.)

14. ('25) AIR 1925 P C 36 (37, 38) : 47 All 151 : 52 Ind App 61 (P C). (2 Bom 457 and 18 Bom 693, Overruled.)

('78) 2 Mad 140 (141).

('83) 6 Mad 203 (216, 219, 226) (FB).

('03) 26 Mad 376 (382).

('03) 26 Mad 554 (570, 577) (581) (FB).

('07) 30 Mad 185 (190) : 34 Ind App 93 (P C).

[See also ('09) 1 Ind Cas 716 (718) : 32 Mad 478.

('31) AIR 1931 All 341 (344).]

15. ('25) AIR 1925 P C 36 (37, 38) : 47 All 151 : 52 Ind App 61 (P C).

('07) 30 Mad 15 (16).

('10) 7 Ind Cas 663 (665) : 34 Bom 571. (Dissenting from 2 Bom 457 and 18 Bom 693.)

('82) 5 Mad 304 (309).

('17) AIR 1917 Mad 122 (124).

('83) 6 Mad 203 (225, 226, 227) (FB).

('03) 26 Mad 376 (384).

('97) 24 Cal 524 (526).

('16) AIR 1916 Nag 81 (83, 84) : 12 Nag L R 130.

('09) 32 Mad 478 (484). (Illegal order of Magistrate restraining procession will give rise to a cause of action.)

The remedies are concurrent and the pursuit of one does not bar the other. Thus, where *A* obstructs a public highway by occupying and enclosing a portion thereof, he may be prosecuted under Section 268 of the Indian Penal Code. This will not preclude a suit under this Section by the Advocate-General or by two or more persons with his consent. Nor will the institution of the said two proceedings bar a suit by a private individual whose house abuts on that highway and the access to whose house is cut off by such enclosure by *A* causing him *special damage*.²

6. Declaration. — Where the relief claimed in respect of a suit is a right of easement and not in respect of any public nuisance, no declaration that the place in suit is a public thoroughfare can be granted on the mere fact that the plaintiff's witnesses described it as a public place.¹

As to declarations of right to take religious processions in public streets, see Note 3 above.

7. Injunction. — Where a nuisance is temporary and intermittent,¹ or *occasional*,² no injunction will be granted. Nor will it be granted where the injury is trifling in amount and effect.³ But even slight nuisances, if they are of *frequent* occurrence, will justify the grant of an injunction.⁴ Thus, a *continuous* ringing of bells will be stopped by an injunction.⁵ Similarly, where the defendant claims a right to *continue* the nuisance,⁶ or the act committed tends to the injury of the public,⁷ or causes damage to private individuals,⁸ an injunction will be granted.

(1815) 4 M & S 101 (103), *Rose v. Miles*. (Do.)
(1824) 2 Bing 263 (265, 266), *Greasly v. Codling*. (Do.)

(1867) 36 L J Q B 205 (217) : L R 2 Eng and Ir Ap 175, *Ricket v. Metro. Ry. Co.* (Special injury should not be merely consequential.)

('91) 14 Mad 177 (181). (The special injury however should not be merely consequential nor remote.)

Bull N P 26. (The damage must be direct and not consequential e. g., by delay on a journey.)
('95) 22 Cal 551 (557). (Injury must not be remote.)

('78) 1 All 557 (559). (Deprivation of access to a thoroughfare and the use of a certain drain.)

('18) AIR 1918 Nag 159 (159). (Special degree of inconvenience suffered by him cannot be said to cause him damages.)

('21) AIR 1921 Cal 271 (271, 272). (Fact that plaintiffs were only inconvenienced by taking a longer route is not enough.)

('01) 5 Cal W N 285 (286). (Nor will mere inconvenience or a remote danger make such an action maintainable.)

(1835) 2 Bing N C 281 (297), *Wilkes v. Hungerford*. (Loss of custom due to building operations obstructing a highway in front of plaintiff's shop.)

(1874) L R 9 C P 400 (407, 408), *Benjamin v. Storr*. (Allowing carts and horses to stand in front of a shop for an unreasonable length of time.)

('84) 8 Bom 35 (87, 92). (Inability to let house, owing to noise and smoke emitted by a manufacturing mill.)

('14) AIR 1914 All 487 (487), (Narrowing a street from 22 inches to 2½ cubits which caused great inconvenience.)

('19) AIR 1919 Cal 209 (210). (The fact that the plaintiff cannot himself commit a public nuisance owing to the nuisance caused by the defendant is not special damage to the plaintiff.)

2. ('29) AIR 1929 Bom 94 (95) : 53 Bom 187.
See also the cases under foot-note (1).

Note 6

1. ('29) AIR 1923 Lah 546 (548).

Note 7

1. (1853) 3 D. M. & G 304 (323, 340), *Attorney-General v. Sheffield Gas Consumers Co.*

(1864) L R 4 Ch 71 (81), *Attorney-General v. Cambridge Gas Consumers Co.*

(1864) 4 De J & S 211 (216), *Swaine v. G. N. Railway*.

2. (1867) L R 5 Eq 166 (173), *Cooke v. Forbes*.
(1864) 4 De J & S 211 (216). *Swaine v. G. N. Ry.* (Where the defendant company allowed manure to be deposited in a siding.)

3. (1899) 2 Ch 705 (709, 710). *Llandudno Urban District Council v. Woods*.

4. (1851) 21 L J Ch 153 (166, 167) : 2 Sim (N S) 133, *Soltan v. Deheld*.

5. (1851) 21 L J Ch 153 (166, 167) : 2 Sim (N S) 133, *Soltan v. Deheld*.

6. (1875) 45 L J Ch 638 (643) : L R 7 H L C 697, *Swinden Waterworks v. Wilts and Berks*.

(1883) 22 Ch D 221 (231), *Attorney-General v. Acon Local Board*.

7. (1882) 21 Ch D 752 (755), *Attorney-General v. Shrewsbury Bridge Co.*

8. ('78) 2 Bom 457 (468).
('84) 8 Bom 35 (88).

('77) 3 Cal 20 (22) (FB).

Where, however, the plaintiff has *acquiesced* in the nuisance,⁹ or where there is no *proof* or *prospect* of any injury,¹⁰ no injunction will be granted. No mandatory injunction will be granted if the nuisance is only *constructive*.¹¹

Where a right to injunction is proved, it should be granted as a rule and without regard to any difficulty or expense that the defendant may be put to in removing the nuisance. But in exceptional cases where such difficulty is considerable, the Court may suspend the operation of the injunction.¹²

8. "Such other relief." — In England a private individual may join the Attorney-General in the action and claim special damages which he suffered by the nuisance.¹ It is doubtful whether persons suing under this Section, can claim such special damages.

9. *Saving of rights, existing independently of this Section — Sub-section (2).* — It has been observed in Notes 1 and 5 above that this Section does not affect rights of suit which may exist independently of this Section and this is embodied in sub-section (2) of this Section. Thus the Section does not control or restrict the provisions of O. 1 R. 8 under which a person may sue on behalf of others.¹

92. [S. 539.] (1) In the case of any alleged breach⁶ of any express or constructive trust created for public purposes of a charitable or religious nature,⁵ or where the direction of the Court is deemed necessary for the administration⁶ of any such trust, the Advocate-General, or two or more persons having an interest in the trust⁸ and having obtained the consent in writing of the Advocate-General,²³ may institute a suit, whether contentious or not,³² in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the *Provincial Government* within the local limits of whose jurisdiction³⁸ the whole or any part of the subject-matter of the trust is situate, to obtain a decree —

(a) removing any trustee;¹⁵

(b) appointing a new trustee;¹⁶

(c) vesting any property in a trustee;¹⁷

(d) directing accounts and inquiries;¹⁸

(’88) 15 Cal 460 (467) (FB). (Allegation that a piece of land forms a part of a public highway — Suit under Section 42 of Specific Relief Act lies.)

(’05) 32 Cal 697 (709).

9. (1895) Johiss 372, Wicks v. Hunt.

10. (1828) 3 Wills & Shaw 295, Mewzies v. Breadal Zeone.

11. (’10) 5 Ind Cas 213 (229) (Bom).

12. (1868) L R 4 Ch 146 (161), Attorney-General

v. Colony Lunatic Asylum.

Note 8

1. (1868) L R 6 Eq 177 (180, 181), Cooke v. Mayor.

(1891) 2 Q B 100 (104, 106), Attorney-General v. Logan.

Note 9

1. (’25) AIR 1925 Cal 1233 (1238).

(’34) AIR 1934 All 941 (943).

- (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust;¹⁹
- (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;²⁰
- (g) settling a scheme;²¹ or
- (h) granting such further or other relief as the nature of the case may require.¹¹

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs⁹ specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.³³

[1877, S. 539.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

Synopsis

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Other Topics (Miscellaneous)

Court not competent to take action under the Section unless a regular suit is filed. See Notes 2 and 4.
 Court's power to add parties. See Notes 25 and 28.
 Devolution of trust property. See Note 5.
 Jurisdiction after scheme. See Note 21.
 Mutts. See Note 5.
 Power to trustee to deal with endowed property. See Note 20.
 Relators—If can appeal. See Note 36.
 Romilly's Act. See Note 4.
 Scheme for Mahomedan mosque. See Note 21.

Suit against strangers to trust for declaration and possession of trust property. See Notes 2, 9 and 28.
 Suit against trespassers. See Notes 2 and 28.
 Suit to enforce private rights. See Notes 2 and 7.
 Suit to remove trustee for illegal alienation impleading alienee. See Notes 10 and 28.
 Trustee *de son tort*. See Notes 5, 28 and 40.
 Trust denied — Whether Section applies. See Notes 5, 6 and 12.
 Trust not carried out. See Note 9.
 Vague trusts. See Note 5.

1. Legislative changes. — This Section has been enacted in substitution of Section 539 of the Code of 1882 and has introduced the following changes —

- (a) The words "public purposes of a charitable or religious nature" have been introduced in place of the words "public charitable and religious purposes." See Note 5 below.
- (b) Under the old Code, the interest of the plaintiff was required to be a "direct interest" in the suit. The word "direct" has been deleted by Act VII of 1888.¹ See Note 8 below.
- (c) The words "whether contentious or not" are new. See Note 32 below.
- (d) The words "in the principal Court of original jurisdiction" have been substituted for the words "in the High Court or the District Court" and the words "or any other Court empowered in that behalf by the Local Government" have been newly added. See Note 38 below.
- (e) Clause (a) is new. See Note 15 below.
- (f) Clause (d) is also new. See Note 18 below.
- (g) The following words in clause (e), namely, "what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust" have been substituted for the words "the proportion in which its objects are entitled." See Note 19 below.
- (h) Sub-section (2) is also new. See Note 33 and Note 41 below.

2. Applicability, object and scope of the Section. — This Section may be taken as intended to confer upon the Courts in this country the same powers as the English Courts of Chancery possessed, in matters relating to the administration of public charities, religious or otherwise.¹ It has been intended to be an exhaustive statement of the law applicable to cases in which there has been a breach of trust in relation to a *public* trust (whether express or constructive) of a charitable or religious nature.² The aim of the Section is to protect the rights of the public in such trusts and to enable the public, the Advocate-General and Courts of Justice to stop the misuse of the income of charitable institutions.³ This Section is intended to provide proceedings of a special nature for the purpose of determining questions that relate to the administration of public, religious or charitable trusts and to prevent multifarious

Section 92 — Note 1

1. ('94) 24 Cal 418 (427). (To worship in a public temple.)

Note 2

1. ('05) 28 Mad 319 (324).
 ('12) 16 Ind Cas 225 (234) (Mad). (To appoint

new trustees.)

2. ('22) AIR 1922 All 349 (351, 352): 44 All 622.

('99) 21 All 187 (188).

('78) 3 Cal L Rep 112 (115).

3. ('16) AIR 1916 Mad 332 (337): 19 Ind Cas 694 (699): 38 Mad 356.

See also the case cited below.¹³

Sections 92 and 93 have no application as regards Tirumalai-Tirupati Devasthanams. See the Tirumalai-Tirupati Devasthanams Act (Madras Act XIX of 1933), Section 44 (2).

When all the above conditions are satisfied, the suit will be governed by the Section and cannot be instituted except in conformity with the procedure prescribed thereby.¹⁴ When any one of the conditions is absent, the Section has no application. The necessity of obtaining the sanction of the Advocate-General, in a suit falling within the Section, has been imposed with a view "to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust."¹⁵

The mere fact that a suit *relates* to a public trust or to the properties belonging thereto, without satisfying all the conditions of the Section, will not make the Section applicable thereto.¹⁶ Nor will a suit which satisfied all the conditions of the Section be taken out of its scope merely by the fact that claims for reliefs *other* than those described in the Section are *also* added therein.¹⁷ A suit for removal from religious office, if the office is connected with the management of trust funds and properties, is within the scope of the Section.¹⁸ The aim of the Section being to restrict the powers of individuals from having unrestricted access to Courts in the matters described in the Section, its provisions must be strictly construed.¹⁹ Where therefore a point is taken that a suit brought in the ordinary manner is really governed by the provisions of this Section, the Court must see whether it is really and strictly within the four corners thereof.²⁰

Section 9 of the Charitable and Religious Trusts Act (XIV of 1920) provides that if a suit under this Section is pending or a scheme has been settled, no petition under the provisions of that Act shall be entertained. Section 10 of the same Act also empowers the Court, in suits under this Section, to direct the defendant to furnish security or deposit money for costs of the plaintiff. Where an order under Section 5 of the Charitable and Religious Trusts Act is not complied with, there is a breach of trust and by virtue of Section 6 of the Act a suit for any of the reliefs mentioned in this Section so far as it is based on such failure may be instituted without the previous sanction of the Advocate-General.²¹

Section 73 of the Madras Hindu Religious Endowments Act provides that this Section (*i. e.*, Section 92) shall have no application to any suit claiming any relief in

(92) 15 Mad 241 (246). (Suit by trustees against ex-trustees holding over, for possession of properties—Section does not apply.)

(10) 7 Ind Cas 566 (567) : 13 Oudh Cas 177.

13. ('87) AIR 1937 Cal 150 (152); I L R (1937) 1 Cal 673. (Bengal Wakf Act does not apply to suit under S. 92 which is based on rights accrued before commencement of Act.)

14. ('25) AIR 1925 Pat 544 (547); 4 Pat 741.

(18) AIR 1918 All 218 (219). (District Judge cannot interfere in the management of trust on the mere application (without a suit under S. 92) calling attention to a breach of trust.)

(27) AIR 1927 All 526 (529); 49 All 191. (Suit not under S. 92—Question of breach of trust cannot be tried.)

15. ('97) 24 Cal 418 (425).

(06) 33 Cal 789 (804).

(09) 32 Mad 131 (135).

(17) AIR 1917 All 319 (320).

[See also ('91) 14 Mad 1 (15).]

16. ('23) AIR 1923 Bom 67 (70); 46 Bom 101.

(29) AIR 1929 All 518 (518). (Suit in relation to trust property by mutawalli against tenant for rent.)

17. ('97) 24 Cal 418 (426). (Suit for removal of trustee and for possession from alienee from trustee—S. 92 applies.)

(21) AIR 1921 Mad 563 (565, 566). (To find out what properties belong to the charity, Court may go into question not directly arising in the suit.)

18. ('05) 2 Cal L Jour 460 (465).

19. ('19) AIR 1919 Low Bur 56 (57).

20. ('23) AIR 1923 Bom 67 (68, 70); 46 Bom 101.

(36) AIR 1936 Sind 179 (181); 30 Sind L R 104. (But though the Section has to be construed strictly, it should not be construed in such a way that a fraud is perpetrated on the Section itself.)

21. ('33) AIR 1933 Mad 854 (854); 57 Mad 153.

respect of the administration or management of a religious endowment and that no suit in respect of such administration or management shall be instituted except as provided by that Act. The effect of Section 73 of that Act is that a suit which could only be instituted by the Advocate-General or by some persons with his consent under this Section must, when it relates to religious endowments governed by that Act, be instituted by the Religious Endowments Board or by some person having an interest and with the consent of the Board.²² See also the undermentioned cases²³ under that Act.

Under Section 192 (a) of the Madras Estates Land Act (I of 1908), the provisions of this Section corresponding to Section 539, Chap. XL of the old Code, have been made inapplicable to proceedings under the said Act.

3. Retrospective operation of the Section. — It is a general principle of law that alterations in *procedure* are always retrospective in operation, and accordingly there is nothing to prevent Section 92 of the Code from operating retrospectively.¹ This Section deals with the *right of suit* (which is a *substantive* right), as well as with *procedure*.² In so far, therefore, as it affects *rights of suit*, it will not have a retrospective operation, but will have such operation so far as it affects *procedure*.³

4. Analogous law — Comparison with the Religious Endowments Act, 1863 and with Section 42 of the Specific Relief Act, 1877. — Section 539 of the old Code, corresponding to Section 92 of this Code, was an imperfect reproduction of Lord Romilly's Act (52 Geo. III, C. 101) and the Trustee Act (13 & 14 Vict., C. 60) of 1850 in England. There is a conflict of opinion as to whether decisions on Romilly's Act could be referred to for interpreting the provisions of this Section, some holding that they could be so referred to¹ and others that they could not.² The language of those Acts, however, is materially different from that of the Code³ with this additional difference in procedure that the remedy under the English Act is by way of an *application*⁴ and the proceedings are regarded as *summary ones*,⁵ whereas under the Code the remedy is by way of a *suit*, and the proceedings are *not summary*.⁶

Before the year 1863, the general superintendence of all religious and charitable endowments in the Provinces of Bengal and Madras was vested in the respective Boards of Revenue of those Provinces by virtue of two Regulations, *viz.*, Bengal

22. ('32) AIR 1932 Mad 234 (236) : 55 Mad 549.

(Hence a suit by a trustee to recover trust property from the alienees is outside the scope of S. 73, Madras Religious Endowments Act.)

23. ('34) AIR 1934 Mad 126 (127) : 57 Mad 362. (Suit for removal of trustee of kattalai does not lie either under S. 73, Madras Religious Endowments Act or S. 92, C. P. Code.)

('85) AIR 1935 Mad 983 (988). (Madras Hindu Religious Endowments Act applies only to what are religious endowments within the meaning of the Act — Fund devoted to two purposes, one falling within Madras Hindu Religious Endowments Act, other though religious, outside the Act — Endowment is not a religious endowment.)

Note 3

1. ('12) 13 Ind Cas 264 (267) : 5 Sind L R 184.

2. ('10) 5 Ind Cas 515 (517). (Mad.)

3. ('14) AIR 1914 Mad 593 (594) : 20 Ind Cas 515 (516) : 37 Mad 184. (Sanction granted by Collector for suit for removal of trustee — Suit brought under new Code — Sanction is valid.)

('79) 3 Bom 27 (28).

('28) AIR 1928 All 660 (662) : 51 All 30.

Note 4

1. ('11) 36 Mad 364 (369).

2. ('94) 17 Mad 462 (464). (Decisions relevant.)

('97) 21 Bom 48 (52). (Not strictly relevant.)

('97) 24 Cal 418 (424). (Do.)

('05) 2 Cal L Jour 431 (439). (Not safe to rely on English decisions.)

[See ('36) AIR 1936 Mad 449 (453). (Section 92 has been modelled on the practice of the Chancery Courts, but as that division of jurisdiction is not part of the law of this country, limitations arising out of that conflict of jurisdiction have no direct application here.)

3. ('91) 14 Mad 186 (203, 204, 218).

('97) 24 Cal 418 (424).

('05) 2 Cal L Jour 431 (439).

4. ('91) 14 Mad 186 (193).

5. ('91) 14 Mad 186 (215).

6. ('91) 14 Mad 186 (217, 218).

('36) AIR 1936 Mad 449 (452).

Regulation XIX of 1810 and Madras Regulation VII of 1817.⁷ But there was no law of Religious Endowments as such applicable to the *whole* of India.

In the year 1863, the Government wanted to divest themselves of their powers of interference with *religious* endowments and accordingly Act XX of 1863 was passed, whereby the provisions of the said Regulations relating to *religious* endowments were repealed and provision was made to transfer all such endowments to trustees and committees.⁸ The operation of the Act was, however, not confined to such endowments only as had been actually taken under the management of the Board of Revenue.⁹ The Act does not apply to the Presidency of Bombay excepting the District of North Canara, nor to any Presidency Towns.¹⁰

As regards *charitable* endowments, the power of superintendence continued to remain in the Board of Revenue, under the old Regulations, and is still retained by it.

Comparison with Religious Endowments Act. — Section 14 of the Religious Endowments Act provides that any *person* or *persons interested*¹¹ in any *public religious* trust¹² may sue the trustee, manager, superintendent or a member of any committee appointed under the Act, for any *misfeasance, breach of trust* or *neglect of duty* committed by him in respect of the trust¹³ and the Court may, in such a suit —

- (1) direct the specific performance of any act by such trustee, manager, superintendent or member of the committee;
- (2) decree damages and costs against such person, and
- (3) direct his removal.¹⁴

Section 92 declares that the provisions of the Religious Endowments Act for the institution of suits governed by that Act are not affected by its provisions.¹⁵

Section 92 read with the provisions of the Religious Endowments Act thus leads to the following result —

- (1) Suits in respect of *charitable* trusts are outside the scope of the Religious Endowments Act (XX of 1863). They will fall within the scope of Section 92 if the conditions for the applicability of the Section described in Note 2 above are satisfied.
- (2) Suits, in respect of *religious* endowments, which do not charge the trustee,

7. [See ('17) AIR 1917 Mad 551 (552) : 39 Mad 700 (703).]

[See also ('32) AIR 1932 Pat 177 (177) : 11 Pat 594.]

8. ('84) 6 All 1 (6); 10 Ind App 90 (PC).

9. ('82) 8 Cal 32 (38, 40).

('94) 17 Mad 95 (96). (Act XX of 1863 does not apply unless endowment could come within Regulation VII of 1817.)

('96) 18 All 227 (231).

10. ('01) 24 Mad 219 (232). (Not intended to apply to suit, brought under the ordinary original jurisdiction of the High Court inherited from the Supreme Court.)

('78) 3 Cal 563 (572). (Suit brought under original jurisdiction of Supreme Court—Section does not apply.)

11. ('67) 8 Suth W R 313 (314). (It is not necessary that the interest should be a pecuniary one.)

('97) 24 Cal 418 (427). (Pecuniary interest is not necessary.)

12. ('92) 19 Cal 275 (281). (Act of 1863 applies only to public religious trusts.)

('91) 14 Mad 1 (8, 15). (Act does not apply if the endowment is not a public one.)

('81) 7 Cal 767 (770).

('77) 3 Cal 324 (330) (PC). (Suit for removal of mutawalli of Mahomedan religious endowment falls under Act XX of 1863.)

('86) 8 All 31 (34).

('96) 19 Mad 285 (287). (Suit for appointment of trustee.)

('92) 19 Cal 275 (284). (Act does not apply if endowment is not a public religious one.)

13. ('78) 2 Mad 197 (199). (The Act does not recognize any difference between hereditary and selected trustees.)

('67) 8 Suth W R 313 (314).

('78) 2 Mad 58 (61).

('90) 3 C P L R 11 (13). (Act except S. 22 does not apply to Central Provinces.)

14. ('01) 24 Mad 243 (245). (Declaration also may be asked as ancillary to the claim for removal of manager.)

15. See S. 92, sub-section 2.

manager, superintendent or committee member with *misfeasance, breach of trust or neglect of duty*, are outside the scope of the Act. They will fall within the scope of Section 92 if the conditions for its applicability are satisfied.¹⁶

- (3) Suits in respect of public *religious* trusts which charge the trustee, manager, superintendent or committee member with misfeasance, breach of trust or neglect of duty will fall within the scope of both the said Act and Section 92 of the Code. In such a case, the plaintiff may proceed under *either* provision at his choice,¹⁷ though the proper machinery to proceed under would, in the generality of cases, be under the Code.¹⁸
- (4) Both under the Act as well as under Section 92, permission is necessary to be obtained before the institution of the suit—if, under the Act, from the principal Civil Court of original jurisdiction, and if under Section 92, from the Collector or the Advocate-General.¹⁹
- (5) The general procedure of the Code equally applies to suits under the Act.²⁰
- (6) The reliefs granted under the Act are slightly different from those accorded under Section 92 of the Code.²¹
- (7) A suit under the Religious Endowments Act is as much a *representative* suit as one under Section 92 of the Code and affects the rights of all those interested in the trust.²²

Comparison with Specific Relief Act, Section 42. — Section 42 of the Specific Relief Act provides that no Court shall grant a declaration where the plaintiff being able to seek further relief, omits to do so. But this Section has been held to be inapplicable to cases falling within the scope of Section 539 (the corresponding Section of the old Code), or Section 92 even if the suit is one for a *mere declaration* and the plaintiff does not ask for further relief, being able to do so.²³ Nor can a plaintiff evade the requirements of Section 92 by framing a suit as one under Section 42 of the Specific Relief Act.²⁴

5. Trust, whether express or constructive, for public purposes of a religious or charitable nature, necessary. — This Section deals with *completed*

16. ('07) 4 All L Jour 774 (775).

('19) AIR 1919 Mad 159 (160) : 42 Mad 668. (Rahim, J.)

17. ('18) AIR 1918 Bom 134 (137) : 42 Bom 742.

('34) AIR 1934 Pat 443 (446).

('14) AIR 1914 Mad 593 (593, 594) : 20 Ind Cas 515 (515) : 37 Mad 184.

('21) AIR 1921 Cal 425 (426). (Decree under S. 5 of Religious Endowments Act—No bar to a suit under this Section.)

18. ('25) AIR 1925 Pat 544 (546) : 4 Pat 741.

('04) 8 Cal W N 404 (407, 408). (But in a suit under the Act only such relief can be given as the special statute says it may give.)

19. ('07) 4 All L Jour 774 (775). (See S. 18 of Act XX of 1863).

All 31 (34).

20. ('18) AIR 1918 Mad 560 (562) : 41 Mad 237. (Per Sadasiva Aiyar, J.)

('01) 24 Mad 685 (689). (Application for leave to sue under the Religious Endowments Act must be verified and presented as in the case of plaints.)

21. ('25) AIR 1925 Pat 544 (546) : 4 Pat 741. (Power to appoint new trustee or to frame

scheme is restricted to S. 92 only.)

('18) AIR 1918 Bom 134(137):42 Bom 742. (S. 92 is wider than S. 14 of the Religious Endowments Act and provides for settling a scheme which is a jurisdiction of a very wide and beneficial nature.)

('08) 5 All L Jour 191(192). (Court cannot appoint new trustee under the Act.)

22. ('28) AIR 1928 Mad 614 (619).

('18) AIR 1918 Mad 560 (562) : 41 Mad 237.

('30) AIR 1930 Mad 216 (218). (S. 73 of the Madras Religious Endowments Act is closely modelled on this Section.)

23. ('03) 26 Mad 450 (453). (Suit for declaration that defendants in possession are not lawful trustees and for appointment of new trustees—Possession not claimed.)

('10) 5 Ind Cas 515 (517) (Mad).

('93) 16 Mad 31 (33). (Suit outside S. 539—S. 42 Specific Relief Act applies if it is a suit for mere declaration.)

24. ('22) AIR 1922 All 349(351, 352) : 44 All 622. (Suits with regard to trusts relating to public charities must either be brought under S. 92 or they cannot be brought at all—Per Walsh, J.)

trusts and does not become applicable until that stage is reached.¹ In other words, it pre-supposes the *existence* of a trust,² and does not apply where there is no trust, express or constructive, for public purposes of a charitable or religious nature.³ A suit, therefore, for deciding solely *whether a trust exists or not* is outside the scope of the Section.⁴

In order that the Section may apply, the trust must be a *public* one.⁵ The words "public purposes of a charitable or religious nature" used in the Section should

Note 5

1. ('17) AIR 1917 Mad 1008 (1009).
2. ('26) AIR 1926 Pat 321 (326) : 5 Pat 539.
(04) 1 All L Jour 26 (28).
(30) AIR 1930 Bom 167 (168).
3. ('38) AIR 1938 Bom 471 (476). (Section applies to trust under Trusts Act.)
(36) 14 Rang 575 (582, 583). (Suit denying existence of trust—Section does not apply.)
3. ('22) AIR 1922 PC 253 (256) : 49 Cal 459 : 49 Ind App 100 (PC). (Gift as in effect a private trust—Section would not apply.)
(29) AIR 1929 P C 27 (29) (PC).
- (15) AIR 1915 Low Bur 67 (70). (Court should pause before interfering under S. 92 with a matter which is more a family matter than of a public nature.)
- (20) AIR 1920 Oudh 120 (122). (Acts of private trustee—Person having no interest in the trust property cannot question.)
- (23) AIR 1923 All 247 (248). (Pujari of an idol is not a trustee and S. 92 does not apply to suit against him.)
- (16) AIR 1916 Bom 281 (282) : 40 Bom 439. (Charitable bequest—No trust alleged—S. 92 does not apply.)
- (27) AIR 1927 Oudh 604 (604).
- (10) 5 Ind Cas 515 (517) (Mad). (Suit must be against a trustee or trustee *de son tort*.)
- (12) 17 Ind Cas 596 (597) (Mad).
- (25) AIR 1925 All 759 (761) : 47 All 867.
- (21) AIR 1921 Cal 405 (406). (High way—Suit for declaration of public way on behalf of villagers—Section does not apply.)
- (21) AIR 1921 All 116 (117). (No allegation that defendant was express or constructive trustee—Section does not apply.)
4. ('26) AIR 1926 Pat 321 (326) : 5 Pat 539.
- (33) AIR 1933 Lah 670 (671). (Suit for declaration of wakf and invalidity of alienations.)
- (30) AIR 1930 Cal 787 (795) : 58 Cal 474.
- (20) AIR 1920 Lah 455 (456).
- (02) 25 All 631 (633, 634).
- (27) AIR 1927 Lah 350 (351) : 8 Lah 111.
- (25) AIR 1925 All 683 (685, 686) : 47 All 770. (Where a suit prays for removal of the trustee and incidentally prays for declaration that a property is wakf, it is not outside S. 92.)
- (28) AIR 1928 Lah 888 (889).
- (86) 8 All 31 (34).
- (36) AIR 1936 Lah 283 (285). (Persons intended to benefit under a trust are competent to sue for declaration that property is wakf, without sanction required by S. 92.)
- (37) AIR 1937 Sind 174 (175) : 30 Sind L R 478. (Suit for declaration that certain property was

plaintiff's private property does not fall under the Section though the defendants plead that the property was a public charitable and religious trust.)

[See ('35) AIR 1935 Mad 855 (856). (Issue as to trust character of properties incidental—Main relief by way of scheme for management—Suit not maintainable without sanction under S. 92, Civil P. C.—Declaration as to trust character held could not be given.)

(37) AIR 1937 Sind 174 (175) : 30 Sind L R 478. (A suit to which a claim is made to property as the plaintiff's private property is not a suit to which S. 92, Civil P. C., applies. The nature of a suit is determined by the plaint and not by the written statement. The fact that the defendant in his written statement pleads that the property is a public charitable and religious trust cannot make the suit one under the Section.)]

[See also ('39) AIR 1939 Bom 354 (358) : 41 Bom L R 787 (795). (Suit challenging trust—Section does not apply.)]

5. ('23) AIR 1923 Mad 376 (393) : 46 Mad 300. (Gift to *samajam* or for the spread of Sanskrit language is outside the Section.)

(34) AIR 1934 All 315 (317).

(14) AIR 1914 All 394 (395).

(10) 32 All 503 (511).

(10) 5 Ind Cas 4 (14) : 33 Mad 265 (FB).

(28) AIR 1928 All 660 (662) : 51 All 30. (Provision that mutwalli should spend a portion of income on good deeds and charity—Outsider not entitled to benefit in lifetime of family members—Trust is private trust.)

(12) 34 All 469 (471). (Support of Fakirs of a sect.)

(85) 11 Cal 33 (36).

(21) AIR 1921 Bom 338 (350). (Advocate General is not concerned with private trusts.)

(91) 14 Mad 1 (8). (Trust of private nature—Feeding persons at Gurupriya and keeping water pandal during hot season.)

(34) AIR 1934 P C 230 (234) : 61 Ind App 405 : 58 Mad 91 (PC).

(36) AIR 1936 Mad 449 (460).

(36) 14 Rang 575 (592, 593). (A trust for the benefit of the poor members of a particular testator's family is not a trust "for a public purpose of a charitable nature" within the meaning of S. 92.)

(39) AIR 1939 Rang 203 (205). (Where charity, *prima facie* for public purposes, is the expressed object of the settlor, this purpose not in any way defeated by the reminder that members of his own family are eligible to benefit with other members of the public at large—Case not under

be given their ordinary meaning and cannot be made to vary according to the classification of trusts which may be accepted in different systems of law.⁶ A public trust differs from a private trust in important particulars.⁷ In the case of the former, the beneficial interest is vested in an *uncertain and fluctuating* body and the trust itself is of a *permanent* character.⁸ In the case of the latter, the beneficial interest is vested absolutely in one or more *ascertainable individuals* and the trust itself need not be a permanent one.⁹ The fact that the uncertain and fluctuating body is only a *section* of the public or caste,¹⁰ or the fact that such section levies poll-tax amongst themselves for the maintenance of the trust or holds caste meetings and erects buildings out of the income of the trust will not detract from the public character of the trust.¹¹ To see if a trust is a public or private one, the real substance of the trust and the primary intention of the creator of the trust must be looked to.¹² A trust in favour of a Hindu idol, or temple,¹³ or in favour of a Mahomedan mosque,¹⁴ or a "Devadayam"¹⁵ have all been held to be *prima facie* trusts for public purposes.

When a trust is created both for public and private purposes, this Section will apply to such a trust although the public and charitable part of the trust is small as compared with the other parts of the trust.¹⁶

In order to create a trust there must be a *dedication* for the purposes of the trust.¹⁷ Whether in any particular case a property has been validly dedicated to a

Mahomedan law—Where nothing is said as to the charitable purposes being public or private, they are presumed to be of a public nature.)

[See ('32) AIR 1932 Pat 33 (51) : 11 Pat 288. (Provisions for maintenance of *khankahs* and for distribution of alms and charities are objects of a public nature.)]

6. ('28) AIR 1928 All 660 (662) : 51 All 30.

7. ('10) 32 All 503 (511).

('33) AIR 1933 Oudh 22 (25) : 8 Luck 266. (No hard and fast rule can be laid—Should be judged from inferences drawn from the circumstances of each case.)

('37) AIR 1937 Cal 67 (79) : I L R (1937) 1 Cal 515. (Tests to see if trust is public or private discussed.)

('38) AIR 1938 Cal 278 (280). (The Court must look to the real substance of the trust and the primary intention of the creator of the trust in every case.)

[See also ('32) AIR 1932 All 708 (709). (Whether a temple is public or private depends upon the facts of each case. In this case on proved facts held to be a public temple.)]

8. ('90) 3 C P L R 11 (13).

('33) AIR 1933 Oudh 22 (25) : 8 Luck 266.

('22) AIR 1922 All 519 (520).

('93-1900) 1893-1900 Low Bur Rul 645 (647).

('37) AIR 1937 Mad 862 (863). (Dharmadhayam grant—Grantee described as Dharmakartha and grant subject to condition of 'tope' being preserved and produce applied to charity—Tope utilized as place of shelter for villagers and cattle—Grant held public charitable trust and S. 92 therefore applied.)

[See ('32) AIR 1932 Pat 33 (51) : 11 Pat 288. (In case of a public trust it is not necessary that there should be privity of contract between the grantor and the grantee on the one hand and

the beneficiaries on the other.)]

9. ('22) AIR 1922 All 519 (520).

10. ('11) 11 Ind Cas 166 (174) (All).

('32) AIR 1932 Pat 33 (51) : 11 Pat 288.

('94) 1894 All W N 159 (160). (Endowment to a sect called Bhagwatas is public.)

('31) AIR 1931 All 212 (214) : 53 All 422. (Bequest to a society—Society can sue in the interests of the trust.)

('38) AIR 1938 Bom 471 (473). (Even if the use of a temple is restricted to persons professing a particular panth (sect), the temple might still be a public one.)

('39) AIR 1939 Sind 13 (14, 15) : I L R 1939 Kar 325. (Allotting property for benefit of poor members of particular community is for public purpose of charitable nature.)

11. ('17) AIR 1917 Mad 426 (427, 428).

12. ('38) AIR 1938 Cal 278 (280). (AIR 1929 Oudh 225 followed.)

13. ('88) 12 Bom 247 (262).

14. ('88) 12 Bom 247 (266). (Trust in favour of Hindu idol.)

('34) AIR 1934 Pesh 57 (63). (In Mahomedan law, there is no private mosque—Once dedicated it becomes public property.)

('24) AIR 1924 Lah 432 (435) : 5 Lah 59. (Wakf.)

('18) AIR 1918 Mad 1155 (1157). (Mosque founded to perpetuate the memory of departed men.)

15. ('24) AIR 1924 Mad 491 (491).

('25) AIR 1925 Mad 411 (413).

16. ('39) AIR 1939 Sind 13 (15) : I L R 1939 Kar 325. (Reversing AIR 1935 Sind 235.)

17. ('02) 24 All 257 (265).

('05) 32 Cal 129 (141) : 31 Ind App 203 (PC). (In case of dedications to an idol the right of management belongs to the shebait.)

('96) 23 Cal 645 (655, 662). (Offerings of a more or less permanent character given to the idol of public worship partake of the character of trust.)

trust is a question of fact to be determined by a reference to the terms of the document of dedication where there is one,¹⁸ or, where there is no document or the terms thereof are ambiguous,¹⁹ to the *user*,²⁰ *treatment*,²¹ *surrounding circumstances*²² and also the *feelings* and *sentiments* of the religious community to which the parties belong.²³ The mere fact that the owner of a land built a temple on it and planted a grove thereon,²⁴ or the fact that a person was spending a large portion of his income from a certain property on a temple founded by him,²⁵ or the mere fact that the public worshipped there,²⁶ is insufficient by itself to establish a dedication. But these facts may be some evidence and may be considered in gathering the intention of the founder.²⁷

In order that the dedication might be a *valid* one, it is essential that its objects and purposes should not be *vague*²⁸ or opposed to law. Under the Mahomedan law, a

('26) AIR 1926 Mad 1150 (1152). (There is nothing illegal for a person who builds a temple out of his own funds to create a trust directing in what manner it should be managed.)

[See ('33) AIR 1933 Lah 189 (191). (Owner must completely divest himself of his ownership.)

18. ('90) 13 Mad 66 (73).

('95) 18 Mad 201 (213).

('91) 15 Bom 625 (635). (Direction in sanad that the property should continue to C and his heirs for worship, jubilees, feeding of Brahmins in honour of deity—Grant is one made to the religious foundation and not to C or his descendants.)

('82) AIR 1932 Cal 419 (422).

19. ('18) AIR 1918 Oudh 207 (208). (Deed of endowment silent as to nature of trust.)

('25) AIR 1925 Mad 689 (690).

('25) AIR 1925 Mad 411 (413).

20. ('19) AIR 1919 Mad 515 (521) : 42 Mad 161. (In absence of evidence as to what was actually granted by Native rulers there is no presumption that only the 'melwaram' was granted—Kudivaram is included.)

('24) AIR 1924 Pat 502 (503).

('17) AIR 1917 Oudh 375 (378, 380) : 20 Oudh Cas 49. (Usages and traditions may be considered.)

('21) 62 Ind Cas 655 (659) (Mad). (Members of public all along invited and freely admitted to the temple—Prima facie the inference is dedication to the public.)

('28) AIR 1928 Mad 879 (884). (Hindu public using temple freely for centuries is strong evidence of its being a public one.)

('14) AIR 1914 Cal 813 (814) : 42 Cal 536.

('26) AIR 1926 Oudh 578 (587). (But existence of residential apartments in temples would not detract from public character of the temple.)

[See also ('84) AIR 1934 Nag 48 (49, 50). (Presumption is in favour of public dedication.)]

21. ('19) AIR 1919 Mad 225 (226). (Grant treated by Government with the consent of the grantees as an endowment of the mosque is a public religious trust.)

('18) AIR 1918 Oudh 207 (208).

('21) 62 Ind Cas 655 (659) (Mad). (When user and treatment establish a temple to be a public one, the fact that management follows a particular line of descent does not rebut it.)

('20) AIR 1920 Mad 42 (43, 52, 53) (F B). (Worship and contributions by the public, buildings of

choultries by the public, installation of a copper idol by the founder, conduct of processions in public streets, all these show that the shrine is dedicated to the public.)

('28) AIR 1928 Mad 879 (881, 888). (Inam proceedings are of great importance in deciding the question.)

[See also ('32) AIR 1932 Cal 419 (422). (From subsequent acts and conduct of parties.)]

22. ('21) AIR 1921 Pat 511 (512). (Such words as indicating that beneficial interest vested in the public.)

('11) 11 Ind Cas 166 (174) (All). (Grant for charity which for over hundred years having been carried out by maintenance of fakirs and the trustee, is a grant for public trust. Karamat Hussain, J., contra.)

('12) 34 All 468 (473). (Property held for maintaining fakirs and giving alms—Trust must be presumed.)

('37) AIR 1937 Cal 67 (79) : I L R (1937) 1 Cal 515. (In the absence of a deed of dedication, the question depends on inferences to be drawn from facts not in dispute and from unambiguous evidence adduced in the suit.)

23. ('13) 20 Ind Cas 295 (296) : 1913 Pun Re No. 38, page 151.

24. ('94) 16 All 412 (414, 415).

25. ('15) AIR 1915 Oudh 181 (184).

('11) 11 Ind Cas 308 (309) (All).

26. ('21) AIR 1921 Sind 1 (3) : 15 Sind L R 38.

27. ('09) 36 Cal 1003 (1012) : 36 Ind App 148 (P O).

('38) AIR 1938 Bom 471 (477). (Public user for a long period without objection can be relied upon as strong evidence of a public trust. Where properties have been acquired by a Sadhu, mahant of a temple, and have descended from chela to chela there is a presumption that they have been dedicated to religious uses.)

28. ('99) 23 Bom 725 (735) : 26 Ind App 71 (P C). (Trust for Dharam is void for vagueness.)

('82) 1882 Pun Re No. 50, p. 143. (Bequest "bama sariff-in-dulla" is vague and indefinite.)

('21) AIR 1921 Pat 125 (131) : 6 Pat L Jour 218. (Object to make a permanent provision for mohurram is not vague.)

('08) 30 All 111 (114). (Gift to Dharmasala is not vague—A gift to charity generally is not as vague as a gift to Dharm which includes philanthropy, piety, etc., etc.)

waqf or trust for public or charitable purposes is not valid unless express provision is made for the *ultimate devolution* of the *waqf* property to *charitable or religious purposes*²⁹ and unless the dedication is a *substantial* and not merely an illusory one.³⁰ The mere fact that some provision is made for the maintenance of the grantor's kindred and descendants will not render the *waqf* invalid.³¹ A dedication will not also be invalid merely because it offends the rule against perpetuities³² or because it is in favour of a nonsentient being like an idol.³³

The *devolution* of the trust upon the death or default of the trustee depends upon the terms on which it was created or, in the absence thereof, upon the usages of the particular trust.³⁴ One of the accepted rules is that the office of the *shebait* of an idol is vested in the heirs of the founder in default of evidence that he has disposed of it.³⁵ Again, a person who has founded a temple, whether out of his own funds or out of funds collected by subscriptions, can, in the absence of any prohibition by the subscribers, direct in what manner the trust is to be managed, whether hereditarily or otherwise.³⁶ In cases of dedication of the completest character to a Hindu idol, the idol is regarded as a juridical person capable of holding property, but in dedications of every kind the possession and management still belongs to the trustees or *shebait* in whom is vested the right to sue for the protection of the property.³⁷

As has been seen already in Note 2 above, a trust, for the purposes of Section 92, may be either *express* or *constructive*. The words "express or constructive trust" are not limited to the meaning of the word "trust" as used in English law³⁸ but should be construed liberally and in a sense as favourable as possible to the assumption of jurisdiction by a Court under Section 92.³⁹ A "constructive trustee"

('25) AIR 1925 Mad 689 (690). (Vanabhojanam Dharmam is not a vague object of trust.)

29. ('89) 13 Bom 264 (274).

('82) 6 Bom 42 (51). (Wakf must be unconditional and must have a fixed final object.)

('91) 13 All 261 (270).

('81) 6 Cal 744 (748, 749).

('17) AIR 1917 Cal 835 (837). (Sanad for maintenance of mosque, feeding of travellers and the public offer of prayers—Trust is a public, religious and charitable one.)

30. ('93) 20 Cal 116 (230, 231) (F B). (Overruling 19 Cal 412.)

('83) AIR 1933 All 277 (280).

('90) 17 Cal 498 (509) : 17 Ind App 28 (P C).

('70) 13 Suth W R 235 (237). (Mere charge upon profits of certain items which must in time cease is not a valid wakf.)

('06) 8 Bom L R 245 (250).

('93) 17 Bom 1 (4) : 19 Ind App 170 (P C).

('97) 19 All 211 (214).

('01) 23 All 233 (246) : 23 Ind App 15 (P C). (Wakf not substantially dedicated to charity is not valid.)

('99) 21 All 329 (339).

('05) 8 Oudh Cas 379 (388).

('02) 24 All 257 (265). (Perpetual endowment on family with instructions to do certain ceremonial acts—Not a valid wakf.)

('81) 9 Cal L Rep 66 (75). (Wakf trying merely to create family settlement is not valid.)

('06) 4 Cal L Jour 442 (453). (True idea to tie up property in family.)

('28) AIR 1928 All 660 (662, 663) : 51 All 30.

(Illusory dedication is no valid wakf.)

('95) 22 Cal 619 (622) : 22 Ind App 76 (P C).

(Substance of deed decides validity of wakf.)

('75) 23 Suth W R 453 (455).

('20) AIR 1920 Cal 879 (881) : 47 Cal 866.

('73) 10 Bom H O R 7 (13, 14). (The mere use of the word "wakf" is insufficient.)

31. ('92) 14 All 375 (376).

('83) AIR 1933 Oudh 107 (112, 114) : 8 Luck 246.

('83) 9 Cal 176 (180).

('90) 17 Cal 498 (509, 510) : 17 Ind App 28 (P C).

('88) AIR 1938 P C 184 (187) : 65 Ind App 198 : ILR (1938) Lah 838 : 32 Sind L R 749 (P C).

(The fact that right is given to testator's heirs of private residence in sarai, for purposes of which wakf is created, does not make dedication invalid nor render it illusory.)

32. ('97) 25 Cal 112 (127, 123).

33. ('09) 3 Ind Cas 642 (647) : 37 Cal 128 (F B).

34. ('09) 3 Ind Cas 403 (413) (Cal).

35. ('09) 3 Ind Cas 403 (413) (Cal).

('16) AIR 1916 Cal 312 (315).

36. ('26) AIR 1926 Mad 1150 (1152).

('31) AIR 1931 All 765 (766). (Courts may, however, vary founder's rule of management in public interests.)

37. ('05) 32 Cal 129 (140, 141) : 31 Ind App 203 (P C).

38. ('27) AIR 1927 Mad 614 (617) : 50 Mad 567.

('32) AIR 1932 Pat 33 (48) : 11 Pat 288. (Word "trust" is used in the ordinary sense in this Section and therefore the Section applies to Mahomedan wakfs and to Hindu debutters.)

39. ('11) 11 Ind Cas 308 (310) (All).

would include a trustee *de son tort* who has without title taken upon himself the character of a trustee.⁴⁰ It would also include a person, who, though not a trustee *de son tort*, holds a fiduciary position whose obligation in such capacity can be enforced in a Court of law.⁴¹

The question whether the head of a *mutt* holds the *mutt* properties as a *life tenant* or as a *trustee* must depend upon the conditions on which they were given or which may be inferred from usage and treatment.⁴² It has been held that he is not a "trustee" in the English sense of the term⁴³ but is *answerable as a trustee* for his administration.⁴⁴ Section 92 has accordingly been applied to the case of *mutts* also.⁴⁵ The *acharya* of a temple can be sued under Section 92 as a constructive trustee as his fiduciary position is that of a custodian of property held for public purposes.⁴⁶ Similarly, the manager of a temple, as administrator of the temple properties, is a constructive trustee within the meaning of the Section.⁴⁷ It may be noted at this stage that the mere fact that the defendant *does not admit* the trust but claims to be the owner of the trust properties, will not take the suit out of the scope of the Section.⁴⁸ Nor will a suit, in which the defendant claims under a trust, be taken out of the Section merely because the plaintiffs challenge the appointment of the defendant as a trustee.⁴⁹

40. ('25) AIR 1925 Mad 212 (213). (Suit will lie against trustee *de son tort*.)

('84) AIR 1934 Pat 321 (324). (Section applies to removal of a trustee *de son tort*.)

('14) AIR 1914 Oudh 403 (409) : 18 Oudh Cas 38, ('10) 5 Ind Cas 515 (517) (Mad).

('06) 33 Cal 789 (806, 807). (Suit lies against trustee *de son tort*.)

('99) 23 Bom 659 (665). (Person taking charge of religious endowment and purporting to manage it is a constructive trustee or a trustee *de son tort*.)

('88) 12 Bom 247 (265). (Shevakas taking possession of trust properties held to be trustees *de son tort*.)

('17) AIR 1917 All 264 (265). (Section applies to a trustee *de son tort*.)

('24) AIR 1924 All 884 (890) : 47 All 17. (Suit lies against trustee *de son tort*.)

('22) AIR 1922 All 542 (544) : 44 All 652.

('86) AIR 1936 Sind 179 (182) : 30 Sind L R 104. (Constructive trustee—Such person intermeddling with charitable property and making himself trustee—Action is within S. 92.)

('37) AIR 1937 Sind 230 (232) : 31 Sind L R 510. (Person in possession asserting property as his but admitting that he is executing trust—Such person is trustee, constructive or *de son tort* and not stranger and suit under S. 92 can be brought against him.)

41. ('24) AIR 1924 Bom 193 (201, 204). (Mahant of Mutt though not a trustee in the strict sense of the term occupies a fiduciary position and is an implied trustee.)

('21) AIR 1921 Mad 479 (479). (Subordinate trustee is not a trespasser and is deemed to be a trustee.)

('25) AIR 1925 All 759 (761) : 47 All 867.

('18) AIR 1918 Lah 146 (147) : 1918 Pun Re No. 97.

('17) AIR 1917 Oudh 81 (85).

('23) AIR 1923 Mad 376 (377) : 46 Mad 300.

(Suit against heir-at-law in possession of trust property.)

('06) 33 Cal 789 (805, 806).

42. ('10) 5 Ind Cas 4 (8) : 33 Mad 265 (F B).

('20) AIR 1920 Oudh 244 (247). (Temple built for and used for public worship — Mahant not absolute owner.)

('24) AIR 1924 Oudh 261 (263) : 27 Oudh Cas 149. (Mahant is a trustee and can be removed in suit under Section 92.)

43. ('19) AIR 1919 P C 62 (68, 69) : 46 Ind App 204 : 43 Mad 253 (P C).

('18) AIR 1918 Mad 1016 (1025).

('22) AIR 1922 P C 123 (126) : 48 Ind App 302 : 44 Mad 831 (P C).

44. ('27) AIR 1927 Mad 614 (617) : 50 Mad 567. (Case law fully discussed.)

('19) AIR 1919 Mad 571 (571). (Mahant of Mutt is a trustee in law.)

('35) AIR 1935 Pat 111 (114) : 14 Pat 379.

45. ('27) AIR 1927 Mad 614 (617) : 50 Mad 567. ('11) 11 Ind Cas 166 (173) (All). (Suit against Mahant.)

('35) AIR 1935 Pat 111 (114) : 14 Pat 379.

46. ('24) AIR 1924 Bom 193 (201).

47. ('06) 29 Mad 283 (289) : 33 Ind App 139 (P O).

48. ('11) 9 Ind Cas 358 (358) (Bom).

('34) AIR 1934 Bom 257 (260).

('82) AIR 1932 Pat 33 (52) : 11 Pat 288.

('24) AIR 1924 Pat 657 (659, 660) : 3 Pat 842.

('05) 2 Cal L Jour 460 (465).

('05) 2 Cal L Jour 491 (497).

('35) AIR 1935 Cal 805 (807) : 63 Cal 74. (In such a case, it is open to the Court to decide the question whether the trust in respect of which the suit is brought is public trust.)

('36) AIR 1936 Mad 449 (451).

('36) AIR 1936 Sind 179 (182) : 30 Sind L R 104.

49. ('25) AIR 1925 Cal 1106 (1107).

The words "where the direction of the Court is deemed necessary for the administration of any such trust," must be interpreted as meaning "where the Court has to give direction in the nature of framing a scheme or otherwise for the administration of trust."⁷ The mere appointment of a *mutawalli* is not such a "direction" as is contemplated by the Section and therefore a suit for the appointment of a *mutawalli* without anything more is not within the Section.⁸ This Section does not say that the direction of the Court can be asked for, only where there has been a breach of any express or constructive trust. It contemplates cases where the direction of the Court may be necessary even though there has been no such breach of trust.⁹ Thus, a suit for accounts of the trust property and in effect asking for directions as regards the trust funds, is one which falls within the Section.¹⁰

7. Suit must be in a representative capacity on behalf of the public. — Section 92 applies only where the suit brought is representative in its nature, that is to say, where the suit is brought by two or more persons as *representing the general public*, in order to secure the proper administration of a public trust.¹ A suit by the *whole* body of persons authorized to administer a trust or by *all* the persons interested in the trust is not within the Section.² Again, where a person sues, not to establish the *general rights* of the public, but to remedy a particular infringement of his *individual* right in a public trust, the suit is not within the Section.³ The reason is that the

7. ('28) AIR 1928 Cal 368 (370) : 55 Cal 1284.

8. ('28) AIR 1928 Cal 368 (370) : 55 Cal 1284.

[See ('38) AIR 1938 Rang 339 (342) : 1938 Rang L R 276. (Suit for appointment of new trustees on the ground that there do not exist any lawful trustees is one which falls within the purview of the words "where the direction of the Court is deemed necessary for the administration of such trust" in S. 92 — 26 Mad 450, Foll.)]

9. ('84) AIR 1934 Bom 26 (27, 28).

('38) AIR 1938 Rang 339 (342) : 1938 Rang L R 276.

10. ('24) AIR 1924 Bom 518 (520).

Note 7

1. ('17) AIR 1917 Mad 389 (390) : 40 Mad 110.

('22) AIR 1922 All 499 (500) : 44 All 721.

('16) AIR 1916 Mad 332 (337) : 19 Ind Cas 694 (699) : 38 Mad 356. (Advocate-General has power to prevent misuse of the income of public charitable endowments.)

('12) 13 Ind Cas 232 (233) (Mad).

2. ('07) 29 All 27 (28). (Suit by all persons authorized by will to take action.)

('97) 24 Cal 418 (427).

3. ('06) 33 Cal 789 (807). (Suit between two persons to decide which of them is the lawful trustee.)

('21) AIR 1921 Pat 511 (512).

('14) AIR 1914 Cal 356 (357) : 41 Cal 749.

('09) 2 Ind Cas 701 (734, 735) : 33 Bom 509.

('10) 5 Ind Cas 515 (517) (Mad). (S. 539 was neither intended to bar the assertion of private rights on the one hand nor to afford a means of asserting them on the other.)

('13) 19 Ind Cas 740 (744). (Section should not be used to deprive individuals whose private rights have been infringed of their remedy.)

('22) AIR 1922 Mad 17 (21) : 45 Mad 113 (F B). (Suit by one trustee against co-trustee for accounts.)

('27) AIR 1927 Cal 130 (135).

('83) 7 Bom 323 (328). (Plaintiffs alleging personal injury by pollution of shrine.)

('85) 7 All 178 (183). (Right to use mosque.)

('10) 6 Ind Cas 219 (223) : 32 All 503.

('13) 18 Ind Cas 797 (798) : 35 All 197. (Suit for removal of hindrance caused to plaintiff with regard to his right of worship.)

('81) 3 All 636 (640, 641).

('17) AIR 1917 Mad 868 (870). (Suit by plaintiff to enforce his right to perform a festival.)

('12) 17 Ind Cas 589 (590) (Mad). (Section does not repeal or affect individual rights of suit.)

('15) AIR 1915 Mad 915 (916). (Party having special interest in trust can sue in his own behalf without sanction.)

('27) AIR 1927 All 257 (258) : 49 All 435. (Claim of founder to appoint trustees does not require sanction under S. 92.)

('19) AIR 1919 Low Bur 56 (57, 58). (Individual right of worship claimed.)

('23) AIR 1923 Pat 309 (316, 317). (Chela claiming possession of office of mahant.)

('21) AIR 1921 Bom 297 (299) : 45 Bom 683. (Pujari suing servants of temple for share of offerings.)

('86) 1886 Pun Re No. 76, page 162. (Suit for share of offerings appropriated wholly by defendants.)

('21) AIR 1921 Mad 388 (392) : 44 Mad 205. (Claim for joint possession with person in possession.)

('90) 13 Mad 293 (308). (Exclusion from temple.)

('83) 6 Mad 151 (153). (Suit for wrongful prevention from taking part in public worship.)

object of the Section is not to determine the conflicting rights of *private individuals* but to devise the method for fully carrying out the purposes of the trust.⁴

One consideration which is relevant in coming to a conclusion whether an individual right has been infringed is whether, apart from the infringement of the rights of the general body, there is some damage *special* to the plaintiff in which the other members of the general body are not concerned.⁵ The right of the plaintiff to be *himself a trustee*⁶ or to *share in the management* of the trust or to see that certain trusts are managed by persons entitled to manage them, are all individual rights, the enforcement of which falls outside the scope of the Section.⁷ The right of a Mahomedan to *use and to worship in a mosque* has been held to be a private right existing under the Mahomedan law, independently and wholly irrespective of the rights of

('13) 18 Ind Cas 622 (623) (Mad). (Suit by person having special right—S. 92 is not applicable.)

('17) AIR 1917 All 319 (320). (The bringing of a suit under this Section for private purposes of some individuals is really an abuse of the process of the Court.)

('98) 21 Mad 406 (408). (General trustee may enforce obligation of special trustees without sanction.)

('29) AIR 1923 All 120 (121) : 45 All 215. (Idol, as a juristic person, can sue persons who interfere unlawfully with the property of the idol or the income thereof—Such a suit has nothing to do with S. 92.)

('31) AIR 1931 Lah 727 (728). (Suit claiming to enforce personal right as mahant.)

('31) AIR 1931 Nag 198 (199, 200) : 27 Nag L R 299. (Suit claiming that plaintiff and certain others alone have the right to manage the school.)

('39) AIR 1939 Mad 757 (759) : 1939 Mad W N 418 (420). (Right to recite Vedas and to the income and honours on account of a person being a member of a Goshti holding Vedaparayanam Mirashi office—Suit to enforce this right as office-holder does not fall within the ambit of Section 92.)

[See ('97) 1897 Pun Re No. 29, p. 139. (Suit by pujaris to restrain alteration of temple property.)

('89) 11 Mad 283 (284, 286).]

[See also ('91) 15 Bom 309 (319, 321). (Suit for refusal to admission to mandir—Illustrative case.)

('88) 9 Cal 133 (136). (Suit by temple committee against their manager for damages.)]

4. ('16) AIR 1916 P O 132 (136) : 43 Cal 1085 : 43 Ind App 127 (P O).

5. ('27) AIR 1927 Mad 551 (555).

6. ('13) 18 Ind Cas 622 (623) (Mad).

('15) AIR 1915 All 25 (26) : 37 All 86.

('28) AIR 1928 All 33 (34) : 50 All 165.

('22) AIR 1922 All 499 (500) : 44 All 721.

('25) AIR 1925 Pat 544 (547) : 4 Pat 741. (It would be otherwise where a trustee is sought to be removed for a breach of trust.)

('24) AIR 1924 Pat 502 (503). (Suit raising question between two rival claimants.)

('11) 12 Ind Cas 449 (451) : 36 Mad 364. (Enforcement of right of hereditary trusteeship.)

('31) AIR 1931 Mad 801 (802) : 54 Mad 1011. (Suit

by removed trustee to enforce his hereditary right.)

('31) AIR 1931 Rang 322 (324) : 9 Rang 459. (Suit for declaring that plaintiffs are lawfully appointed trustees of a waqf.)

('31) AIR 1931 Bom 170 (172).

('13) 20 Ind Cas 37 (39) : 35 All 459.

('27) AIR 1927 Mad 338 (339). (Right to be a co-trustee or co-manager.)

('38) AIR 1938 Lah 869 (874). (A suit by a person claiming to be a mutawalli of a certain mosque against a registered corporation which has been managing the mosque, for a declaration that he is the mutawalli of the mosque and as such entitled to manage all the affairs connected with it, does not fall under S. 92.)

7. ('87) 10 Mad 375 (506).

('27) AIR 1927 Mad 948 (950). (Joint right of management claimed.)

('32) AIR 1932 Bom 65 (66).

('05) 32 Cal 273 (276). (Suit to declare plaintiff a mutwalli and for possession is not a dispute of a public nature.)

('06) 33 Cal 789 (808).

('19) AIR 1919 All 335 (336). (Right of plaintiff to jointly manage with defendant.)

('16) AIR 1916 Bom 281 (281, 282) : 40 Bom 439. (Suit for joint management of trust with the defendant.)

('21) AIR 1921 Mad 403 (403). (S. 92 governs suits for the vindication of the rights of the public and not of the right of the trustees.)

('04) 28 Bom 20 (54). (Suit by trustees for vindication of right of management vested in them.)

('93) 22 Bom 496 (499). (Suit by trustee against co-trustee to share in management.)

('36) 63 Cal 326 (336). (Plaintiff alleging that he was appointed mahant and shebait of certain deities, and as such, entitled to properties—Possession asked for—No prayer for removal of defendant—S. 92, does not apply.)

('39) AIR 1939 Mad 594 (594). (Suit by newly appointed trustee for recovery of moveable properties of the temple after taking an account of the trust money received by the previous trustees who have been lawfully removed by the members of the community is not governed by S. 92.)

[See also ('38) AIR 1938 Mad 999 (1004) : I L R (1939) Mad 121. (Suit by a trustee against a

other worshippers of the mosque,⁸ though in an earlier decision of the Calcutta High Court it was held to the contrary.⁹ The reasoning of the decision has not been followed in later cases and does not seem to be sound.¹⁰

A person having an interest in common with others is not *obliged* to seek any relief on *behalf* of all others but may maintain an action for the establishment of his *own rights*.¹¹ While so suing for the establishment of his private rights, he cannot, at the same time, be regarded as suing in the alternative, on behalf of others also similarly interested.¹² Where a person whose *individual rights* are affected sues a trustee for *reliefs specified in the Section*, the suit will nevertheless not be governed by the Section inasmuch as it is not a *representative* suit on behalf of the public but is one in enforcement of his *own rights*.¹³ Thus, one trustee suing his co-trustee for accounts sues only in his individual capacity and the suit will, consequently, be outside the scope of the Section.¹⁴ The Bombay High Court has, however, held that such a suit is within Section 92 and cannot be instituted without the sanction of the Advocate-General.¹⁵ Their Lordships base their conclusion on the ground that the reliefs claimed *being within the Section*, the suit cannot be brought except in conformity with it. They do not advert to the principle that a suit must be a *representative* one also before the Section is made applicable thereto. In this view the conclusions of the Bombay High Court do not seem to be sound. The Sind Judicial Commissioner's Court has held, accepting the principle abovementioned, that a trustee suing his co-trustee for accounts cannot be held to be suing on the basis of an infringement of individual rights and so the Section will apply.¹⁶ The Allahabad High Court has, in an *obiter dictum*, doubted whether, when a relief claimed falls within the Section, there is any distinction between the enforcement of public rights and of private rights.¹⁷

It has been held by the Madras High Court that the mere fact that the plaintiffs in a suit are trustees will not necessarily preclude the application of the Section if the reliefs sought relate not to the personal rights of the trustees but to the advancement of the interests of the institution itself by securing more efficient management.¹⁸

banker to recover trust money which he has mis-applied is outside the scope of S. 92.)

8. ('85) 7 All 178 (183). (Suit by Mahomedan worshipper to establish his right to effect repairs to the mosque.)

('88) 5 All 497 (500). (Suit by Mahomedan worshipper for declaration that the alienated mosque property is still waqf property and to set aside the sale.)

9. ('82) 8 Cal 32 (40). (Such a right is a public right.)

10. ('93) 20 Cal 810 (816). (Reasoning of the Allahabad High Court approved.)

('24) AIR 1924 P C 221 (224): 47 Mad 884 (891): 51 Ind App 282 (P C).

11. ('97) 24 Cal 385 (390).

('05) 9 Cal W N 594 (597).

('08) 1908 Pun L R No. 78, p. 218. (Suit by Mahomedan for declaration of a certain property as graveyard and for injunction lies—S. 92 does not apply to such a case.)

('19) AIR 1919 Cal 179 (180, 181). (Mahomedan worshipper can enforce his individual rights without resort to this Section.)

12. ('78) 1 Mad 343 (348).

13. ('27) AIR 1927 Mad 820 (823).

14. ('22) AIR 1922 Mad 17 (18, 19, 20): 45 Mad 118 (FB). (The decision in AIR 1921 Mad 696 is no longer law.)

('06) 33 Cal 789 (807, 808).

('23) AIR 1923 Nag 298 (299).

('38) AIR 1938 Mad 92 (94): ILR (1938) Mad 39. (Nature of relief prayed for is not conclusive and exclusive test in determining applicability of Section 92.)

[See also ('13) 19 Ind Cas 740 (744) (Mad). (Suit for removal of trustee, based on infringement of private right.)

15. ('92) 16 Bom 626 (628, 629).

('18) AIR 1918 Bom 134 (136): 42 Bom 742.

('24) AIR 1924 Bom 518 (519).

16. ('10) 8 Ind Cas 926 (928): 14 Ind L R 152.

17. ('28) AIR 1928 All 551 (552): 51 All 30.

18. ('85) AIR 1985 All 333 (334). 'A suit the avowed object of which is the furtherance of the interests of the institution itself is a suit falling under Section 92.'

Where a trustee of a public charitable trust dies leaving behind him a widow as trustee and a next reversioner who would be in due course entitled to the management of the trust brings a suit against the widow alleging waste and mismanagement and prays for the appointment of a receiver for the management and preservation of the properties, the suit is not for the protection of his own *individual or personal rights*. The plaintiff is not in the position of a co-trustee because even in respect of the private properties of the deceased male holder, the position of the presumptive reversioner is merely that of a person with a *spes successionis*. The analogy of an action allowed to a Hindu reversioner under the Hindu law to maintain a declaratory suit during the lifetime of the widow cannot be invoked because, as regards trusteeship, there is no difference between a male holder of the office and a female holder of the office. The suit is therefore governed by this Section and must be in conformity with its provisions.¹⁰

8. Who can sue — "Two or more persons having an interest in the trust." — A suit under this Section can be brought by —

(1) the Advocate-General, or

(2) two or more persons having an interest in the trust, after getting the sanction of the Advocate-General.¹

The first essential for a person other than the Advocate-General, to institute a suit under this Section, is that he should have an *interest* in the trust. Unless he has this, even the written consent of the Advocate-General will not be of any avail.² The object of this condition is "to prevent people interfering by virtue of the Section, in the administration of charitable trusts merely in the interests of others and without any real interest of their own."³ The Advocate-General is entitled to intervene at any stage⁴ and is entitled to be heard.⁵

Under the English Law, the plaintiff in a suit of the description mentioned in this Section was required to have *direct interest* in the trust.⁶ This rule was adopted by the Code of 1877 and re-enacted in Section 539 of the Code of 1882, which thus required the plaintiffs to have a *direct* interest in the trust.⁷ The limitation of "direct interest" was not thought expedient in India and therefore, by Section 44 of the Civil Procedure Code (Amendment) Act, 1888, the word "direct" was omitted.⁸ The effect of the amendment is to widen the class of persons entitled to institute a suit under this Section.⁹ But the interest required even under this Section as amended must be a *clear* interest in the particular trust over and above that which men may be said to have by virtue of their religion. It must be a *real, substantive and an existing* interest and not merely a remote, fictitious or a contingent one,¹⁰ though it need not

19. ('89) AIR 1939 Mad 65 (65, 66.)

Note 8

1. ('17) AIR 1917 Mad 868 (870).

('20) AIR 1920 Mad 133 (134) : 43 Mad 707.

('08) 10 Bom L R 87 (89).

2. ('24) AIR 1924 P C 221 (223) : 47 Mad 884 : 51 Ind App 282 (PC).

('17) AIR 1917 Cal 678 (678, 679).

('78) 2 Cal L Rep 128 (131). (Plaintiff must show that he has an interest.)

3. ('24) AIR 1924 P C 221 (224) : 47 Mad 884 : 51 Ind App 282 (PC).

4. ('67) 4 Bom H C R O C 203 (207).

5. (1846) 4 Moo Ind App 190 (195, 200) (PC).

6. (1819) 2 Swans 470 (518), *In re Bedford Charity*.

7. ('89) 12 Mad 157 (160).

('82) 8 Cal 32 (35, 36).

('88) 12 Bom 247 (266, 267). (Priests and worshippers have a direct interest to sue.)

8. ('24) AIR 1924 P C 221 (224) : 51 Ind App 282 : 47 Mad 884 (PC).

('13) 24 Ind Cas 712 (713) : 7 Sind L R 129.

9. ('05) 2 Cal L Jour 460 (470).

10. ('19) AIR 1919 Mad 384 (396) : 42 Mad 360.

('20) AIR 1920 Mad 238 (240).

('26) AIR 1926 Mad 267 (268).

('93) 20 Cal 810 (817). (Mere possibility of an interest and of succession.)

('26) AIR 1926 Mad 466 (467).

be a direct interest in the sense that only a beneficiary can institute a suit.¹¹ Whether a person has an interest in a particular trust has to be determined on the facts bearing on the relation of the person to the trust with reference to which the suit is brought.¹²

The following persons have all been held to have a sufficient interest within the meaning of the Section —

- (1) The founder and his representatives or persons of the same sect and form of religious worship as that of the founder of the religious endowment for carrying on the sectional worship.¹³ So also are persons who have contributed to the funds of a trust,¹⁴ or who have devoted time and energy in the affairs of the trust.¹⁵
- (2) Residents of the locality in which a choultry is situated and members of the community for which the choultry was founded.¹⁶ But this test of locality is only to be applied in relation to actual user of the temple or mosque by such residents. Mere residence without user will not create any interest in the trust.¹⁷
- (3) Persons lawfully in possession of the trust property.¹⁸
- (4) Trustees of the trust.¹⁹
- (5) Beneficiaries under the trust²⁰ such as persons entitled to receive food in

('05) 2 Cal L Jour 431 (441). (Presumptive heir of trustee has no interest merely as such to sue under this Section.)

('09) 1 Ind Cas 995 (997) : 32 Mad 131. (Mere subscriber in a society has no sufficient interest to sue to remove office-bearers for misconduct.)

('24) AIR 1924 P C 221 (224) : 51 Ind App 282 : 47 Mad 884 (PC). (Bare possibility that a Hindu might desire to resort to a particular temple is not enough.)

('38) AIR 1938 Rang 339 (344) : 1938 Rang LR 276.

11. ('23) AIR 1923 Lah 518 (519).

('97) 24 Cal 385 (390).

('27) AIR 1927 Mad 462 (464) : 50 Mad 726. (Need not be personally affected by any act of the person sued.)

12. ('26) AIR 1926 Mad 267 (268).

('21) AIR 1921 Mad 563 (564).

('26) AIR 1926 Lah 100 (106) : 7 Lah 275. (Followers of Guru Govind Singh are a separate sect from the udasis and have no interest to sue in respect of an udasi shrine.)

13. ('80) 5 Cal 700 (705).

('33) AIR 1933 Oudh 22 (24) : 8 Luck 266.

('21) AIR 1921 Mad 563 (564). (Descendants in female line.)

('20) AIR 1920 Cal 210 (215).

('24) AIR 1924 P C 221 (224) : 51 Ind App 282 : 47 Mad 884 (PC). (Descendants in the female line from the founder.)

('12) 17 Ind Cas 589 (590) (Mad). (Persons of the same sect and form of worship as the founders.)

('29) AIR 1929 Lah 428 (428). (Collaterals of the founder have an interest.)

('35) AIR 1935 Pat 111 (115) : 14 Pat 379. (Disciples of the sect.)

14. ('25) AIR 1925 Mad 1011 (1012).

('32) AIR 1932 All 708 (709).

15. ('20) AIR 1920 Mad 238 (240). (So also a person who has devoted time and energy in order

to place the affairs of a chatram on a proper footing.)

16. ('19) AIR 1919 Mad 943 (944).

('26) AIR 1926 Mad 267 (268). (Residents in the neighbourhood of temple and attending the temple on important occasions are persons having a sufficient interest.)

('83) 7 Bom 323 (329). (Suit by member of Chit-pawan community that other castemen have no right to enter temple.)

(1900) 24 Bom 50 (54) : 26 Ind App 109 (PC). (Hereditary patron and residents of the temple property have sufficient interest to maintain a suit.)

('10) 6 Ind Cas 835 (836) : 32 All 631. (Worshipper of mosque can sue for declaration that a certain land adjoining the mosque is wakf property.)

('34) AIR 1934 Pesh 57 (61). (Residents of locality using mosque are persons interested to sue.)

17. ('26) AIR 1926 Mad 466 (467, 468).

18. ('23) AIR 1923 Mad 376 (377) : 46 Mad 300. (Heir-at-law of creator of trust in possession.)

19. ('25) AIR 1925 Mad 820 (821).

(1900) 23 Mad 99 (100). (Suit for possession by trustee only but not by worshipper lies.)

(1900) 23 Mad 537 (540). (A worshipper and a general trustee.)

('35) AIR 1935 Mad 855 (856). (The mere fact that the plaintiffs in a suit are in a sense trustees will not necessarily preclude the application of S. 92, if the reliefs sought relate not to the vindication of the personal rights of the trustees, but to the advancement of the interests of the institution itself by securing more efficient management.)

20. ('88) 12 Bom 247 (259). (Manager and priests.)

('27) AIR 1927 All 518 (519).

('95) 8 C P L R 49 (51). (Pujari of temple has sufficient interest to sue.)

('98) 21 Mad 10 (13).

amendment of the plaint by adding other persons as plaintiffs after getting the necessary consent. The Bombay High Court has held that the defect in the institution cannot be so cured.³² Though the Madras High Court holds a contrary opinion,³³ it does not base its decision on any principle but simply purports to follow the previous rulings of that Court. It is submitted that the Madras view is not sound.

Where the Advocate-General having filed a suit at the instance of relators, has not appealed, the relators who were no parties to the suit were held incompetent to appeal on their own account.³⁴

The consent of some of the original plaintiffs, later on, to let the property be managed by the original *maintain* for whose removal the suit was instituted will not affect the institution of the suit.³⁵

The word "person" is not restricted to persons *sui juris*. Even an infant if he has the required interest and if he is properly represented by a next friend, is entitled to institute a suit under this Section.³⁶

9. The suit must be for one of the reliefs specified in the Section.—The Section is limited in its application to suits for reliefs *specified* in the Section.¹ Unless, therefore, a suit prays for a relief so specified the Section will not apply.³ But the prayer need not be express. If in substance such a relief is *impliedly* asked for, the Section will apply.³

10. Effect of adding other reliefs.—A suit for a relief specified in the Section will not be taken out of the scope of the Section merely because a subordinate

Note 9

32. (106) 30 Bom. 603 (606).
33. (120) AIR 1920 Mad 134 (134) : 43 Mad 720. (Following 10 Mad 185 and AIR 1920 Mad 133. The latter was a case where neither of the parties who instituted the suit had the required interest. In such a case it was held that the Advocate-General could be added as plaintiff.)
34. (107) 32 Bom 155 (156).
35. (117) AIR 1917 Oudh 375 (376) : 20 Oudh Cas 49. (Such a consent does not affect the jurisdiction of the Court to hear the appeal.)
36. (110) 6 Ind Cas 119 (119) (Cal).
1. (109) 2 Ind Cas 701 (733, 734) : 33 Bom 509. (Suits by non-converts to have it determined whether converts are entitled to trust funds is a suit within the Section.)
- (197) 21 Bom 48 (51). (Suit for removal of trustees and for accounts must be brought in conformity with Section 92).
- (192) 16 Bom 626 (628, 629). (Suit for accounts against trustees and for their removal for breach of trust—Section 92 applies.)
- (124) AIR 1924 Bom 518 (519). (Suit for accounts from trustees and for direction as to trust property.)
- (118) AIR 1918 Lah 146 (147) : 1918 Pun Re No. 97. (Suit for removal of mahant and appointment of new mahant is within the Section.)
- (135) AIR 1935 Mad 825 (826) : 58 Mad 988 (PB). (The question whether a suit falls within S. 92, C. P. C., depends not upon the character in which the plaintiff sues but upon the nature of the reliefs sought.)

2. (116) AIR 1916 Cal 712 (713).
- (133) AIR 1938 Pat 246 (247) : 18 Pat 65. (Suit for permanent injunction restraining defendant from preventing general public from going to certain place for puja does not come under Section 92).
- (133) AIR 1938 Lah 395 (396). (Prayer of ejectment cannot be entertained in a suit under this Section.)
- (119) AIR 1919 Lah 190 (192). (Declaration that mortgage be declared ineffective as against wakf property.)
- (118) AIR 1918 Cal 488 (483).
- (111) 11 Ind Cas 86 (87) : 33 All 660. (Suit for declaration of trust and possession not within Section.)
- (129) AIR 1929 Bom 158 (156). (Suit for recovery of the share payable to an institution by trustee—Not within the Section.)
- (129) AIR 1929 Bom 193 (194). (Suit to recover possession from trespassers—Not within Section.)
- (130) AIR 1930 Cal 588 (585). (Plaintiff's case is not for accounts.)
- (176) 23 Subh W R 76 (76). (Suit for by person not authorised by law resuming trust where the objects of the trust have not been carried out, is not within the Section.)
- (127) AIR 1927 All 518 (519). (Suit by beneficiaries against trustees for encroachment by them but not praying for any reliefs under Section 92 is maintainable under the general law.)
- (136) AIR 1936 Mad 449 (453).
3. (127) AIR 1927 Mad 886 (886).

or consequential relief, not specified in the Section, is asked *in addition* to a relief so specified.¹ Thus, in a suit for the removal of the trustee, the validity of an alienation of the trust property could be decided.² See Note 2 foot-note 15.

11. "Such further or other relief as the nature of the case may require."—The words "such further or other relief as the nature of the case may require" must, on general principles of construction, be taken to mean relief *ejusdem generis* with (of the same nature as) those described in clauses (a) to (g) of the Section, and not one wholly outside thereof.³ They cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the Section.⁴ The words must in fact be read with what has preceded, as referring to further relief to which the party may be entitled which arises out of the existence of the trust, in respect of which the suit has been brought.⁵

12. Declarations.—It has already been seen (Note 5 above) that the Section presupposes the *existence* of a trust and that consequently suits for declaration that

(19) AIR 1919 Mad 159 (160): 42 Mad 668. (Suit for declaration of invalidity of appointment of defendant as trustee is virtually one for his removal and falls within the Section.)
(06) 33 Cal 789 (809, 810).
(39) AIR 1939 Mad 102 (105). (Relief claimed by plaintiff in effect nothing more than prayer for framing scheme for reconstruction of obsolete temple office although the word "scheme" is not used—Consent of Advocate-General under Section 92 is necessary.)

Note 10

1. (28) AIR 1928 Mad 205 (207).
(25) AIR 1925 All 688 (684): 47 All 770.
(18) AIR 1918 Bom 134 (136): 42 Bom 742. (Suit for possession of trust lands but in effect for removal of defendant trustee—Such a suit is within Section 92).

[See (10) 7 Ind Cas 566 (567): 13 Oudh Cas 177. (Suit for removal of mahant and for declaration that property under his control is trust property.)]

2. (26) AIR 1926 Mad 280 (280).
(06) 28 All 112 (116, 117, 118, 121).
(10) 8 Ind Cas 528 (529) (Lab).

Note 11

1. (05) 2 Cal T. Jour 431 (438). (Suit for ejectment against a trespasser.)
(32) AIR 1932 Bom 65 (66, 67). (Suit for declaration of plaintiff's right of joint management of a mosque together with defendant—Suit is not within the Section.)

(31) AIR 1931 Rang 322 (324): 9 Rang 459. (Suit for declaration that plaintiffs are trustees and that defendant is not a lawful trustee and for injunction is not within the Section.)
(28) AIR 1928 P C 16 (18): 55 Ind App 96: 55 Cal 519 (PC).

(06) 33 Cal 789 (810).
(09) 2 Ind Cas 701 (734): 33 Bom 509.
(30) AIR 1930 Sind 204 (208). (Injunction alleging breach of trust is a relief included in cl. (h) of Section 92 (1).)
(30) AIR 1930 Bom 167 (168). (Prayer for declaration

tion that trust property is public charitable property and not personal property is not for a relief under Section 92).
(25) AIR 1925 All 688 (685): 47 All 770. (Declaration that property is a wakf property is brought in suit for possession of debutter property mortgagee by previous mahant—Section 92 (1) (h) is not applicable.)
(38) AIR 1938 Lab 869 (874).
(39) AIR 1939 Mad 757 (765): 1939 Mad W N 418 (426). (Per Venkatasubba Rao, J.: A direction that in the administration of the trust, the trustee shall do a certain thing or abstain from doing it, is surely not alien to a scheme of management. That is a relief falling within Cl. (h) *ejusdem generis* with the relief specifically mentioned in cl. (g).)
(36) 14 Rang 575 (582).
(36) AIR 1936 Sind 179 (184): 30 Sind T. R 104. (Clause (h) can come into operation though no relief coming under any of the previous clauses has been asked for.)
(37) AIR 1937 Sind 280 (292): 31 Sind T. R 510. (Clause (h) does not so widen the provisions of Section 92 as to make Section 92 not otherwise applicable to suits against strangers, applicable to such suits.)
2. (17) AIR 1917 All 336 (337).
(89) 12 Mad 157 (161).
3. (08) 25 All 681 (635).
(19) AIR 1919 All 83 (89). (Court can direct the removed trustee to deliver the trust property to the new trustee.)
(06) 28 All 112 (117). (Court can determine validity of particular alienations.)
(15) AIR 1915 All 69 (69). (Court can grant relief by way of asking the trustee to account and pay up the monies found due.)
(27) AIR 1927 Mad 416 (417). (Decree directing an account and to order payment of money found due is within the Section.)
(31) AIR 1931 All 212 (214): 53 All 422. (Conversion of trust property into Government promissory notes.)

order that the costs should come out of the estate.² Costs of Advocate-General, as between attorney and client, come, as a rule, out of the trust fund,³ so also the cost of the trustee defendants if they are incurred for purposes of administration of the trust, but the taxing officer's order to the contrary will not be set aside by the Court.⁴

15. Removing a trustee — Clause (a). — This clause is new. Under the old Code there was a conflict of opinion as to whether a prayer, in a scheme suit, for the removal of the trustee could be granted by the Court. The Calcutta, Bombay, Allahabad and Lahore High Courts, following earlier decisions of the Madras High Court¹ held that it could be granted, either as coming within the words "such further or other relief" or as being involved in the prayer for the appointment of a new trustee.² Later decisions of the Madras High Court, however, held that such a prayer could not be granted under the Section.³ The conflict is now set at rest by the introduction of this new clause⁴ and a suit for removal of a trustee can now be brought under Section 92 even if the plaintiffs challenge the appointment of the defendant as a trustee.⁵

There has been a difference of opinion as to whether a suit by some trustees, for a declaration that the appointment of the defendant as a co-trustee is invalid and for an injunction restraining him from interfering with his management, is a suit for the removal of a trustee falling within this Section. The Madras and Patna High Courts held that the case *may be regarded* as one in which the direction of the Court is necessary for the administration of the trust, and the relief claimed, *cognate* to the removal of a trustee, and that, therefore, the suit is governed by this Section.⁶ The Bombay High Court, on the other hand, holds that the mere fact that it *resembles* a suit for the removal of a trustee will not make the Section applicable. The suit must

2. ('16) AIR 1916 Pat 306 (307). (Each side to bear its own costs.)
3. ('88) 7 Bom 19 (38) : 9 Ind App 86 (PC).
4. ('95) 20 Bom 301 (303).

Note 15

1. ('91) 14 Mad 186 (189). (Power of removal is implied in "such further or other relief.")

2. ('99) 21 All 200 (203). (Removal comes under "the appointment of new trustees.")

3. ('98) 20 All 46 (51, 52).

4. ('97) 24 Cal 418 (426).

5. ('95) 2 Cal 460 (465). (Appointment in-voles removal.)

6. ('91) 15 Bom 612 (624).

7. ('97) 21 Bom 48 (51, 52). (Prayer is involved in appointment of new trustees.)

8. ('99) 1 Bom 118 (123) : 23 Bom 659.

9. ('06) 33 Cal 789 (802).

10. ('17) AIR 1917 Mad 426 (430). (Removal cannot be granted.)

11. ('99) 22 Mad 361 (364). (Power to re-move trustee was however assumed.)

12. ('91) 16 Ind Cas 9 (12) (Cal).
13. 18 Ind Cas 573 (574) : 35 All 98. (Suit for removal of trustee must be only under S. 92.)
14. AIR 1915 Mad 1044 (1047). (Cannot be re-moved without a suit under S. 92.)
15. AIR 1918 Lah 76 (77).
16. 20 Ind Cas 767 (767) (Mad). (Suit for re-moval of trustee and for settling scheme is with-in S. 92.)
17. AIR 1919 Mad 159 (159) : 42 Mad 668. (Court can question an appointment if it is not made reasonably.)
18. 1 Ind Cas 995 (997) : 32 Mad 131. (Suit for removal of trustees by persons interested who are not beneficiaries must be brought under S. 92.)
19. AIR 1936 All 97 (102) : 58 All 538.
20. ('25) AIR 1925 Cal 1106 (1107).
21. ('19) AIR 1919 Mad 159 (160) : 42 Mad 668.
22. ('17) AIR 1917 Mad 214 (215, 217). (Suit in sub-stance for removal of trustee is one under the Section but where preferential right is claimed, suit is not one for removal. Cf. however (1903) 26 Mad 450.)
23. AIR 1925 Pat 544 (546) : 4 Pat 741.

be clearly one within the Section and must be based on a breach of trust or on the necessity of the direction of the Court being given for the administration of the trust.⁷ The guiding principle in granting or refusing a prayer for the removal of a trustee under this Section is to see whether in the particular case, it is for the *welfare of the trust* to do so,⁸ having regard to the *original purposes* of the trust.⁹ The primary duty of the Court is to consider the interests of the public or that part of the public for whose benefit the trust was created.¹⁰ Every mistake, neglect of duty or inaccuracy of conduct is not necessarily a ground for removal.¹¹ Nor is even misconduct on the part of the trustee such a ground unless it is for the benefit of the trust to remove him.¹² On the other hand, a Court can always remove a trustee under this Section even in the absence of proof of misconduct or misappropriation if it is in the interests of the trust to do so.¹³

The following grounds have been held sufficient, to order the removal of a trustee in the interests of the trust —

- (1) Trustee, asserting a hostile title in himself to the trust properties or alienating the same¹⁴ or claiming a right to utilise the income for his own purposes.¹⁵ A mere assertion, however, that the trust properties are his private properties is not a sufficient ground for his removal unless his attitude is unreasonable or *malà fide*, and amounting to a breach of trust.¹⁶
- (2) Trustee who is guilty of a breach of trust or misappropriation of the trust funds¹⁷ or who has concurred in a breach of trust.¹⁸
- (3) Falsification of accounts.¹⁹
- (4) Trustee being guilty of *wanton* waste and neglect of duty.²⁰
- (5) Lack of capacity to manage.²¹

7. (28) AIR 1928 Bom 67 (68) : 46 Bom 101.
8. (20) AIR 1920 Cal 210 (222).
- (25) AIR 1925 Mad 1011 (1012). (No misappropriation — Trustee as much interested in the trust as others — Removal not desirable.)
- (18) AIR 1918 Mad 56 (60).
- (35) AIR 1985 Pat 111 (115) : 14 Pat 379.
9. (99) 1 Bom L R 743 (753). (No misconduct of any kind — Mahant is not liable to dismissal.)
- [See (26) AIR 1926 Lah 100 (108) : 7 Lah 275. (Original purposes of the trust must be looked to.)
10. (84) AIR 1984 P C 58 (54) (P.C). (Defendant mutawalli's removal on account of their insolvency and mismanagement and keeping the charity in a deplorable condition.)
11. (28) AIR 1928 Cal 225 (226).
- (97) 21 Bom 556 (560). (Mere lax management is no ground for removal of a trustee.)
- (23) AIR 1923 Mad 163 (167). (Failure to keep accounts without any wilful default.)
- (18) AIR 1918 Mad 56 (60). (Misappropriation — Trustee removed.)
- (29) AIR 1929 All 433 (436). (Mere inaccuracy in accounts, or petty neglect of duty or indebtedness — No ground for removal.)
12. (19) AIR 1919 Mad 575 (578).
- (99) 1 Bom L R 743 (748). (Mahant — No case of misconduct proved.)
- (99) 2 Oudh Gas 340 (343). (Misconduct, immorality and breach of trust held to be grounds for removal.)
21. (24) AIR 1924 Cal 1024 (1025).

- (21) AIR 1921 Mad 467 (470). (Hereditary archakas bona fide appropriating surplus income of lands — No ground for removal.)
13. (25) AIR 1925 Mad 1070 (1078).
- (27) AIR 1927 Mad 1038 (1034).
- (24) AIR 1924 Lah 107 (108) : 4 Lah 364. (Adverse title.)
- (26) AIR 1926 Mad 280 (280). (Alienating property.)
- [See (93) AIR 1938 Oudh 22 (27) : 8 Luck 266. (Adverse title and mismanagement.)]
15. (91) 15 Bom 612 (623, 624).
- (22) AIR 1922 P C 325 (332) : 45 Mad 565 : 49 Ind App 237 (P.C).
16. (28) AIR 1928 Mad 879 (886).
- (24) AIR 1924 Cal 1024 (1025). (Breach of trust and other things.)
- (10) 8 Ind Gas 545 (545) (Mad). (Misappropriation.)
18. (24) AIR 1924 Cal 1024 (1025).
- (22) AIR 1922 P C 325 (332) : 45 Mad 565 : 49 Ind App 237 (P.C). (Falsification of accounts.)
- (17) AIR 1917 Oudh 375 (380) : 20 Oudh Gas 49. (Neglect and mismanagement — Accounts not produced.)
- (99) 22 Mad 481 (483).
20. (07) 2 Mad L Tim 94 (95). (Gross neglect of duty.)
- (24) AIR 1924 Cal 1024 (1025).
- (24) AIR 1924 Mad 491 (492). (Not applying inam in a proper manner to the mosque.)

Where, in a suit by one trustee under this Section for removal of another co-trustee the latter charges the plaintiff himself as being guilty of misconduct, the Court can go into the question and if necessary remove the plaintiff himself from the trusteeship.²²

The High Court of Madras has held that the right to pray for the removal of a trustee does not, however, carry with it the right to possession of the lands attached to the trust.²³ But the Judicial Commissioner's Court of Nagpur has held that, in a suit under this Section for the removal of a trustee, a decree for delivery of possession of the trust properties to the new trustee could be granted.²⁴

It was held by the Bombay High Court that where the Court frames a scheme in a suit under this Section, it is desirable to provide therein for the removal of the trustees for breaches of trust, so that the removal of the trustee, in case of default, may be obtained by way of *execution* of the decree and without the trouble and expense of a regular suit.²⁵ The said decision has, however, been dissented from by the High Court of Madras²⁶ and the Court of the Judicial Commissioner of Nagpur²⁷ and does not appear to be a sound one in view of the decision in the Privy Council in the undermentioned case.²⁸ In any case, where the scheme does not provide for the removal of the trustee, an *application* for the removal of the trustee is not the proper procedure but a *suit* under this Section is necessary.²⁹ Where a scheme provides for the removal of a trustee for unfitness, the power can be exercised in the course of proceedings arising out of the scheme, even though the trustee be found unfit by reason of a *breach of trust* and a *suit* under this Section is not necessary.³⁰ Where a hereditary trustee is removed by a decree in a scheme suit, it is not proper to provide in the decree that the descendants of the trustee are for ever debarred from holding the office.³¹

As to whether a *sajjadnashin* can be removed under this Section, see the undermentioned cases.³²

Where a will creates a trust and the trustees are wrongly called 'executors,' the proper procedure for removal of the trustees is by a suit under this Section and not by a petition under Section 301 of the Succession Act.³³

16. Appointment of a new trustee — Clause (b). — Under this Section, the Court has complete discretion in appointing *any* person as a trustee and in arranging for the management of the trust.¹ One of the principles to be remembered in exercising

[See also (35) AIR 1935 Sind 210 (210); 29 Sind

L R 308.]

28. (25) AIR 1925 F C 155 (156) (PC).

29. (35) AIR 1935 All 273 (275). (Although a

scheme was originally drawn up in a proper pro-

ceeding under S. 92, Civil Procedure Code, that

fact does not remove the necessity imposed by

the Court can act under the Section and remove

a trustee or appoint another trustee.)

(35) AIR 1935 Sind 210 (210); 29 Sind L R 308.

30. (37) AIR 1937 Bom 124 (127).

31. (19) AIR 1919 Mad 515 (524); 42 Mad 161.

32. (09) 6 All L Jour 632 (635). (No—When it

is impossible.)

(34) AIR 1934 Pat 443 (457). (Yes.)

(32) AIR 1932 Pat 33 (52); 11 Pat 288. (Yes.)

33. (38) AIR 1938 All 197 (198).

Note 16

1. (20) AIR 1920 Cal 379 (380); 47 Cal 866.

26. (26) AIR 1926 Mad 559 (561); 49 Mad 580.

27. (31) AIR 1931 Nag 82 (82) (FB).

period of suspension.)

and to appoint a manager to act during the

trust Judge may be validly empowered as a per-

individual, not the District Court. The Dis-

motion speaking of the District Judge as an

from his office by the District Judge of his own

in a scheme that the trustee may be removed

does not render invalid or ineffectual a clause

of a trustee without recourse to the Court does

(A scheme providing a means for the removal

[See also (37) AIR 1937 Bom 124 (132, 133).

25. (1900) 24 Bom 45 (49).

24. (34) AIR 1934 Nag 48 (50).

23. (10) 8 Ind Cas 525 (525) (Mad).

22. (25) AIR 1925 Mad 820 (821).

the power of appointing a trustee is that *no right of inheritance* attaches to a religious institution. It is by *appointment* that one officer succeeds to another and such appointment is made either by the original founder, or by the superintendent of the trust, or falling these, by the ruling power. The appointment of a *mutawalli* to a *waqf* is a matter regarding religious usages within the meaning of Regulation XV of 1793 and must be determined with reference to the provisions of the Mahomedan law on the subject. In respect of waqfs created for public purposes of a religious nature, the District Judge may be assumed to have been authorised by virtue of Section 92 to exercise the powers of a Kazi."

The duty of the Court is to appoint the *most suitable* persons available as trustees whether originally impleaded in the suit or not and, in doing so, it should take into consideration the *wishes* and rights of the founder, the *past history* of the institution and the way in which the management was carried out in the past."

Section 539 of the old Code contained the words "new trustees under the trust." And this gave room for arguments that the appointment must be "in conformity with the *original constitution* of the trust or with the rules in force in respect of it." This argument was however negatived by decisions which accordingly held that it was competent for the Court to appoint new or additional trustees though not in conformity with the original constitution of the trust, if the interests of the trust demand it.⁴ The same view will obviously prevail under the present Code. A Court will, however, refrain from appointing a person declared not fit to be appointed, by the author of the trust.⁵

The words "new trustee" under the Code mean "new trustee in the place of an old one" and therefore the Section applies only when a new trustee is sought to be appointed in the place of an old one and not to a case where there is no *mutawalli*, and the Court is asked to appoint a *mutawalli*." In cases of the latter class the Court can appoint a *mutawalli* without a suit under the Section and in the exercise of the

- (16) AIR 1916 P C 182 (185): 48 Cal 1085; 8 Low Bur Rui 517 : 48 Ind App 127 (PC).
 (11) 9 Ind Cas 168 (168) (Mad). (Suit for appointment of new trustee is within the Section and requires sanction.)
 (97) AIR 1937 Oudh 198 (194): 13 Luck 81. (Illegitimacy will not necessarily be a disqualification for appointment as trustee.)
 2. (16) AIR 1916 Cal 894 (900) : 43 Cal 467.
 (24) AIR 1924 Cal 441 (441).
 3. (17) AIR 1917 All 331 (334).
 (28) AIR 1928 Mad 955 (957).
 (20) AIR 1920 Cal 210 (215). (Founder has a right to nominate the shahat in certain events e. g., where the line originally indicated by the founder fails.)
 (12) 17 Ind Cas 969 (971) (Cal). (Person having pecuniary interest in the trust or a creditor of the endowment not to be appointed to the committee of management.)
 (35) AIR 1935 Pat 111 (116): 14 Pat 379. (Interests of institution is the governing factor — arrangements should be made which will prevent mismanagement as has taken place.)
 4. (05) 28 Mad 319 (323, 324).
 (19) AIR 1919 All 83 (89). (Directing property to be delivered to new trustees.)

- (28) AIR 1928 Mad 955 (957). (Additional trustees may be appointed.)
 (20) AIR 1920 Mad 146 (146). (Additional trustees.)
 (11) 11 Ind Cas 728 (729) (Mad). (Court can associate a new person with the trustee.)
 (12) 16 Ind Cas 225 (234) (Mad). (Additional trustees can be appointed.)
 (19) AIR 1919 Mad 575 (578). (If appointment of additional trustee will lead to friction, existing trustee alone may be allowed to continue as the sole trustee on terms.)
 (20) AIR 1920 Cal 379 (380): 47 Cal 1866. (Stranger appointed as mutawalli.)
 5. (09) 8 Ind Cas 419 (421) : 37 Cal 268.
 6. (28) AIR 1928 Cal 368 (369, 370): 55 Cal 1284. (03) 26 Mad 450 (452). (Suit for appointment of new trustee on the ground that defendants are not lawful trustees and therefore office of trustee is vacant held to be covered by cl. (b).)
 [See (38) AIR 1938 Pat 537 (538). (But the District Judge has no general power to remove mutawalli in miscellaneous proceedings, his powers in this respect being limited and defined by S. 92. Nor has he power in such proceedings to require the mutawalli of a private endowment to render accounts.)]
 [But see (34) AIR 1934 Oudh 118 (121): 9 Luck 507.]

powers of a *Kazi* under the Mahomedan law. Under that law it was the duty of the *Kazi* whenever there was no one to administer the trust, to see that it was properly administered and for that purpose, to appoint a suitable trustee or manager of the property. That power, as has been already mentioned, now lies with the District Judge and a Sub-Judge cannot recall the order of a District Judge or appoint a *mutawalli*."

Where a trustee dies and the disciples of the *muti* were authorised by custom in such cases to appoint a successor, a suit for a declaration by the disciples that the defendant was not validly appointed, that he should be ejected and that a successor of the deceased trustee should be appointed, is misconceived and does not lie under Section 92."

17. Vesting any property in a trustee — Clause (c).—"This clause gives power to the Court, where it removes a trustee and appoints a new trustee, to vest the trust property in the new trustee." This clause refers to cases where a new trustee is appointed and is not intended to cover cases in which it is sought to recover possession of the trust property by ejecting trespassers who are wrongfully in possession of it.³ See also Note 28 *infra*.

18. Directing accounts and inquiries — Clause (d).—"This clause is new. A relief for accounts was not one of the reliefs specifically provided by Section 539 of the old Code. But the Bombay High Court held that a relief of the nature indicated in this clause came within the words "such further or other relief" and that it was the first and most important thing to be done in such suits." This has been made clear by the introduction of the new clause giving effect to the Bombay decisions. A suit for accounts of the trust property will now clearly fall within the Section.⁴

In taking accounts under this Section, the claim of the trustee against the trust for monies due to him may also be considered, even if his right to sue in respect of those items is barred by limitation. The reason is that though the *right to sue* is barred, the claim is otherwise unaffected.⁵

It is also a general principle that *back accounting* will not be decreed except on proof of dishonesty and malversation.⁷

7. (28) AIR 1928 Cal 368 (369, 370); 55 Cal 1284.
8. (16) AIR 1916 Cal 891 (900); 43 Cal 467 (491).
9. (99) 22 Mad 117 (119).
- Note 17
1. (06) 28 All 112 (117).
2. (32) AIR 1932 Rang 132 (136) : 10 Rang 342.
- Note 18
1. (92) 16 Bom 626 (629).
- (97) 21 Bom 48 (51).
- (08) 10 Bom L R 87 (89).
- (91) 16 Bom 612 (624). (Court actually ordered the taking of accounts.)
2. (1900) 24 Bom 50 (54) : 26 Ind App 199 (PC). (On appeal from 12 Bom 247.)
- (12) 17 Ind Cas 969 (971) (Cal). (Income of endowment uncertain and variable—It is extremely desirable that audits should be fairly frequent.)
3. (24) AIR 1924 Bom 518 (519, 520).
7. (28) AIR 1928 Mad 879 (887).
6. (16) AIR 1916 Mad 720 (723) : 39 Mad 365.
5. (26) AIR 1926 Mad 509 (510).
- [But see (34) AIR 1934 Nag 48 (50).]
- (35) AIR 1935 Mad 825 (826) : 58 Mad 988 (FB). (Income of this Section.)
- (21) AIR 1921 Mad 479 (479). (Suit by trustee against subordinate trustee for accounts is within this Section.)
4. (27) AIR 1927 Mad 416 (417).
- (19) AIR 1919 All 203 (205). (Suit for accounts against trustees appointed under a compromise.)
- (15) AIR 1915 All 69 (69).
- Section 92.)
- in Court is in effect a suit for accounts under injunction to compel defendant to deposit amount by trustees against subordinate trustee.)
- (24) AIR 1924 Mad 882 (883). (Suit for mandatory injunction to compel defendant to deposit amount by trustees against subordinate trustee.)
- (21) AIR 1921 Mad 479 (479). (Claim for accounts (18) AIR 1918 Bom 134 (136) : 42 Bom 742.

19. Declaring what proportion, etc. — Clause (e). — The words "what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust" have been substituted for the words "the proportion in which its objects are entitled" in order to make the clause more clear.

A suit for a declaration as to whether the offerings made to a deity belong to the pujaris exclusively or should be divided between the pujaris and the temple servants and if so what proportion of the offerings should be allocated to the *pujaris* and the temple servants respectively, is one coming under this clause, inasmuch as the suit is in substance one to declare what the trust properties are and for the directions of the Court for the administration of the trust properties.

20. Authorising alienation of trust property — Clause (f). — As has already been seen in Note 16 above, the powers of a *Kazi* under the Mahomedan law are exercised by the District Judge in the mutasils¹ and where a *mutawalli* claims permission to execute a lease, it can be granted by the District Judge in the exercise of his powers as *Kazi* and without any *suit* for that purpose. It is only where *all* the essentials for the applicability of the Section are present, that such a permission must be sought for by way of a suit.²

It is a general principle of law that though it is not competent as a rule for a *shahai* to alienate trust property, yet he will be entitled to do so where it is necessary for the benefit or preservation of the estate or for the purpose of preventing it from hostile or litigious attacks.³ The position of a *shahai* or head of a *muti* is, in fact, that of the manager of an infant heir and where debts are contracted by him for purposes binding on the *muti*, a decree will be passed charging the income of the *muti* for such debts.⁴ Where the *shahai* or trustee as such commits trespass and is mulcted in damages against the estate, the *debutter* property will be liable for it.⁵

Debutter property is not absolutely inalienable but can be alienated for *legal necessity*. The trustee can create derivative tenures over the trust property conformable to usage⁶ but a permanent lease at a fixed rent for all time cannot be a proper act of management and will be, on the other hand, a breach of duty.⁷

21. Settling a scheme — Clause (g). — The Civil Court which in the British Indian system, has taken the place of the *Kazi* in the Mahomedan law, has a complete discretion in arranging for the management of a *public* trust, though "in giving effect to the provisions of this Section and in appointing new trustees and settling a scheme it is entitled to take into consideration, not merely the wishes of the founder so far as they can be ascertained, but also the past history of the institution and the way in which the management has been carried out heretofore, in conjunction with other existing conditions that may have grown up since its foundation." Such conditions would include the existing rights of individuals to the trusteeship of endowment, though

Note 19

1. ('21) AIR 1921 Bom 297 (299): 45 Bom 683.

Note 20

1. See note 16 above.

2. ('20) AIR 1920 Cal 129 (130) : 47 Cal 592.

3. ('07) 34 Cal 249 (255, 256).

('04) 27 Mad 435 (439, 445, 456).

('75) 23 South W R 253 (255, 256) : 2 Ind App

145 (P C).

4. ('08) 35 Cal 226 (229, 231). (Hereditary trustee cannot alienate office of shebaitship except for necessity.)

('08) 31 Mad 47 (49).

Note 21

1. ('16) AIR 1916 P C 132 (135): 43 Cal 1085 : 43 Ind App 127: 8 Low Bur Rui 517 (PC).

Ind App 127: 8 Low Bur Rui 517 (PC).

(PC). ('70) 13 South W R 18 (20) : 13 Moo Ind App 270

(06) 28 Mad 391 (392).

Ind App 148 (PC).

7. ('09) 4 Ind Gas 449 (451) : 36 Cal 1003 : 36

(PC). ('70) 13 South W R 18 (19) : 13 Moo Ind App 270

6. ('04) 27 Mad 465 (472, 476) (FB).

5. ('06) 10 Cal W N 1000 (1002, 1003).

the Courts are averse generally to the creation of a hereditary right to the office of a public trustee.⁷

The main thing to be remembered is the welfare and interests of the trust.⁸ The jurisdiction of the Court to frame a scheme is not excluded by the fact that the temple, for which the scheme is to be framed, is subject to a temple committee⁹ or is managed by a caste or section of the public.⁵ It is desirable, however, that it should be framed in such a way as to meet the exigencies of the case without unduly interfering with the powers of the temple committee,⁶ or impairing the authority of the *mahant* or the duly constituted manager of the institution.⁷

In framing a scheme under the Section, the Court is not restricted to the arrangement contemplated by the author of the trust, though as a general rule, it ought not to depart therefrom except for very strong reasons.⁵ Thus, the Court can provide for the management by co-trustees in rotation or otherwise alter the original scheme in the interests of the institution³ such as by providing for new or additional trustees.¹⁰

The ground on which the relief for the settlement of a scheme should be granted does not depend upon any *charges* against the trustees at all, but upon its being necessary for the *welfare* of the trust and upon its being conducive to the better management of the trust property.¹¹ When a scheme is working properly, the Court will, in fact, refuse to alter it on the mere allegation of mismanagement and malversation by the trustees.¹² Such a ground is not sufficient for *altering* the scheme itself, though it may be a ground for *removal* of the trustees.¹³ Where, however, there is mismanagement and there is a large surplus income unspent,¹⁴ or, where a temple has got temple properties and also *kattalas* properties (which are in the nature of distinct endowments themselves) and the management and mixing up of the various *kattalas* is likely to lead to embezzlement, it will be a sufficient ground to seek the aid of the Court in framing a scheme.¹⁵ In fact, in that case, separate schemes should be framed for the temple properties and the *kattalas* properties.¹⁶

The Court may, and it is desirable that it should, do the following things in framing a scheme :

(1) Give necessary directions with reference to the property of the trust and the income therefrom.¹⁷ A scheme which does not ascertain the income

- (192) AIR 1922 Mad 409 (411). (Not desirable to impose condition on hereditary trustee but where necessary in particular circumstances, the Court is entitled to impose it.)
(172) 17 Ind Cas 441 (442) (PC). (Framing of scheme is largely a matter for the discretion of the Court.)
[See also (17) AIR 1917 All 331 (334).
(06) 5 Bom L R 756 (757).]
2. (12) 16 Ind Cas 225 (233) (Mad).
3. (26) AIR 1926 Mad 1150 (1153).
4. (17) AIR 1917 Mad 551 (554, 560): 39 Mad 700.
5. (17) AIR 1917 Mad 426 (427, 428).
6. (17) AIR 1917 Mad 551 (560) : 39 Mad 700. (Temple committee.)
7. (07) 9 Bom L R 538 (550) : 34 Ind App 75 : 30 Mad 138 (PC). (Scheme framed without impairment the authority of the mahant.)
(30) AIR 1930 Mad 466 (469). (Though there is general trustee, a scheme regulating daily worship by archakas, not objectionable.)

8. (23) AIR 1923 Pat 420 (421).
(32) AIR 1932 Pat 33 (34) : 11 Pat 288. (Court not bound by the terms of the grant or usage.)
9. (04) 27 Mad 192 (198, 201, 202).
10. (03) 28 Mad 319 (323, 324, 325).
(24) AIR 1924 Rang 134 (135). (Mosque with majority of Bengali worshippers — Scheme should provide for majority of Bengali trustees.)
11. (16) AIR 1916 Mad 318 (319, 320).
(18) AIR 1918 Oudh 207 (210).
12. (16) AIR 1916 Mad 530 (530, 531). [See (34) AIR 1934 Pat 443 (454). (But where directions in a previous scheme prove ineffective for effecting due administration new scheme should be framed.)]
13. (16) AIR 1916 Mad 530 (530, 531).
14. (16) AIR 1916 Mad 318 (319).
15. (24) AIR 1924 Mad 168 (171, 172, 173).
16. (23) AIR 1923 Mad 555 (556).
17. (17) AIR 1917 Mad 555 (558). (91) 13 Bom 612 (624).

and expenses of the trust is an unsatisfactory scheme.¹⁸

(2) Provide some authority for supervising the administration by the trustees.¹⁹ But a clause empowering the Court to exercise disciplinary

jurisdiction over the trustees is invalid as it makes the Court practically the superintendent of the institution.²⁰

(3) Provide that any person interested in addition to the trustee, shall be at liberty to ask the Court by way of *application* for *directions* to carry out the scheme.²¹ There is a conflict of opinion as to whether a reservation of a right to a person or persons to ask the Court by way of *application* for a relief coming within the Section is valid. The High Court of Madras and the Judicial Commissioner's Court of Nagpur have held that such a reservation is *ultra vires* inasmuch as such relief can only be granted in a *suit* under Section 92.²² The High Courts of Calcutta and Patna, on the other hand, appear to be of the opinion that such a reservation is *intra vires*.²³ There is also a conflict of opinion as to whether a reservation of a right to seek, by way of *application*, a *modification or alteration* of the scheme later on is or is not *ultra vires*. The High Courts of Madras and Rangoon and the Judicial Commissioner's Court of Sind hold that such a reservation is *ultra vires* as it offends against Section 92 which requires that the remedy should be by way of a *suit*.²⁴ The High Courts of Bombay and Allahabad have, on the other hand, held a contrary view.²⁵

A provision in a scheme giving the Court authority to appoint a successor in place of a deceased trustee cannot be regarded as one for the modification of the

that where the ordinary law requires a suit to be brought, an application may be substituted for it.]

23. (18) AIR 1918 Cal 580 (581). (No power to depart from arrangement in the wakfana.)

[See also (34) AIR 1934 Pat 448 (457). (Provision in scheme empowering Court to reduce the powers of managing trustee and even to remove him in specified contingencies is legal.)]

24. (27) AIR 1927 Mad 1073 (1078) : 51 Mad 31 (RB).

(29) AIR 1929 Mad 625 (626). (The view expressed in A I R 1922 Mad 413 to the contrary cannot be considered to be good law.)

(29) AIR 1929 Rang 20 (20) : 6 Rang 594. (AIR 1928 Rang 168 : 6 Rang 97, not followed. See in A I R 1914 Low Bur 226.)

(27) AIR 1927 Sind 1 (10) : 21 Sind L R 220. (35) AIR 1935 Sind 210 (212) : 29 Sind L R 308. 25. (31) AIR 1931 Bom 391 (395) : 55 Bom 414.

(36) AIR 1936 All 97 (100) : 58 All 538. (37) AIR 1937 Bom 124 (131). (It is open to the Court to include in schemes for the administration of charitable institutions clauses providing that the schemes may, from time to time and as occasion arises, be altered by the Court according to the practice of the Bombay High Court. Such a clause is a valid provision.)

[See also (21) AIR 1921 Bom 297 (299) : 45 Bom 688. (Once scheme framed no separate suit can

18. (18) AIR 1918 Mad 1006 (1009). (1900) 24 Bom 50 (54) : 26 Ind App 199 (PC). (Trust funds not ascertained — Proper course is to take accounts before scheme is framed.)

19. (12) 16 Ind Cas 225 (235) (Mad). 20. (26) AIR 1926 Mad 559 (562) : 49 Mad 580. (25) AIR 1925 Mad 411 (414).

[See (35) AIR 1935 Mad 474 (475). (Clause in vesting Court with general powers and duties of superintendence over institution is ultra vires.)

21. (28) AIR 1928 Mad 268 (271). (30) AIR 1930 Mad 918 (920) : 54 Mad 315. (32) AIR 1932 Mad 41 (42, 44) : 54 Mad 345.

(39) AIR 1939 Mad 605 (607). (Applicants held entitled to apply to the Court for determination whether the person nominated for trusteeship was eligible for it. The Court had power to determine the question and direct the trustee to reject the nomination paper. Such direction was necessary for the carrying out of the scheme.)

22. (28) AIR 1928 Mad 268 (271). (The words "for modification of the term thereof" appearing in the scheme framed by the lower Court were held to be ultra vires.)

(27) AIR 1927 Mad 1073 (1078) : 51 Mad 31 (RB). (26) AIR 1926 Mad 557 (558).

(26) AIR 1926 Mad 555 (555). (25) AIR 1925 Mad 411 (414).

(29) AIR 1929 Mad 322 (322). (30) AIR 1930 Mad 226 (227).

(31) AIR 1931 Nag 82 (82) (RB). [See (35) A I R 1935 Mad 474 (475). (It is not competent to the framers of a scheme to provide

scheme and hence is not *ultra vires*, even assuming that a provision for modification would be *ultra vires*.²⁶

Where a scheme contains a clause reserving liberty to apply for directions to work out the scheme but the persons who are to apply are not specified, the proper persons who can apply under the liberty clause are the parties to the suit, and, in case they are dead or are colluding with the defendants or are negligent in applying, other persons wishing to so apply may be allowed to do so after bringing them on the record under O. 1 R. 10 of the Code.²⁷ Where, however, the persons who are to apply are specified, it is not open to any other person to make an application for directions.²⁸ Where a scheme provides for the modification of the scheme by the Court on the application of parties interested in the institution, (assuming such provision is *ultra vires*) any person who may have an interest in the institution from time to time, whether or not he is a party or representative of a party to the original litigation, is entitled to make an application for the modification of the scheme.²⁹

Where a compromise decree is passed embodying a scheme whereby certain persons were to be elected trustees subject to confirmation by the High Court, the provision regarding confirmation is not *ultra vires*.³⁰

A scheme once framed and settled by the Court can be varied by the Court, but only on substantial grounds.³¹ But a suit to establish the private rights of the plaintiff which would, if established, alter the scheme framed, is not maintainable.³²

The authority of the Court to deal with matters arising under the scheme is derived only from the scheme itself, and cannot be exercised independently of it.³³ Thus, where a scheme provides for an application to the Court for necessary directions in the management of the trust, the Court cannot order in execution that the trustee should pay the archakas their salaries.³⁴

A scheme once framed is to be interpreted in all respects as if it were an Act,³⁵ as reasonable a construction as possible being given to it when the provisions are doubtful or defective.³⁶

In *Gopal Lal Sett v. Purna Chandra Basak*,³⁷ a decision of the Privy Council, the following passage occurs: "..... they (their Lordships of the Privy Council) regard the gift as in effect a private trust to which the provisions of Section 92 of the Code of Civil Procedure would not apply, and consequently, the establishment of a scheme for its administration as provided by the decree of the High Court is inappropriate."

In *Tula Ram v. Trikram Singh*,³⁸ the Allahabad High Court also held that a scheme could be formed only if the trust was a public trust.

- be allowed relating to administration or appointment.)
 26. (37) AIR 1987 Oudh 193 (194) : 13 Luck 81.
 27. (31) AIR 1981 Bom 388 (389).
 28. (30) AIR 1980 Mad 226 (227). (Others to bring a suit under Section 92.)
 29. (37) AIR 1937 Lab 490 (491).
 30. (32) AIR 1932 Mad 41 (43) : 54 Mad 345.
 31. (11) 12 Ind Cas 449 (451) : 36 Mad 364.
 (24) AIR 1924 Cal 380 (381, 382).
 (18) AIR 1918 Cal 530 (532).
 (05) 28 Mad 319 (325).
 (36) AIR 1936 All 97 (101) : 58 All 558. (The inherent power of the Court to modify a scheme prepared by itself should, however, be exercised.)
 38. (34) AIR 1934 All 315 (317).
 Ind App 100 (PC).
 37. (22) AIR 1922 P C 253 (256) : 49 Cal 459 : 49
 36. (14) AIR 1914 Low Bur 226 (228).
 class of persons to be appointed trustees.)]
 [See also (30) AIR 1930 Mad 226 (228). (In re
 35. (24) AIR 1924 Mad 369 (369) : 47 Mad 139.
 34. (26) AIR 1926 Mad 655 (655).
 (29) AIR 1929 Mad 526 (527).
 33. (26) AIR 1926 Mad 659 (659).
 32. (11) 12 Ind Cas 449 (451) : 36 Mad 364.
 [See (35) AIR 1935 Pat 88 (89).]
 plainly demand it.)
 process of the Court or where the ends of justice where it is necessary to prevent abuse of the

But, in *Bimal Krishna v. Shebaitis of Sri Sri Iswar Radha Ballav*,³⁹ the Calcutta High Court held that the Civil Court is competent to entertain a suit the object of which is to have a scheme established for the administration of a private *debutter*. In this case, the decision of the Privy Council in *Gopal Sett v. Purna Chandra Basak* was distinguished in the following words :

"It is clear from the facts set out in that judgment (the Privy Council judgment) that in this case (*i. e.*, the Privy Council case), there was no gift to the *idols* but the property was given to one Udoy who was made a trustee in the legal sense of the word and upon whom were cast certain duties both religious and secular in their nature. He was to perform the worship of a certain idol with the income of a particular property and the remainder of the income was given to three people whose names were given in the will. In a case like this, where a private trust was created not of a purely religious character and the ownership of the property was vested in the trustee in the legal sense of the word, the Court could not possibly frame a scheme for the administration of the trust estate. In a religious endowment, however, where the deity who is a perpetual infant is the legal owner of the property and the shebaitis occupy the position of managers or guardians, the position is different. . . . In India, the Crown is the constitutional protector of all infants and as the deity occupies in law the position of an infant, the shebaitis who represent the deity are entitled to seek the assistance of the Court in case of mismanagement or maladministration of the deity's estate and to have a proper scheme for management framed which would end the disputes amongst the guardians and prevent the debutter estate from being wasted or ruined."

Where a scheme for a private trust has been settled by an award and a decree passed thereon, it cannot be varied or altered by consent of parties where the scheme itself does not provide for such alteration.⁴⁰

Where a public trust has been constituted under a will, it is not necessary that a suit for administration of the estate should first be brought before a scheme could be framed under this Section, except in a case where it is doubtful whether there would be funds sufficient to the charitable bequest.⁴¹

See also Note 15 *supra* and Note 34 *infra*.

22. Court's power to apply the Cypres Doctrine.—The provincial Courts had originally no equitable jurisdiction to act on the *cypres* doctrine in the administration of trusts. Section 539 of the old Code remedied this defect and enabled the Courts to exercise such jurisdiction.¹

The doctrine should receive as extended an application as possible, so as to give effect to the true intent and aim of the donor or founder.² But in order to apply the doctrine, the Court should be satisfied that the original object cannot be carried out in the manner and form intended by the donor.³ Thus, where the objects of the trust are not suited to modern conditions and there is a general charitable intention in the terms of the endowment, the Court is competent to apply the funds of the charity *cypres*.⁴

39. (37) AIR 1937 Cal 338 (341) : 1 L R (1937) 2 Cal 105.

40. (19) AIR 1919 Mad 731 (732).

41. (23) AIR 1923 Mad 376 (381, 382) : 46 Mad 300.

Note 22

1. (91) 14 Mad 186 (200).

2. (19) AIR 1919 Mad 659 (668).

3. (08) 32 Bom 214 (224, 228, 231, 243).

4. (19) AIR 1919 Mad 659 (668, 664).

Where the original object is *impossible* of performance or is *impracticable* in fact or would be *impolitic* to carry out literally, the doctrine can be applied, although *impossibility* of performance is not a *condition precedent* to its applicability.⁵

Again, where the mode indicated by the donor *does not exhaust* the surplus and the same has accumulated in the hands of the trustees, it will be necessary, in order to prevent waste and embezzlement thereof, to prepare a scheme *cypres* for the utilization of the fund.⁶

Where grants are made to religious institutions as a *general thinks-offering*, it is proper and legitimate to apply them *cypres* to the promotion of knowledge.⁷

A charitable bequest does not lapse into residue on the failure of the object of the bequest, and a Court can execute it *cypres* unless upon the construction of the will a direction to the contrary can be implied.⁸

23. Sanction of the Advocate-General.—A suit under this Section must be brought with the sanction of the Advocate-General.¹ The object of the sanction is to protect the trust property as well as the trustees from an indefinite number of reckless and harassing suits being brought against the trustees.² A sanction under the Section obviates, in respect of the classes of suits described in the Section, the necessity of following the procedure for a suit brought in a representative capacity under O. 1, R. 8, Civil Procedure Code.³ Under the old Code, it had been held by some decisions that a suit coming within the Section could be instituted without sanction by following the procedure under O. 1 R. 8 of the Code.⁴ The present Section is now clearly imperative, and a suit of the nature specified cannot be instituted except in conformity with the requirements of the Section.⁵

An objection as to want of sanction is one which goes to the *jurisdiction* of the Court to entertain the suit and as such cannot, under general principles of law, be *waived*.⁶

5. (108) 32 Bom 214 (228, 229, 231).
- (186) 13 Cal 193 (196). (Bequest for education of boys in a particular school—School closing down—Bequest may be executed *cypres*.)
- (11) 12 Ind Cas 577 (578) : 36 Bom 29. (Trustees dead at the time of the operation of the bequest—Object of bequest specific—Court will administer the trust.)

6. (105) 28 Mad 319 (326).
- (19) AIR 1919 Mad 659 (663, 664).
7. (19) AIR 1919 Mad 659 (667).

8. (85) 11 Cal 591 (595).
- (75) 1 Cal 808 (819, 820) : 3 Ind App 32 (P C).
9. (75) 1 Cal 808 (821) : 3 Ind App 32 (P C).

Note 23

1. (93) 20 Cal 397 (400). (Permission of the Collector not taken—Suit dismissed.)
- (14) AIR 1914 Low Bur 169 (171) : 7 Low Bur Rul 333. (Suit for accounts on allegation of breach of trust though ostensibly to set aside compromise decree.)
- (21) AIR 1921 Mad 696 (697). (Suit for directing trustee to submit account is one under cl. (1) of the Section and sanction must be got before suit; cf. Act 14 of 1920 as amended by Act 41 of 1928.)
- (10) 8 Ind Cas 926 (928). (Even the founder is not exempt from the operation of the Section.)

2. (105) 32 Cal 273 (276).
- (97) 21 Bom 257 (263).
3. (25) AIR 1925 Mad 1070 (1071, 1072).
4. (25) AIR 1925 Mad 1070 (1071, 1072).
5. (25) AIR 1925 Pat 544 (547) : 4 Pat 741. (Reliefs coming under this Section cannot be enforced except in a suit under the Section.)
- (30) AIR 1930 Sind 204 (208). (Previous consent of Collector imperative.)
- (35) AIR 1935 Mad 825 (826) : 58 Mad 988 (P B).
- (35) AIR 1935 Oudh 96 (108).
- (36) AIR 1936 Mad 449 (453). (For every suit relating to trust, consent of Advocate-General is not necessary—Only for relief specified in Section consent is necessary.)
- (39) AIR 1939 Mad 170 (172). (Public charitable trust—Management vested in members of family—Dispute among parties—Reference to arbitration—Award dealing with management and laying down scheme for future management—Suit to make award decree of Court cannot be instituted when the procedure prescribed by S. 92 has not been complied with.)
- (39) AIR 1939 Rang L R 254 (255) : 1939 Rang L R 140. (Trust failing under S. 92—Consent of Advocate-General applied for and refused does not relax provisions of S. 92 (2).)
6. (26) AIR 1926 Mad 970 (970).

It is only the *plaintiffs* in the suit under Section 92 that have to obtain the sanction of the Advocate-General. Persons who seek to be made *defendants* to a scheme-suit need not obtain any sanction.⁷

In a suit instituted under Section 92 by persons interested, a Court has power under O. 1 R. 10 to join the Advocate-General as party in order to effectually and finally adjudicate upon the questions relating to the administration of the trust.⁸

24. Nature of and form of consent.—In granting the "consent in writing" required by the Section, the Advocate-General or the Collector has to exercise his *judgment* and see whether the petitioners have an *interest* in the trust, whether the trust is one contemplated by the Section, and whether there is a *prima facie* case of a *breach of trust*.¹ The fact that the Advocate-General or the Collector originally refused to grant sanction under this Section will not preclude him from subsequently changing his mind on further consideration and granting the sanction.² But a wrong exercise or a non-exercise of judgment is only an irregularity *curable* under Section 99 of the Code.³

A consent, in order to be a valid one, must be *unconditional*. A conditional consent is no consent at all for the purposes of the Section.⁴

The Advocate-General or the Collector giving consent under this Section has no jurisdiction to impose any time limit within which the suit is to be brought and if he does so, the condition will not be binding.⁵

There is no particular *form* in which the consent ought to be given. In the Bombay Presidency it is the practice for the Advocate-General to endorse his consent upon the plaint.⁶ But the consent must be a *specific* permission to two persons *by name*. A permission to one person named "and another" is not sufficient.⁷ Where, however, two persons apply for permission and it is granted to one of them by name "and the other applicant," it is a sufficient permission inasmuch as "the other applicant" is clearly ascertainable by name.⁸ This Section does not require that details as regards the names of the proposed defendants and the reliefs should be stated in the order granting the sanction.⁹

A permission granted "to institute a suit under Section 539" is not limited to any particular *species* of suits mentioned in the Section or in the application for sanction.¹⁰

25. Consent, when necessary—Effect of consent.—The obtaining of a "consent in writing" of the Advocate-General is a *condition precedent* to a valid institution of a suit under this Section. Where no such consent has been obtained, the suit must be dismissed, and cannot be rectified by any subsequent amendment.¹

7. (27) AIR 1927 Rang 180 (180) : 5 Rang 268.
8. (20) AIR 1920 Mad 138 (138, 134) : 43 Mad 707.

Note 24

1. (97) AIR 1915 Bom 38 (39, 40) : 39 Bom 580.
(Consent not to be given unless suit is such as the Collector would himself be justified in filing at the instance of relators.)
(30) AIR 1980 Mad 129 (131) : 53 Mad 223.
(Status and position of petitioners to be considered and notice given to the institution or the trustees.)
2. (34) AIR 1934 Bom 257 (259).
3. (97) 24 Cal 418 (428).

- (21) 60 Ind Cas 570 (571) (Lah).
4. (15) AIR 1915 Bom 38 (39, 40) : 39 Bom 580.
5. (37) 1937 Mad W N 1319 (1320).
6. (15) AIR 1915 Bom 38 (39, 40) : 39 Bom 580.
7. (04) 26 All 162 (165).
8. (11) 9 Ind Cas 358 (359) (Bom).
9. (33) AIR 1933 Oudh 22 (24) : 8 Luck 266.
10. (21) AIR 1921 P C 123 (124) : 48 Cal 493 : 17 Nag L R 37 : 48 Ind App 12 (P C).

Note 25

1. (11) 11 Ind Cas 726 (728) : 36 Bom 168.
(Amendment not allowed.)
(92) 16 Bom 626 (628). (Consent not taken—Suit dismissed.)

The question whether this Section applies to a suit depends on the prayers in the plaint at the date when the suit is instituted and the Section cannot be evaded by an amendment of the plaint at a later date.² Where sanction *has been obtained* but the suit is *otherwise* defective and in order to remedy such defect the Court adds other parties who have subsequently obtained sanction, such sanction will *relate back* to the date of institution.³

Where in a suit instituted with the required sanction the Court adds a new defendant under O. 1 R. 10 in order to *effectually and completely* adjudicate upon all the questions involved in the suit, but such addition does not *alter the nature* of the suit, no new sanction need be obtained⁴ nor need it be obtained for transposing a defendant to the array of plaintiffs.⁵ Where such addition or other amendment *does alter* the nature of the suit, a fresh sanction is necessary.⁶ Thus, an amendment relating to a fresh cause of action involving a fresh addition of parties and fresh reliefs against them requires the sanction of the Advocate-General.⁷ The Calcutta High Court has held in a recent decision⁸ that where a representative suit relating to a trust has been instituted with the consent of the Advocate-General under this Section, no fresh consent is necessary in the case of each fresh addition of a party and that any member of the public who is interested in the trust may come in and carry on the suit or appeal, as the case may be, without obtaining a fresh sanction. Where sanction is given on the basis of a breach of trust and the plaintiffs seek amendment later by giving *particulars* of the breach of the trust, such amendment does not alter the nature of the suit and no sanction is necessary for such amendment.⁹

Where the addition of a relief which is not sanctioned is made to reliefs which are sanctioned, the suit should not on that ground be dismissed but the portion covered by the sanction should be heard and decided.¹⁰ The said additional prayer may be

(98) 1898 All W N 71 (71). (Suit dismissed for

want of consent.)

(94) 26 All 162 (165, 166). (Amendment not

allowed.)

(96) 8 Bom L R 751 (755) : 30 Bom 608. (Amend-

ment not granted.)

(95) 1895 All W N 2 (2). (Suit dismissed for want

of consent.)

(16) AIR 1916 Cal 49 (50). (Whether consent

required or not depends on the facts proved at

trial and plaintiff suing without consent takes

a risk.)

(39) AIR 1939 Rang 254 (255) : 1939 Rang L R

140. (Sanction of Advocate-General applied for

but refused by latter on the ground of there being

no public trust—Still, if suit falls under this Sec-

tion, consent of Advocate-General is necessary.)

2. (36) AIR 1936 Bom 412 (416).

(39) AIR 1939 Sind 18 (15) : I L R 1939 Kar 325.

(A I R 1981 Bom 38 relied on.)

(20) AIR 1920 Mad 134 (134) : 43 Mad 720.

(Plaintiffs having no necessary interest—Two

persons having interest added—Suit valid.)

(20) AIR 1920 Mad 133 (133, 134) : 43 Mad 707.

(Court can add parties to effectually dispose of

the matters in dispute.)

4. (25) AIR 1925 Cal 187 (190).

(26) AIR 1926 Mad 970 (970). (New sanction

necessary if addition alters nature of the suit.)

(29) AIR 1929 Mad 635 (638).

(27) AIR 1927 Rang 180 (180) : 5 Rang 263. (It

does not appear whether the addition altered the

nature of the suit or not.)

(23) AIR 1923 Sind 35 (37) : 16 Sind L R 221.

(20) AIR 1920 Mad 732 (735). (Plaintiff wishing

to withdraw scheme suit—Court may make some

defendants as plaintiffs and proceed with suit.)

(12) 13 Ind Cas 232 (233) (Mad). (Plaintiff not

properly prosecuting case—Court can add other

worshippers and proceed with suit.)

5. (87) 2 Cal L Jour 448 (454).

6. (28) AIR 1928 Lah 717 (718). (Suit against

wrong trustees tried to be converted into suit

against real trustee—Sanction is necessary.)

(26) AIR 1926 Mad 970 (970). (Sanction obtained

against a person not a trustee cannot avail

against a real trustee subsequently.)

(30) 1930 Mad W N 456 (466, 469). (Sanction

obtained only against one of the defendants;

Appellate Court can direct case to stand over to

get sanction.)

(20) AIR 1920 Mad 238 (238).

7. (11) 11 Ind Cas 726 (727) : 36 Bom 168.

8. (35) 62 Cal 1132 (1136).

9. (07) 9 Bom L R 901 (902, 903).

10. (19) AIR 1919 Lah 82 (82) : 1919 Pun Re

No. 144. (Court cannot grant relief not san-

ctioned.)

(07) 1907 Pun Re No. 110, p. 510. (Claim for

relief not sanctioned will not be entertained.)

(97) 21 Bom 257 (265). (Matter not sanctioned

cannot be enquired into.)

(23) AIR 1923 Bom 428 (428).

The powers of the Advocate-General under Section 539 of the old Code were conferred on the Collector by a Government Resolution. And, by virtue of Section 157 of this Code, the powers so conferred under the old Code operate under the present Code also.³ The Collector can, in the main, thus exercise the powers of the Advocate-

28. Parties to a suit under the Section. — It is a general principle to be remembered in dealing with cases under this Section that the grant of reliefs against *third parties* is outside the scope of the Section.¹ The reason is two-fold — firstly, the object of the Section is to protect *trustees* from vexatious and harassing suits and *not* to protect trespassers and *third parties* from suits against them;² secondly, a relief against a third party is not one of the reliefs specified in the Section and cannot be brought within the words “such further or other relief” which should be construed *ejusdem generis* with the preceding clauses, and not as including reliefs wholly outside.³ It follows as a consequence that in a suit under Section 92, no relief such as the recovery of possession, or *ejection* or rendition of *accounts* can be granted against third parties such as trespassers or alienees of the trust properties;⁴ and *vice versa* a

suits against strangers.
(1938) AIR 1938 Cal 278 (281).

- Note 28**

- (32) AIR 1982 Rang 132 (135) : 10 Rang 342.
(16) AIR 1916 Sind 60 (61) : 10 Sind L R 12.

- (93) 16 Mad 81 (32).
(36) AIR 1936 Mad 449 (451).
(37) AIR 1937 Sind 280 (232): 31 Sind L R 510.
(C) Clause (h) does not make Section applicable to

- (84) 8 Bom 365 (367). (Recovery of possession.
trespasser.)
(11) 12 Ind Gas 577 (578) : 36 Bom 29. (Eject-
ment of trespasser.)

by the Calcutta High Court in the undermentioned case¹⁰ that where a stranger receives property which he knows to be part of the trust estate, he is a *constructive* trustee and relief against him can be claimed in a suit under this Section.

It would seem to logically follow from the principle that no *relief* can be granted against third parties under this Section, that such third parties are not necessary or proper parties to the suit. There has, however, been a divergence of opinion on the point, and at least four different views have been expressed —

(a) The Calcutta High Court has held that it is not competent to the Court to implead an alienee at all in the suit.¹¹ The High Court of Rangoon also has held that strangers to the trust are not proper or necessary parties to a suit under this Section and that in such a suit the plaintiffs who have wrongfully impleaded third parties cannot pray in aid the provisions of O. I R. 3 or O. I R. 10.¹²

(b) The Madras High Court has held that an alienee cannot be made a party to the suit¹³ against his will but may, if he himself desires it, be made a party.¹⁴ If he is impleaded against his will, the suit should be dismissed against him.¹⁵ Even if he is a party the Court is not bound to decide whether the alienation in his favour is binding on the institution.¹⁶ In a later decision,¹⁷ the Madras High Court has held that an alienee of the trust property though not a necessary party is a proper party to the suit under this Section.

(c) The Allahabad High Court has held that the alienee though not a necessary party¹⁸ is a *proper* party to the suit¹⁹ and any decree passed in the suit will be binding on him.²⁰

(d) The Bombay High Court has held that the alienee is a *necessary* party to the suit and that suit could not be decided in his absence. Yet ejectment decree was not passed against him even though he was a party.²¹

It must not, however, be inferred from the above discussion that no *suit* can be brought against third parties under this Section unless they are trustees *de jure* or *de facto* or *de son tort*. It is only when a *relief* outside the Section is asked for (such as possession or ejectment) against a third party that it cannot be granted. A suit for a scheme or for the appointment of a new trustee or for directions, can, and sometimes

10. (35) AIR 1935 Cal 805 (809): 68 Cal 74. [See also (37) AIR 1937 Sind 230 (232): 31 Sind L R 510. (Person in possession asserting property as his but admitting that he is executing trust — Such person is trustee either constructive or de son tort and in either case he is not a stranger.)]

11. (18) AIR 1918 Cal 5 (7) (SB). (Reversing decision of Greaves J. in AIR 1916 Cal 985: 42 Cal 1135.)

12. (06) 38 Cal 789 (805).

13. (05) 2 Cal L Jour 431 (439). (Dissenting from 24 Cal 418.)

14. (32) AIR 1932 Pat 33 (52): 11 Pat 288.

15. (38) AIR 1938 Cal 278 (281). (In a suit for the removal of a trustee under S. 92, the plaintiff from the trustee is not a necessary party and as it is not possible to grant any relief against him in a suit under S. 92 it is not proper that he should be joined as a party at all.)

16. (32) AIR 1932 Rang 132 (135): 10 Rang 342.

17. (16) AIR 1916 Mad 979 (980). (Court cannot.)

18. (13) AIR 1916 Mad 979 (980).

19. (11) AIR 1916 Mad 979 (980).

20. (11) 11 Ind Cas 218 (219): 33 All 752.

21. (11) 12 Ind Cas 30 (31): 35 Bom 470.

16. (18) AIR 1918 Mad 1179 (1182).

17. (36) AIR 1936 Mad 449 (456).

18. (25) AIR 1925 All 759 (761): 47 All 867.

19. (25) AIR 1925 All 759 (761): 47 All 867.

20. (11) 11 Ind Cas 218 (219): 33 All 752.

21. (11) 12 Ind Cas 30 (31): 35 Bom 470.

can only be brought against persons in possession of trust property, who either claim the same as their own, or who deny the validity of the trust.²² Otherwise, it will lead to this, namely, that no suit can be brought under this Section in a case where all the trustees are dead or refuse to act.

Where an alienee is made a party and a declaration is granted against the alienee and the latter appeals therefrom, the trustee is not a necessary party to the appeal as a relief could be granted to the alienee in appeal without the presence of the trustees.²³

Under O. 1 R. 10, a Court can join the Advocate-General as a party to a suit brought by persons interested under S. 92, in order to effectually and finally adjudicate upon the questions relating to the administration of the trust.²⁴ See also the undermen-tioned decision.²⁵

29. Compromise of suit.—In earlier decisions of the Calcutta High Court it was held that as long as the question whether the endowment is a *public* one or not is still in dispute, or if it is proved that the endowment is a public one, a suit under Section 92 cannot be compromised.¹ This view has been dissented from in a later decision of the same Court. It was there held that O. 23 of the Code does not exclude suits under this Section and that there is nothing in law to prevent the Court from passing a compromise decree.² The Madras High Court has assumed the correctness of this view but holds that a compromise under which any portion of the trust properties is given to a stranger ought not to be sanctioned by the Court.³ See also the case cited below.⁴

30. Abatement of suit.—Before the decision of the Judicial Committee in *Raja Anand Rao v. Ramdas Daduram*¹ there was a conflict of decisions as to whether, where one of the two plaintiffs dies, the suit abates unless some other person who has the necessary interest and who has obtained the required sanction is brought on record in his place. The Allahabad High Court held that it did,² while the Madras High Court and the Chief Court of the Punjab held that it did not abate, on the ground that the suit is a *representative* one instituted on behalf of all the persons interested in the trust, and that the Court could add parties even without their obtaining the sanction of the Advocate-General.³ According to the Oudh Judicial

(22.) AIR 1928 Mad 376 (377) : 46 Mad 300. (Heli-at-law in possession of trust property is a proper party.)

(27.) AIR 1927 Mad 710 (712).

(24.) AIR 1924 Bom 518 (520). (Claim for accounts and directions against defendants in actual management.)

(11.) 12 Ind Cas 80 (81) : 35 Bom 470.

(19.) AIR 1919 Mad 489 (440) : 50 Ind Cas 58 (58).

(24.) AIR 1924 Pat 657 (660) : 3 Pat 842.

(11.) 9 Ind Cas 358 (358) (Bom).

(07-08) 4 Low Bur Rul 183.

(91.) 15 Bom 612 (621, 622).

(89.) 11 All 18 (22, 25) (PB).

(23.) (14.) AIR 1914 Mad 708 (711) : 38 Mad 1064.

(25.) (37.) AIR 1937 Oudh 229 (232) : 18 Luck 255.

(In a suit under S. 92, Civil Procedure Code, for settling a scheme for a trust, it is necessary to implead as a defendant a person who is not merely a beneficiary but is a near relation of the founder of the trust and has got the necessary qualification which, under the terms of the

trust-deed, entitles him to be made a trustee, in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit.)

Note 29

1. (15.) AIR 1915 Cal 198 (194).

2. (25.) AIR 1925 Cal 187 (189).

3. (19.) AIR 1919 Mad 659 (661).

4. (39.) AIR 1939 Rang 108 (109) : 1938 Rang L R 252. (Suit relating to public charity—Case involving allegations of serious breaches of trust by trustees—It is improper to allow compromise between plaintiffs and defendants. It is better if Advocate-General is brought on record in all such cases.)

Note 30

1. (21.) AIR 1921 P C 123 (124) : 48 Cal 493 : 17 Nag L R 37 : 48 Ind App 12 (P O).

2. (15.) AIR 1915 All 59 (59) : 37 All 296.

3. (33.) AIR 1933 Mad 854 (854, 855) : 57 Mad 158. (Two out of three plaintiffs dropping out after filing of suit.)

Commissioner's Court, the necessity for co-operation of two or more persons is confined to the *institution* of the suit, and therefore when one plaintiff dies, the surviving plaintiff can alone carry on the suit or appeal.⁴

The Judicial Committee, in the abovementioned case, has held that a suit under Section 92 is not prosecuted by individuals for their own interests but as representatives of the general public, and that such a suit does not fail on the death of the parties who originally filed the suit.⁵ The Allahabad view therefore seems to be no longer law.⁶

Where in a suit under this Section against a trustee, the *defendant* trustee dies, the question whether the suit abates depends upon the relief claimed in the suit. If the relief claimed is solely the removal of the trustee, the suit will, of course, abate. But if, in addition to the removal, other reliefs, such as the framing of a scheme, are prayed for, the suit will not abate but will survive against the successor-in-office of the deceased defendant.⁷

31. Suit, if can be brought in forma pauperis.—The provisions of O. 33: of the Code could not have been intended by the Legislature to be combined with those of Section 92 and therefore a suit under Section 92 cannot be instituted in *forma pauperis* especially when the plaintiffs' intention to sue as paupers was not brought to the notice of the Advocate-General before granting sanction.¹

32. Suit under the Section need not be contentious.—Section 539 of the old Code did not contain the words "whether contentious or not" but it was nevertheless held by the Calcutta and Madras High Courts that a suit under that Section need not be contentious.² The said words have been now introduced in the present Section in order to give effect to those decisions and to make the Section clearer.

33. Section is mandatory — Sub-section (2).—Under the Code of 1859 there were no special provisions for the institution of suits relating to public charities. Suits, therefore, relating to such matters could under that Code be brought in the ordinary Courts by certain persons as plaintiffs. For instance, persons who were appointed to supervise over trustees could sue for their removal for misconduct, in the

time—Court can permit parties to proceed with suit or appeal against remaining parties—Provisions of O. 22, Civil P. C., cannot be made applicable to suits or appeals in representative capacity under Section 92, or O. 1 R. 8 of the Code.]

7. ('26) AIR 1926 Mad 162 (163) : 48 Mad 688. (Death of defendant—Suit does not abate—Prayer for removal of trustee and for scheme—Scheme is not an ancillary relief to removal.) ('34) AIR 1934 Pat 443 (446). ('34) AIR 1934 All 315 (317). ('16) AIR 1916 Mad 318 (320). ('25) 91 Ind Cas 106 (106) (Mad). (Suit for removal of trustee and for scheme—Scheme not pressed—Suit abates on death of trustee.)

Note 31
1. ('12) 14 Ind Cas 731 (732) : 15 Oudh Cas 202. Note 32
1. ('93) 20 Cal 810 (817). ('91) 14 Mad 186 (222).

(25) AIR 1925 Mad 244 (244). ('17) AIR 1917 Mad 389 (390) : 40 Mad 110. ('18) AIR 1918 Lab 146 (147) : 1918 Pun Re No. 97. 4. ('15) AIR 1915 Oudh 181 (182). 5. ('21) AIR 1921 P C 128 (124) : 48 Cal 498 : 17 Nag L R 37 : 48 Ind App 12 (P C). (Suit for appointment of new trustee — Defendant dying—Scheme can be ordered.) [See also ('38) AIR 1938 P C 184 (186) : 65 Ind App 198 : 1 L R (1938) Lab 383 : 32 Sind L R 749 (P C).] 6. ('34) AIR 1934 All 1 (2) : 55 All 687. (Plaintiffs appellants—Death of one after institution of appeal.) [See also ('36) AIR 1936 Lab 361 (361). ('37) AIR 1937 Pat 149 (151). (Parties permitted by Court to sue or to be sued in representative capacity — Death of some parties during pendency of suit or appeal—Suit or appeal does not abate by failure to bring on record the legal representatives of such persons, within

ordinary Courts¹ and members of a community could, under Section 30 (O. 1 R. 8 of the Code), bring a *representative* suit also in the ordinary Courts for declarations, etc., with reference to the trust.² Section 539 was introduced for the first time by the Code of 1877 and was repeated in the Code of 1882, but there was no provision therein corresponding to sub-section (2) of the present Section. (Section 539 of the Code of 1877, moreover, did not apply to *religious* trusts or to trusts which were religious as well as charitable.³)

There was consequently a conflict of opinion whether Section 539 was *mandatory* or whether it was merely a *directory* and an *enabling* provision, having no restrictive effect on any *independent* rights of suit.⁴ It was with a view to settle this conflict that the Legislature introduced sub-section (2) of the present Section, clearly removing the classes of suits specified therein from the cognizance of ordinary Courts, and constituting a *special tribunal* for the trial thereof.⁵ The cases before 1908, therefore, holding that the Section was only an enabling one which did not bar independent rights of suit, in regard to the reliefs specified in the Section, are no longer good law.⁶

In considering if the Section is applicable, it is not merely the right of the plaintiff that must be looked into but also the *nature of the relief* claimed and if that is one specified in the Section the direction laid down in the sub-section (2) must be obeyed.⁷ Thus, a District Judge cannot order the suspension or removal of a *mahant* on a mere *report* instead of in a *suit* as required by this Section.⁸ A suit does not cease to be one under Section 92 and subject to its mandatory provisions simply because reliefs not within the Section are claimed *in addition* to reliefs within the Section.⁹ And conversely, the fact that some of the reliefs asked for in the plaint cannot be granted on account of the absence of the consent in writing of the Advocate-General, would not disentitle the plaintiff to the other reliefs.¹⁰

The sub-section which speaks of a suit claiming any of the reliefs specified in sub-section 1 must be read with the latter sub-section and if it is so read, it follows that it is not every suit in which any of the reliefs specified in sub-section 1 is claimed

Note 33

1. ('98) 21 Mad 406 (408). (Suit by general trustee.)
- ('07) 29 All 27 (28).
2. ('06) 38 Cal 905 (907).
3. ('82) 5 Mad 383 (384).
- ('85) 11 Cal 33 (36, 37).
4. ('07) 29 All 27 (28). (Section does not affect independent rights of suit.)
- ('89) 11 All 18 (22, 23, 25, 26, 27). (Suit by work-shippers for directions in the nature of scheme and for declaration is one falling under S. 539 and is not maintainable without sanction.)
- ('98) 21 Mad 406 (408, 409). (Section 539 is only an enabling one.)
- ('91) 14 Mad 1 (15). (Do.)
- ('84) 8 Bom 432 (431). (Section 539 is directory only.)
- ('06) 33 Cal 905 (910). (Section is not mandatory.)
- ('06) 33 Cal 789 (801, 803). (Section 539 is not restrictive but cumulative.)
- ('07) 1 Sind LR 155 (158). (Section 539 is directory.)
- ('92) 16 Bom 626 (628). (Section 539 is mandatory.)
- ('85) 11 Cal 33 (36). (Do.)
- ('97) 21 Bom 48 (51, 52). (Do.)
5. ('12) 18 Ind Cas 264 (266) : 5 Sind L R 184.
- ('19) AIR 1919 Low Bur 56 (57).
- ('18) 20 Ind Cas 767 (767) (Mad).
- ('18) AIR 1918 Mad 1179 (1181).
6. ('25) AIR 1925 Pat 544 (547) : 4 Pat 741.
- ('25) AIR 1925 Rang 294 (294, 295) : 3 Rang 213.
7. ('19) AIR 1919 All 208 (205).
- ('38) AIR 1938 Mad 70 (70, 71).
- ('17) AIR 1917 Cal 678 (678). (S. 92 cannot be avoided by persons having no interest in the trust on suing as representing "the whole Hindu population.")
- ('15) AIR 1915 Bom 38 (40) : 39 Bom 580.
- ('18) AIR 1918 All 2 (8) : 41 All 1.
- ('18) AIR 1918 Mad 1179 (1181).
- ('27) AIR 1927 All 526 (529) : 49 All 191. (Suit against trespasser—Question of breach of trust and nature of property would not arise.)
- ('15) AIR 1915 Mad 915 (916). (Suit not under S. 92—No sanction is necessary.)
- [See ('35) AIR 1935 Mad 825 (826) : 58 Mad 988 (F B). (Whether suit falls under Sec. 92 depends upon nature of reliefs sought and not on character plaintiff sues in.)]
8. ('18) AIR 1918 All 218 (219).
9. ('18) AIR 1918 Mad 1179 (1181).
10. ('38) AIR 1938 Pat 246 (248) : 13 Pat 65.

A District Court in which a suit could not have been instituted as being not one within the Section¹⁰ or a Sub-Judge finding that necessary sanction has not been obtained,¹¹ should return the plaint and not dismiss the suit.

An application for the *modification* of a scheme framed by the District Court and confirmed by the High Court can be entertained only by the High Court but the District Court can give such *directions* as may be necessary to carry out the modified scheme.¹²

The Court of a Subordinate Judge is not disentitled or debarred from entertaining a suit for the administration of the estate of a deceased testator, simply because the will contains directions for applying some portion of the estate for charitable purposes. But he may appoint a receiver in respect of such properties until directions thereto are obtained by the Advocate-General or the Collector from the District Court.¹³

Section 92 does not confer on the High Court powers to entertain suits in its original jurisdiction, in respect of charities in the mufassil.¹⁴

The District Court has no power to transfer to a Subordinate Court a suit under this Section instituted before itself.¹⁵ (See Note 11 to Section 24 ante.)

39. Valuation of suit.—The reliefs claimed in a suit under Section 92 are incapable of valuation and are therefore chargeable under Article 17 clause (6) of the Court-Fees Act, 1870.¹ Even a prayer for *possession* or for a declaration and *consequential* relief under this Section will not take it out of the operation of Article 17 clause (6) of the Court-Fees Act and bring the same under Section 7 of the said Act.² The reason is that the plaintiffs in a suit under Section 92 do not claim the reliefs for their *own advantage* but as representing the public.³ The Bombay High Court has held that where in addition to the reliefs claimed under Section 92, a relief for an *account* is also asked for, the suit is chargeable with a court-fee under Section 7 (iv) (f) of the Court-Fees Act.⁴ This view, being opposed to the opinion of all the other High Courts, does not seem to be a sound one.

A suit of the nature specified, filed in the High Court, is not exempt from court-fees on the ground that the court-fees payable under the schedules thereto have no application to suits filed in the ordinary jurisdiction of the High Court, but *will* have to be taxed under the High Court-fees Rules of that Court.⁵

It may be noted in this connection that the Madras Court-fees (Amendment) Act of 1912 specifically provides in Schedule II Article 17 (iii) for a suit under Section 92 of the Code, charging a fixed fee of Rs. 50 therefor.

40. Limitation.—The cause of action for a suit under Section 92 occurs with every breach of trust or whenever the direction of the Court is necessary.¹ The period of limitation, however, depends upon the question whether the trustee is an *express* trustee or trustee *de son tort*. In the former case, if the suit is for following trust

10. ('99) 21 All 187 (188).
11. ('08) 25 All 681 (683).
12. ('12) 17 Ind Cas 969 (970, 972) (Cal.).
13. ('16) AIR 1916 Bom 281 (282): 40 Bom 439.
14. ('10) 5 Ind Cas 729 (732) (Mad.).
15. ('35) AIR 1935 Bom 172 (173): 59 Bom 412.
- Note 39**
1. ('10) 7 Ind Cas 92 (93) (Cal.).
(1928) AIR 1928 Lah 113 (113): 8 Lah 730.
(197) 19 All 60 (63).

- (199) 21 All 200 (203).
(18) AIR 1918 Lah 146 (147): 1918 Pun Re No. 97.
2. ('25) AIR 1925 Mad 722 (722).
(28) AIR 1928 Lah 113 (113, 114): 8 Lah 730.
(Suit does not come under Section 7 (iv) (c).)
3. ('28) AIR 1928 Lah 113 (114): 8 Lah 730.
4. ('85) 9 Bom 22 (24).
5. ('27) AIR 1927 Mad 940 (942, 1943).
- Note 40**
1. ('99) 23 Bom 659 (665).

property in the hands of the trustee or his representative, there is no period of limitation and the suit is not barred by any length of time under Section 10 of the Limitation Act. In the latter case, however, the suit will be governed by Article 120 of the Act. In a suit, therefore, for accounts under this Section against trustee *de son tort*, the defendant is liable to render accounts only for six years preceding the suit.² The Calcutta High Court has, on the other hand, held that a trustee *de son tort* stands in the same position as an express trustee for the purposes of limitation.³ This view, it is submitted, is contrary to the general *consensus* of decisions and cannot be supported.⁴

Where the *de jure* trustees of a trust lose their right against the *de facto* trustees by limitation, that fact will not confer on the *de facto* trustees immunity from a suit by the Advocate-General under this Section.⁵

Section 5 of the Limitation Act will apply to appeals in scheme suits also. Where a scheme suit is dismissed and on the plaintiffs appealing therefrom, the appeal is returned to them for re-presentation but is not re-presented by them in time *malà fide*, other persons interested can re-present it after the time fixed and claim that the delay should be excused under Section 5 of the Limitation Act.⁶

41. Decision under the Section, whether operates as *res judicata*. — A decree passed in a suit under Section 92 is binding not only on the trust and the trustee but also on all worshippers of the temple.⁷ The reason is that a suit under Section 92 is a *representative* one, the plaintiffs representing *all* persons interested in the trust.⁸ The actual parties to the suit will also be bound by the decree. Thus the transferee of trust property, who is made a party to the suit is debarred from going behind it in any subsequent suit.⁹

Where, however, the suit is *fraudulently* withdrawn, it cannot operate as *res judicata*.⁴

Again, when a suit under Section 92 ceases to be a representative one, it ceases also to be binding except on the *actual parties* thereto. Thus, where a suit filed with sanction was amended by adding strangers and claiming reliefs not covered by the sanction, the suit ceases to be a representative one and cannot bind the public.⁵

A previous litigation in a *private* capacity is not *res judicata* in a subsequent suit in a *public* capacity under this Section.⁶

2. ('24) AIR 1924 All 884 (887) : 47 All 17.

3. ('20) AIR 1920 Cal 558 (559).

4. ('24) AIR 1924 All 884 (887) : 47 All 17.

('22) AIR 1922 Mad 57 (59) : 45 Mad 416.

('21) AIR 1921 Mad 125 (126) : 44 Mad 277.

5. ('98) 22 Bom 216 (220).

[See also ('22) AIR 1922 Mad 394 (396, 397).]

6. ('28) AIR 1928 Mad 456 (458).

Note 41

1. ('25) AIR 1925 Mad 1070 (1071).

('11) 12 Ind Cas 449 (452) : 36 Mad 364. (Scheme framed by Court—A trustee though not a party

6. ('25) AIR 1925

Cal 512 (513).

5. ('23) AIR 1923

4. ('28) AIR 1928

3. ('11) 11 Ind Cas 449 (452)

('09) 33 Bom 216 (220)

('22) AIR 1922 Mad 394 (396, 397)

498) : 17 Nag L.R. 57

2. ('21) AIR 1921

scheme.)

to the suit cannot establish

93. [S. 539, last para.] The powers conferred by sections 91 and 92 on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Provincial Government, exercised also by the Collector or by such officer as the Government may appoint in this behalf.

[1877, S. 539, last para.]

a. This Section and S. 92 have no application as regards Tirumalai-Tirupati Devasthanams: See the Tirumalai-Tirupati Devasthanams Act (Madras Act 19 of 1933), S. 44 (2).
b. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

Synopsis

- 1. May be exercised by the Collector.
- 2. Or by such officer as the Provincial Government may appoint.
- 3. Visitorial powers of the Collector.
- 4. Previous sanction of the Provincial Government.

1. May be exercised by the Collector. — The Collector cannot delegate his functions to any one else.¹ Where the Collector refuses to give the sanction it may be granted by the Advocate-General.²

2. Or by such officer as the Provincial Government may appoint. — For a list of such officers, see the foot-note below.³

3. Visitorial powers of the Collector. — See Note 4 to Section 92 and the undermentioned case.⁴

4. Previous sanction of the Provincial Government.—The Section provides for two distinct matters: (1) the appointment of an officer to exercise the powers conferred by Sections 91 and 92 on the Advocate-General, and (2) the grant of "previous sanction" by the Provincial Government to the exercise of such powers. Both the appointment and the previous sanction must exist before Section 93 can be applied.⁵ Accordingly a suit instituted without such previous sanction is liable to be dismissed.⁶ The fact that the Provincial Government has appointed an officer under this Section generally is no bar to its appointing the Collector or any other person to exercise such powers in any particular case.⁷

Section 93 — Note 1

- 1. See Note 27 to Section 92.
- 2. (28) AIR 1928 Mad 401 (401).

Note 2

- 1. (a) In Lower Burma, by the Government Advocate (See Burma Gazette, 1893, Pt. I, p. 99).
- (b) In Moulmein in respect of the trust for the maintenance of certain pagodas, by the Deputy Commissioner (See Burma Gazette, 1889 Pt. I p. 221).
- (c) In Mandalay, by the Deputy Commissioner (See Burma Gazette, 1890, Pt. I, p. 22).
- (d) In the Central Provinces, by the Secretary to the Chief Commissioner (See Central Provinces List of Local Rules and Orders, Ed., 1896, p. 157).
- (e) In the Madras Presidency, by all Collectors, except the Collector of Madras (See Madras List of

Note 3

- 1. (82) 12 Bom 247 (260).

Note 4

- 1. (32) AIR 1932 P C 51 (54) : 59 Ind App 121 : 53 All 990 (PC).
 - 2. (32) AIR 1932 P C 51 (54) : 59 Ind App 121 : 53 All 990 (PC).
 - 3. (31) AIR 1931 P C 121 (124) : 58 Ind App 460 App 460 (PC).
- [See also (31) AIR 1931 P C 121 (124) : 58 Ind 53 All 990 (PC).]
- Local Rules and Orders, Ed. 1898 Vol. I, p. 197.)
- (f) In the North-Western Provinces and Oudh, by the Legal Remembrancer (See North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p. 114.)

After the decision of the Privy Council in *Prem Narain's case*⁴ referred to above, the Public Suits Validation Act (XI of 1932) has been passed whereby —

(1) the institution of suits *pending* at the commencement of the Act is not to be deemed to be invalid by reason of the "previous sanction" not having been obtained as required by this Section;

(2) suits dismissed after the 30th day of November 1931 (the date of the decision in *Prem Narain's case*) and before the commencement of the Act, solely on the ground of want of such previous sanction are to be restored to file on an application made therefor within six months from the commencement of the Act; and

(3) appeals dismissed between the said dates on the said ground, are to be re-tried on an application made therefor within six months from the commencement of the Act.

See also the undermentioned cases.⁵

And in cases where the suit is pending on the date of the passing of the above-mentioned Act, it is not necessary for the plaintiffs to obtain sanction from the Provincial Government during the pendency of the suit.⁶

Where a suit was brought with the permission of the Collector but without the sanction of the Provincial Government and a decree was passed in such suit before the decision of the Privy Council in *Prem Narain's case*, it was held that the decree was not a nullity for want of jurisdiction.⁷

Where a suit is restored under the Public Suits Validation Act of 1932, the suit must be proceeded with and tried in accordance with law. The suit cannot be again dismissed on the ground that there has been no *valid* consent given by the Collector.⁸

4. See foot-note (1) above.

5. ('34) AIR 1934 Bom 257 (259).

('33) AIR 1933 Oudh 22 (24) : 8 Luck 266.

6. ('33) AIR 1933 Oudh 22 (24) : 8 Luck 266.

7. ('35) AIR 1935 Nag 28 (29).

8. ('36) AIR 1936 Cal 815 (816).

PART VI.

SUPPLEMENTAL PROCEEDINGS

94.

[New.] In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

Supplemental proceedings.

- (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;
- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
- (e) make such other interlocutory orders as may appear to the Court to be just and convenient.

[See Orders 38, 39, 40.]

Synopsis

1. Scope of the Section.
2. "If it is so prescribed."
3. Warrant of arrest — Clause (a). See Order 38.
4. Order for security or attachment—Clause (b). See Order 38.
5. Temporary injunction — Clause (c).
6. Appointment of Receiver — Clause (d). See Order 40 Rule 1 and Section 51.
7. "Such other interlocutory orders" — Clause (e).

1. Scope of the Section.—This is a leading provision summing up the general powers of the Courts in regard to the various kinds of interlocutory orders. The details of procedure have been relegated to the rules.¹ By virtue of Section 7 *ante*, clauses (c) and (e) of the Section do not extend to Provincial Small Cause Courts.²

Section 94 — Note 1

1. See Notes on Clauses.

2. (19) AIR 1919 Cal 6 (6) : 46 Cal 717.

2. "If it is so prescribed."—"Prescribed" means prescribed by rules. See Section 2 clause 16. It has been held by the High Court of Madras that the Courts shall have power to pass the orders referred to in clauses (a) to (e) of the Section *only* if it is so prescribed by the rules and that this would exclude the inherent power of the Court under Section 151 to pass such orders where they are not prescribed by rules.¹ The Lahore High Court has, on the other hand, taken the view that the Court has an inherent power to act *ex debito justitiae* even in cases not prescribed by rules.² The High Court of Patna and the Judicial Commissioner's Court of Sind have taken the same view as the Lahore High Court.³ The High Court of Allahabad seems to be of the same view as that of the Madras High Court.⁴ In a case before the Bombay High Court a person brought a suit under O. 21 R. 103 and applied for an injunction restraining the defendant from taking possession of the property pending disposal of the suit. The injunction was refused on the ground that the provisions of Rules 1 and 2 of Order 39 did not apply.⁵ No question, however, of inherent jurisdiction was either advanced or considered in the case. See also Notes 3 and 22 to O. 39 R. 1.

3. Warrant of arrest—Clause (a).—See Order 38.

4. Order for security or attachment—Clause (b).—See Order 38.

5. Temporary injunction—Clause (c).—The applicant for an injunction must make out a *prima facie* case therefor.¹ A mere apprehension of interference with the plaintiff's collection of rent and of the breach of the peace does not justify the grant of an injunction.² Nor will the Court exercise a proper discretion in granting an injunction restraining the opposite party from the *bona fide* exercise of his statutory rights.³ Order 39 must be read with this clause. O. 39 R. 2 (3), empowering the Court to punish a party for disobedience of an injunction is not confined to suits of the nature specified in O. 39 R. 2 but applies to disobedience generally of an injunction granted by the Court whether under Order 39 or under Section 94.⁴

An injunction cannot be issued by one Court to another Court.⁵
For a fuller discussion of the subject, see O. 39 Rr. 1 and 2.

6. Appointment of Receiver—Clause (d).—See O. 40 R. 1 and Section 51.

Note 2

1. ('96) AIR 1926 Mad 258 (258).
- ('27) AIR 1927 Mad 687 (687, 688).
- ('28) AIR 1928 Mad 491 (492). (Test in (1919) 1 K. B. 410, Cohen v. Rothfield, not applicable to this case.)
- ('33) AIR 1933 Mad 500 (501) : 56 Mad 563.
- ('32) AIR 1932 Mad 180 (181).
2. ('20) AIR 1920 Lab 436 (437).
- ('33) AIR 1933 Lab 73 (74). (But plaintiff must establish that there is no other remedy and if injunction not granted injury would be caused.)
- ('33) AIR 1933 Lab 437 (439) : 14 Lab 68. (Proceedings under the Companies Act—Court has power to make summary order under this Section for the protection of the property to which the Company is prima facie entitled.)
- ('23) AIR 1923 Lab 144 (145). (Though the case is not covered by the provision of O. 39.)
- ('27) AIR 1927 Lab 833 (834). (But plaintiff to establish a strong case that if injunction not granted, injury will ensue.)
3. ('18) AIR 1918 Pat 214 (215) : 3 Pat L Jour 456. (But it must be shown that making of that order was in accordance with the principles of
1. ('28) AIR 1928 Cal 464 (465) : 55 Cal 978. (Case under Section 84, Calcutta Port Act (3 of 1890).)
- ('36) AIR 1936 Pesh 11 (11).
2. ('26) AIR 1926 Cal 604 (605).
3. ('20) AIR 1920 Pat 423 (423) : 5 Pat L Jour 76. (A Civil Court has no jurisdiction to issue an injunction to a party to a proceeding under Section 40, Bengal Tenancy Act.)
4. ('18) AIR 1918 Mad 340 (341).
5. ('95) AIR 1935 Pesh 182 (184).

Note 5

5. ('14) AIR 1914 Bom 148 (149).
1. ('28) AIR 1928 Cal 464 (465) : 55 Cal 978. (Case under Section 84, Calcutta Port Act (3 of 1890).)
- ('36) AIR 1936 Pesh 11 (11).
2. ('26) AIR 1926 Cal 604 (605).
3. ('20) AIR 1920 Pat 423 (423) : 5 Pat L Jour 76. (A Civil Court has no jurisdiction to issue an injunction to a party to a proceeding under Section 40, Bengal Tenancy Act.)
4. ('18) AIR 1918 Mad 340 (341).
5. ('95) AIR 1935 Pesh 182 (184).

7. "Such other interlocutory orders." — Clause (e). — When a witness summoned to produce a document under O. 16 R. 6 fails to comply with the summons, he may be punished by arrest and imprisonment or attachment under O. 16 R. 10. An order directing the furnishing of security and submission of accounts under O. 39, R. 2 (2) is an order of the kind contemplated by S. 94 clause (e).²

95. [Ss. 491, 497] (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted³ under the last preceding section, —

Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds,⁴ or (b) the suit of the plaintiff fails⁵ and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court,⁶ and the Court may, upon such application, award against the plaintiff by its order¹ such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury⁷ caused to him :

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction. (2) An order determining any such application shall bar any suits¹³ for compensation in respect of such arrest, attachment or injunction.

O. 40.]

Synopsis

- | | |
|--|---|
| <p>1. Court other than that by which the arrest, etc., was ordered cannot grant compensation.</p> <p>9. Provincial Small Cause Court.</p> <p>10. Undertaking, effect of.</p> <p>11. Chartered High Court, power of.</p> <p>12. Counter-claim for compensation as defence to suit.</p> <p>13. Regular suit, if and when barred.</p> <p>14. Limitation.</p> <p>15. Appeal.</p> | <p>1. Legislatives changes.</p> <p>2. Analogous law.</p> <p>2a. Scope of the Section.</p> <p>3. The arrest or attachment must have been actually effected or the temporary injunction must have been granted.</p> <p>4. The attachment or arrest must have been applied for on insufficient grounds.</p> <p>5. "Or the suit of the plaintiff fails."</p> <p>6. Procedure for obtaining compensation under this Section.</p> <p>7. Amount and basis of compensation.</p> |
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Note 7

1. ('28) AIR 1928 Mad 299 (305) : 51 Mad 1.
2. ('12) 17 Ind Cas 361 (362) (Cal).

Other Topics (Miscellaneous)

Formal application — A counter petition is sufficient. See Note 6.
Formal application — Claim in a counter-state-ment of an applicant. See Note 13.
Order under this Section, when to be passed. See Notes 6 and 1.
Right of defendant to apply even prior to service of suit summons. See Note 8.
Formal application—Necessity of. See Note 6.
but also for "general damages." See Note 7.
Compensation not only for "special damages" suit be decreed. See Note 13.
Compensation for excessive attachment, even if merits. See Note 3.
Applicability to conditional and ex parte attach-

1. Legislative changes. — This Section amalgamates and corresponds to Ss. 491 and 497 in the Code of 1882. The material changes introduced are —
(a) The words "by its order" have been substituted for the words "in its decree" thereby showing that the order for compensation must be *separately* made and must not be embodied in the decree, as was required under the old Code.
(b) The words "order determining any such application" in sub-section (2) have been substituted for the words "award under this Section," making it clear that it is not only when a compensation has been *granted* under this Section but also when it has been applied for and *refused* that a suit for compensation is barred. See Note 13 below.

2. Analogous law. — This Section is analogous to Sec. 250 of the Criminal Procedure Code which provides for compensation being awarded to an accused person against whom a frivolous or vexatious complaint is made.¹ But the difference between the two Sections is that while the award of compensation under Section 250, Criminal Procedure Code, is no bar to a suit for compensation, the determination of an application for compensation under Section 95 of the Civil Procedure Code precludes a separate suit for compensation.²

2a. Scope of the Section. — The Section applies also to cases in which the plaintiff is a minor represented by a next friend.³

The Section applies to arrest or attachment *before judgment*. There is no corresponding provision in the Code as regards proceedings in *execution* of a decree.⁴

3. The arrest or attachment must have been actually effected or the temporary injunction must have been granted. — No compensation is awardable under this Section unless the attachment or arrest has been *actually effected*.⁵ The mere obtaining of an order for attachment or arrest is not enough.⁶ But it is not necessary that the defendant arrested should have received the summons in the suit.⁷

The Section applies also to temporary attachments under O. 38 R. 5⁸ and a

Section 95 — Note 1

1. ('07) 17 Mad L Jour 810 (811). (A case under old Code. Order should be embodied in the decree and not postponed.)
(93-1900) 1893-1900 Low Bur Rui 411 (412, 418, 414). (Do.)
(13) 21 Ind Cas 756 (757) (Mad).
Note 2
1. See the following cases :
(11) 12 Ind Cas 507 (509) : 35 Mad 598.
(03) 30 Cal 123 (129) (FB).
2. ('11) 12 Ind Cas 507 (509) : 35 Mad 598.
Note 2a.
1. ('35) AIR 1935 Mad 886 (887) : 59 Mad 416.
2. ('39) AIR 1939 Pat 13 (16, 17).

Note 3

1. ('17) AIR 1917 Mad 145 (147) : 33 Mad 932.
(More interlocutory application, however null-cious, would not found an action.)
(25) AIR 1925 Bom 357 (353, 313) : 49 Bom 629.
(Section does not apply where attachment appli-ed for but not been effected)
2. ('39) AIR 1939 Pat 13 (16, 17).
3. ('91) 15 Bom 130 (131).
4. ('19) AIR 1919 Pat 13 (16, 17).
(32) AIR 1932 Pat 13 (16, 17).
5. See also the cases in footnote (1).

creditor attaching before judgment, goods not belonging to his debtor will be liable in damages to the person to whom the goods belong even though he has acted honestly.⁵

4. The attachment or arrest must have been applied for on insufficient grounds.—The words “on insufficient grounds” must be taken to mean “without reasonable or probable cause.”¹ Where in an application for attachment before judgment, the only ground put forward was that unless the attachment was made the plaintiff, in the event of success, would have difficulty in realising the decretal amount, the application is made on insufficient grounds and the defendant is entitled to reasonable compensation.²

Where, as a matter of fact, there have been sufficient grounds for applying for attachment, the mere fact that the grounds have not been mentioned in the application for attachment or arrest before judgment will not make the plaintiff liable for compensation.³

5. “Or the suit of the plaintiff fails.”—A defendant in a suit in which an arrest or attachment has been effected or a temporary injunction granted will be entitled to compensation under this Section, if—

- (1) the plaintiff's suit fails, and
- (2) there was no reasonable or probable ground for instituting it.

It is not necessary to show in such a case that the arrest or attachment was *applied for on insufficient grounds*. The mere fact that the plaintiff's suit for injunction was dismissed because his conduct had been fraudulent,¹ will not enable the defendant to claim compensation under this Section. The reason is that there was *no want of reasonable and probable cause for instituting the suit*, the same being dismissed on the ground of plaintiff's fraudulent conduct. Nor will mere evidence of malice prove the absence of reasonable or probable ground for instituting the suit.²

6. Procedure for obtaining compensation under this Section.—An application by the defendant is necessary for obtaining compensation under it. Beyond this there is no particular procedure or formality to be followed.¹ But it is conceived that the application is to be made only after the suit is heard and not before.² See also Note 1 above. Further, an application for compensation for wrongful attachment of property cannot be entertained by the Court before the order of attachment is set aside.³ It has been held that the Court has power under this Section to permit the conversion of an application for compensation into a suit for compensation upon payment of the necessary court-fees.⁴

7. Amount and basis of compensation.—Under this Section the Court can grant damages only to the extent of Rs. 1,000. There is also a further restriction and that is that it cannot award, as compensation, any sum in excess of its pecuniary jurisdiction.

(131) 1931 Mad W N 956 (957). (Even though suit is decreed and attachment is made absolute—The portion of this Section relating to attachment before judgment is extended to suit under the Bengal Rent Act (VI of 1862) or under Act X of 1859.)

5. See Note 4 to S. 62.

Note 4

1. (94) 18 Bom 717 (720).
2. (34) AIR 1934 Oudh 429 (430).
3. (37) AIR 1937 Nag 126 (127); ILR 1938 Nag 361.

(131) 1931 Mad W N 956 (957).
2. (23) AIR 1923 Mad 352 (353).
(31) 1931 Mad W N 956 (957).
3. (34) AIR 1934 Mad 638 (639). ((1878) 7 Ch D 866, Lees v. Patterson, followed.)
4. (12) 16 Ind Cas 443 (444) (Cal). (Art. 42, Limitation Act applies to such suit.)

Note 5

1. (03) 13 Mad L Jour 70 (71).
2. (15) AIR 1915 Cal 173 (174, 175); 42 Cal 550.
1. (17) AIR 1917 Mad 885 (885). (A counter petition is sufficient.)

The grant of compensation under this Section is a matter of discretion and the discretion has to be exercised in a judicial manner. Where a Court gives no reasons for refusing an application under this Section, the order is not one according to law.¹

The Section authorises the award of reasonable compensation to the defendant for the expense and injury caused to him. There is a conflict of decisions as to whether humiliation and loss of prestige will be included in the term 'injury.' The Calcutta High Court has held that such humiliation and loss of prestige will not be included in the term and that no compensation can be awarded under this Section on such grounds,² while the contrary view has been held by the Madras High Court.³

In the case of a suit by a third party for damages for wrongful attachment of his property in execution of a decree passed against another person, it was held by the Privy Council that the wrong was actionable *per se* and that the plaintiff was entitled to general damages although he did not prove any special damage.⁴

8. Court other than that by which the arrest, etc., was ordered cannot grant compensation.—Under this Section compensation can be awarded only by the Court by which the arrest, etc., was ordered and the application for compensation has to be made only to that Court.¹

9. Provincial Small Cause Court.—A Provincial Small Cause Court can neither order the attachment of *immovable property* nor award compensation under this Section for any such attachment.¹ But it can order the attachment of *moveables* and also award compensation for a wrongful attachment thereof under this Section.² A suit for damages for illegal attachment is not cognizable by a Small Cause Court.³ See also Section 7 (b) (1) and Order 38 Rule 13.

10. Undertaking, effect of.—Where a temporary injunction restraining the defendant from executing a decree obtained by him in another suit is granted on an undertaking by the plaintiff to compensate the defendant for the loss that he may suffer on account of such injunction, and the suit of the plaintiff is dismissed, the undertaking is to be enforced not by application to the Court *executing the defendant's decree* but to the Court which granted the injunction.¹

11. Chartered High Court, power of.—The question as to the applicability of Section 95 to suits entertained by a Chartered High Court on its original side has arisen in Bombay and the view expressed in the latest decision of that Court on the

Note 7

1. (134) AIR 1984 Oudh 429 (431).
2. (136) 164 Ind Cas 78 (73, 74) (Cal). (Humiliation and damage to prestige by reason of attachment before judgment—No right to damages or compensation.)
(132) AIR 1932 Cal 695 (696) : 59 Cal 1082. (Injunction—Person against whom injunction has been obtained must show that he suffered loss by his inability to do one or more of the things which the injunction restrained him from doing.)
3. (17) AIR 1917 Mad 885 (886). (Words "expense and injury" are not confined to some tangible injury that can be measured directly in money but include also general damage due to injury to reputation or the humiliation caused of necessity by the arrest.)
[See also (26) AIR 1926 Mad 962 (962). (Where in action for damages for arrest before judgment on insufficient grounds, no evidence as to

1. (98) 22 Bom 42 (46).
Note 8
1. (98) 22 Bom 42 (46).
(1865) 3 Suth W R Misc 28 (28).

Note 9
1. (07) 1907 Pun Re No. 77, p. 397.
2. (03) 26 Mad 504 (504).
(15) AIR 1915 Mad 1072 (1072).

3. (13) 18 Ind Cas 695 (695) (All). (Vide Art. 35 (i) Sch. II, Provincial Small Cause Courts Act (IX of 1887).
Note 10
1. (98) 22 Bom 42 (46).

point is that the Section does not apply to such suits and that hence the High Court can on an application by the defendant award under Rule 329 of the Bombay High Court Original Side Rules, compensation exceeding Rs. 1,000 for wrongful attachment before judgment.¹ But a different view was taken in an earlier decision of the same High Court.²

12. Counter-claim for compensation as defence to suit.—In a summary suit on a negotiable instrument under Order 37, a defendant who has been arrested before judgment and who claims compensation for such arrest, can, on that ground, apply for leave to defend the suit.¹

13. Regular suit, if and when barred.—It has been seen in Section 9 *ante*¹ that, as a general principle, where two proceedings or two remedies are provided by law, one of them must not be taken as operating in derogation of the other.² It has also been seen³ that a regular suit, according to the general principle, will not be barred by a summary and concurrent remedy being also provided therefor, but that if a party has elected to pursue his remedy under one provision, he is bound by it and cannot on his failing therein proceed under the other provision.

Applying these principles, it follows that a regular suit for compensation is not barred by the omission to proceed under the summary procedure provided for by this Section⁴ but that if an *application* is made and disposed of under this Section such disposal would operate as a bar to a regular suit, whatever may be the result of the application.⁵ A claim for compensation made in a *counter affidavit* against a petition for attachment before judgment is not an *application* for compensation required by Section 95 and cannot bar a regular suit.⁶ The suit barred under this Section and the application barred under this Section must be *ejusdem generis* with the same cause of action. Thus, an application under this Section is no bar to a subsequent suit for damages caused by reaping and removal of crop from the land, which the plaintiff was prevented from entering by the Court's injunction.⁷

There is, however, a difference between the conditions necessary for the maintainability of an application under this Section, and those necessary for the maintainability of a regular suit. In a *suit* for compensation the plaintiff must not only prove want of reasonable or probable cause for obtaining the arrest, attachment or injunction, but also that the defendant was actuated by *malice*.⁸ Malice is not

Note 11

1. ('26) AIR 1926 Bom 523 (524).
2. ('08) 10 Bom L R 1002 (1002, 1003).

Note 12

1. ('94) 18 Bom 717 (720).

Note 13

1. See Section 9, Notes 62 to 64.
2. ('86) 8 All 354 (361) (FB).
- (15) AIR 1915 Mad 197 (199) : 12 Ind Cas 664

3. See Section 9, Note 63.
4. ('66) 1 Agra 104 (105).
- (69) 11 South W R 143 (143).

5. ('74) 21 South W R 375 (376).
- (11) 11 Ind Cas 917 (918) (Low Bur). (The words

"an order determining an application" mean to grant an application or to refuse it.)

- (70) 13 South W R 305 (306). (Decision under the Code of 1859 that unsuccessful application did not bar suit is no longer law.)
6. ('20) AIR 1920 Mad 397 (399). (See the finding of the District Judge which is accepted by the High Court.)
7. ('32) 1932 Mad W N 536 (536, 537).
8. ('11) 12 Ind Cas 507 (509) : 35 Mad 598.
- (70) 2 N W P H C R 353 (357).
- (72) 4 N W P H C R 42 (44).
- (95) 1895 Pun Re No. 86, p. 407. (But proof of want of sufficient grounds for suit will raise presumption of malice.)
- (72) 18 South W R 440 (440). (Suit for damages cannot be maintained merely because the prior suit ended in his favour—He must further make out that there was not good and sufficient cause for the case taken by the plaintiff.)
- (26) AIR 1926 Cal 757 (759). (Collector of Customs made to detain goods by representation

necessarily hatred or enmity, but any improper motive. A plaintiff acts improperly in making use, for putting undue pressure on his debtor, of a process intended to prevent fraudulent conduct on the part of the debtor.⁹ A suit therefore lies for maliciously and wrongfully obtaining a temporary injunction¹⁰ or an excessive attachment of property.¹¹ When property is wrongfully attached and afterwards made away with, in collusion with the attaching officer, it is not necessary for maintaining a suit for compensation that a criminal prosecution should be previously instituted.¹² The mere institution of a malicious civil suit will not give rise to a cause of action for a suit for compensation. When therefore a decree for a *perpetual* injunction is made by the first Court but is set aside in appeal, the defendant cannot maintain a suit for damages caused by the said suit having been brought.¹³

There is a distinction between cases where the plaintiff in the suit for damages for wrongful attachment was a *party* to the suit in which the goods were wrongfully attached and cases where he was not such a party. It is only in the former cases that *malice* and want of reasonable or probable cause is to be proved by the plaintiff. In the latter case a suit will lie even though the attachment may have been made in good faith.¹⁴

14. Limitation.—As to the period of limitation applicable to suits for damages for *wrongful attachment of property*, see Articles 29, 36 and 49 of the Limitation Act and the undermentioned cases.¹

A suit for damages for wrongfully obtaining a *temporary injunction* is governed by Article 42 and time runs from the date when the temporary injunction is dissolved by the decree granting perpetual injunction.²

15. Appeal.—See Section 104, clause (g) and Note 17 to the Commentary thereto.

11. ('66) 6 Suth W R Miso 24 (25).
12. ('72) 18 Suth W R 27 (28).
13. ('15) AIR 1915 Cal 178 (175): 42 Cal 550.
14. ('24) AIR 1924 Rang 802 (807): 2 Rang 181. See also cases cited in Note 4 to S. 62, *ante*. [See also ('20) AIR 1920 Cal 846 (847, 848).]
- Note 14
1. ('15) AIR 1915 Cal 681 (685): 42 Cal 85. (Wrongful arrest of ship—Art. 29 held applicable.) (1900) 28 Mad 621 (626). (Wrongful attachment of goods—Art. 29 applies.) ('07) 29 All 615 (617). (Art. 29 applies.) ('20) AIR 1920 Mad 397 (399). (Art. 36 applies to a suit for damages on account of injury to stocks caused by making an attachment before judgment.) ('04) 6 Bom L R 704 (705). (Wrongful attachment before judgment—Art. 36 applies.) ('96) 19 Mad 80 (82). (Art. 49).
2. ('15) AIR 1915 Cal 178 (175): 42 Cal 550.
- substantial grounds.)
- perly inferred from the fact that there were no
- ('22) AIR 1922 Lah 303 (304). (Malice can be proved whether such suit is maintainable in the absence of undertaking to pay compensation.)
- ('15) AIR 1915 Cal 178 (175): 42 Cal 550. (Doubt—Onus lies on plaintiff.)
- ('17) AIR 1917 All 451 (453, 454): 38 All 520.
- ('11) 11 Ind Cas 729 (732) (Cal).
- ('26) AIR 1926 Cal 757 (760).
10. ('27) AIR 1927 Cal 247 (249): 53 Cal 1008.
9. ('11) 12 Ind Cas 507 (510): 35 Mad 598.
- Gas 357.)]
- [But see ('10) 9 Ind Cas 60 (64): 18 Oudh
- prove legal not actual malice.)
- ('69) 1 N W P H O R 91 (92). (It is sufficient to Act applies.)
- ('28) AIR 1928 Cal 1 (6). (Art. 40, Limitation—Suit for damages lies.)
- made maliciously and without reasonable cause

PART VII.

APPEALS

APPEALS FROM ORIGINAL DECREES

96. [S. 540.]¹⁰ (1) Save where otherwise expressly provided in the body of this Code² or by any other law²² for the time being in force, an appeal³ shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized⁴ to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.¹²

(3) No appeal shall lie from a decree passed by the Court with the consent¹⁵ of parties.

[1877, Ss. 540, 575; 1861, S. 23, Jud. Act; 1873, S. 49. See Order 41.]

Synopsis

13. Appeal against amended decree.
14. Appeal against decree passed without jurisdiction.
15. Appeal against consent decree.
16. Appeal as to costs. See Section 85.
17. Nature of grounds. See O. 41 R. 1.
18. Valuation for purposes of appeal.
19. Court-fee.
20. Abatement of appeal. See Order 22.
21. Limitation. See O. 41 R. 1 Note 8.
22. Appeals under other laws.

Other Topics (Miscellaneous)

- Appeal by party exonerated or struck out. See Note 6.
- Appeal by persons not parties to the suit or decree. See Note 6.
- Appeal by representatives of parties to the suit. Note 6.
- Appeal by transferee after decree. See Note 6.
- Appeal fruitless owing to subsequent events — Dismissal. See Note 3.
- Appeal is continuation of suit. See Note 3.
- Burden of proving right of appeal. See Note 6.
- Abatement of appeal by subsequent supersession of decree by amendment in trial Court. See Note 2.
- Advocate-General and relations—Appeal by, under Section 92. See Note 6.
- Appeal against fresh decree on remand, where no appeal from original decree. See Note 10.
- Appeal by a party with no subsisting interest. See Note 6.
- Appeal by agent. See Note 6.
- Appeal by benamidar. See Note 6.

Clause (3), and orders by consent. See Note 15.
 Compromise decree — Matters outside suit — Appealability. See Note 15.
 Decree — Definition. See Note 6; see Section 2, sub-section (2) and Notes.
 Decree on disputed compromise — Appealability of. See Note 15.
 Decree on oath — Appeal by non-consenting party. See Note 15.
 Failure to draw up a formal decree — No appeal. See Note 12.
 Ex parte decree not set aside — No bar to appeal. See Note 12.
 Hindu reversioner — Appeal by. See Note 6.
 Inapplicability of the Section to Letters Patent appeals. See Note 2.
 Inapplicability of the Section to "Orders." See Note 2, and Section 2 (2) Notes.
 Insolvency — Receiver — Appeal. See Note 6.

Judgment or finding — No appeal from. See Note 6.
 Nature of right of appeal. See Note 2.
 Power of lower Appellate Court to re-hear, pending second appeal. See Note 12.
 Powers of original Court in respect of ex parte decrees on appeal. See Notes 2 and 12.
 Remedies against ex parte decrees. See Note 12.
 Second appeal against ex parte decree in first appeal. See Note 12.
 Second appeal by parties, not impleaded in first appeal. See Note 6.
 Second appeal without appealing from the order refusing to re-hear the appeal. See Note 12.
 Successful party — Appeal by. See Note 6.
 Valuation by consent of parties. See Note 18.
 Valuation for jurisdiction as per law on date of appeal and not suit. See Note 4.
 Valuation for jurisdiction different from that for court-fee. See Note 19.

1. Legislative changes. — This Section corresponds to Section 540 of the Code of 1882. Under that Section an appeal lay "from the decrees or from any part of the decrees" so that *provisional* decrees were also appealable.¹ This was, however, interpreted to mean that the decree or part of the decree should, in order to be appealable, be a decision relating to the disposal of the *entire* suit.² The words "from the decrees or from every part of the decrees" have now been omitted and the words "from every decree" substituted therefor.
 Sub-section (3) is entirely new and gives legislative sanction to the view that had been held that no appeal lay from a consent decree.³ It corresponds with Section 375 of the Code of 1882 except that certain words which occurred at the end of Section 375 have now been omitted: see Note 15 below.
 It is useful in this connexion to compare Section 49 of the Judicature Act of 1873 which provides that "no order made by the High Court or by any Judge thereof, by consent of parties, shall be subject to any appeal except by leave of the Court or Judge making such order."

2. Scope and object of the Section. — It is a general principle of law that a right of appeal is not a natural or inherent right attaching to litigation.¹ A litigant having a grievance of a civil nature has, independently of any statute, a right to institute a *suit* in some Court or other unless its cognizance is expressly or impliedly barred.² But a right of *appeal* does not exist and cannot be assumed unless *expressly* given by *statute* or by rules having the force of statute.³ Nor can parties confer a right

Section 96 — Note 1

1. (95) 18 Mad 73 (87). (Decree directing accounts to be taken — Provisional decree.)
2. (81) 3 Mad 13 (14).
3. See the Report of the Select Committee.

Note 2

1. (12) 39 Ind App 197 (200): 40 Cal 21 (P O). (There must be statutory right.)
- (36) 163 Ind Gas 75 (77): 62 Cal 701. (The litigant may have independently of any statute a right to institute a suit for nullifying the effect of any decision of a Court.)
- (96) 18 All 375 (378). (Only the Court having jurisdiction can hear appeal.)
- (08) 28 All W N 211 (214). (Right must be given by statute or some equivalent authority.)
- (16) AIR 1916 Mad 4 (5).
- (35) AIR 1935 Pat 261 (262): 14 Pat 286.
- (35) AIR 1935 P O 5 (6) (P O).
- (36) AIR 1936 Cal 424 (425).
- (36) AIR 1936 Cal 424 (425).
- (36) AIR 1936 All 376 (377).
- (36) AIR 1936 Rang 267 (270): 13 Rang 457 (PB).
- (36) 163 I O 75 (77): 62 Cal 701.
- (36) AIR 1936 Cal 688 (690): 1 I L R (1937) 1 Cal 699. (Right of appeal must be given by express enactment — It cannot be implied.)

- (12) 15 Ind Gas 512 (512): 36 Bom 360. (Land Acquisition Act (I of 1894), Ss. 53, 54 — Award — No second appeal.)
2. (06) 28 All 545 (549, 550) (PB).
3. (88) 11 Mad 319 (321). (Application to set aside sale in execution dismissed for default — No appeal.)

of appeal upon themselves in any matter by *agreement* or *mutual consent*.⁴

An appeal lies under this Section only from a *decree*. No appeal lies from a finding in a judgment.⁵ See Note 6 *infra*.

Section 104 deals with appeals from *orders* and Section 96 with appeals from *decrees*. The latter Section does not however confer a right of appeal from *all* adjudications which are decrees, but confers such right only where it is not expressly otherwise provided in the body of the Code or by any other law for the time being in force.⁶ Where an order comes under Section 104, it is appealable notwithstanding a decree has been passed subsequently and the decree is not appealed against.⁷

The expression "Court authorised to hear appeals" in the Section has been held to mean either the Court authorised to hear appeals from the Courts in question generally, or else the Court authorised to hear such appeals as the appeal in question.⁸ This Section does not apply to appeals within the High Court, that is from a single Judge of the High Court to a Bench thereof. Such appeals are regulated by the Letters Patents issued to the respective High Courts.⁹ But as regards *procedure*, the

(36) AIR 1936 Mad 514 (516) : 59 Mad 554. (Case governed by special statute—No right of appeal except as provided therein.)
(37) AIR 1937 Oudh 381 (388) : 13 Luck 523.
(38) AIR 1938 Oudh 18 (19).
(39) AIR 1938 Mad 103 (104, 110, 111) : 57 Mad 271 (FB). (Order of District Judge under S. 84 of Madras Hindu Religious Endowments Act (II of 1927)—Not appealable.)
(34) AIR 1934 Mad 360 (364) : 57 Mad 670. (Right of appeal—Creation of statute—Rests with persons in whom statute vests it.)
(88) 11 Mad 26 (34) : 14 Ind App 160 (PC). (Order of District Judge filling vacancy on committee not appealable—Fagoda Act.)
(11) 10 Ind Cas 879 (879, 880) : 36 Mad 16.
(22) AIR 1922 Rang 369 (376, 377) : 3 Lab 296.
(29) AIR 1929 Rang 198 (199). (In cases under the Code, right of appeal exists only if given by the Code.)
(25) AIR 1925 All 380 (382) : 47 All 513 (FB). (A right of appeal is a right conferred on the suitor.)
(25) AIR 1925 Oudh 260 (261). (Express rule or rule by unavoidable implication.)
(12) 16 Ind Cas 188 (189) : 40 Cal 21 : 39 Ind App 197 (P C).
(18) 20 Ind Cas 763 (765) (P C).
(14) AIR 1914 Bom 32 (32) : 38 Bom 337.
(16) AIR 1916 Cal 361 (364) : 43 Cal 857.
(18) AIR 1918 Cal 435 (436) : 45 Cal 926.
(87) 9 All 445 (446).
(01) 28 All 227 (232) : 28 Ind App 11 (P C).
(06) 28 All 545 (550) (FB).
(96) 20 Bom 803 (806).
(04) 27 Mad 504 (508).
(1891) 1891 App Cas 210 (213), Lane v. Esdaile.
[See also (38) AIR 1933 Cal 132 (134) : 60 Cal 618. (Limits on appeal by Indian Legislature.)
(36) AIR 1936 Pat 119 (120). (A wrong decision, even though it relates to jurisdiction, would not give a right of appeal where otherwise no appeal lay.)]
4. (11) 12 Ind Cas 464 (476) : 38 Cal 639. (Court hearing an appeal, when it is not authorized to

do so—Its order will be a nullity.)
(12) 13 Ind Cas 170 (171) (Cal).
(13) 18 Ind Cas 122 (124) : 16 Oudh Cas 86.
(89) 13 Bom 650 (652).
(02) 1902 Pun Re No. 36, p. 135 (FB).
(37) AIR 1937 Cal 427 (429).
(1878) 3 Q B D 1 (4), Sandbank v. North Strathfordshire Railway.
(67) 7 Suth W R 222 (223).
(05) 2 Cal L Jour 384 (387).
(36) 163 Ind Cas 75 (77, 79) : 62 Cal 701.
(38) AIR 1938 Oudh 18 (19).
(90) 12 All 129 (155) (FB).
(84) 8 Bom 269 (270). (It is not provided that no appeal shall lie from a decree under Section 77 Registration Act (III of 1877).)
(39) AIR 1939 All 233 (234). (In the absence of any provision in the C. P. C. or any other Act restricting appeals, S. 96 will apply to all the decrees which are passed by any Civil Court exercising original jurisdiction.)
(39) AIR 1939 All 552 (554). (Declaration concerning relief Act amounts to a decree and is appealable. There is no provision in that Act or in any other law barring appeals from decrees passed in such a case. Such decree is therefore appealable under the general provisions of S. 96.)
7. See also (38) AIR 1938 Pat 634 (635). (Order refusing to recognise adjustment under O. 21 R. 2 appealable even though final decree has followed the said order and has not been appealed against.)
8. (86) 13 Cal 232 (235). (This Section confers rights on parties and not jurisdiction on Court.)
(16) AIR 1916 Cal 973 (973) : 43 Cal 90.
(23) AIR 1923 Bom 218 (224, 225). (Letters Patent (Bom), Clause 36.)
(36) AIR 1936 Mad 134 (135) : 59 Mad 293.
(37) AIR 1937 Rang 268 (269) : 1937 Rang L R 97.
(19) AIR 1919 Bom 1 (7, 9) : 43 Bom 433 (FB). (Clause 36, Letters Patent.)
(02) 25 Mad 555 (558).

Code and the rules contained therein apply to such proceedings save in so far as the Code specially provides to the contrary.¹⁰

By a settled course of practice the procedure in Vice-Admiralty cases is governed by the Code of Civil Procedure.¹¹ This chapter on appeals will also, therefore, it is to be presumed, apply to such cases.

3. "Appeal," meaning of.—The word 'appeal' has not been defined in the Code and has therefore to be construed in its natural and ordinary meaning. It has been held to mean "the removal of a cause from an inferior to a superior Court for the purpose of testing the soundness of the decision of the inferior Court."¹ It is thus a remedy provided by law for getting the decree of the lower Court cancelled² and is, in fact, a complaint made to the higher Court that the decree of the lower Court is unsound and wrong.³

An appeal is not a fresh suit but is only a continuation of the original proceedings and a stage in the suit itself.⁴ The decree passed by the Appellate Court is a

High Court in ordinary civil suits and in its Vice-Admiralty jurisdiction.)

Note 3

1. ('99) 22 Mad 68 (80) (FB). (The explanation of the term in Wharton's Law Lexicon.) ('08) 1908 All W N 211 (218). (It is a continuation of a litigation commenced by a suit.)

2. ('99) 22 Mad 68 (85) (FB). ('83) AIR 1983 Bom 255 (257, 260); 57 Bom 888. (Appeal against order granting review is also appeal, though incompetent.) ('32) AIR 1932 P C 165 (167); 59 Ind App 288; 60 Cal 1 (PC). (Application to Appellate Court, asking it to set aside or revise decision of a subordinate Court is an appeal, though it is irregular or incompetent.)

3. ('73) 6 N W P H C R 19 (21) (FB). ('15) AIR 1915 Mad 548 (549). (Appellant must show that judgment is wrong even if one of the respondents does not consent.)

4. ('15) AIR 1915 Mad 1138 (1134). ('72) 18 Suth W R 261 (269). ("Subject-matter in dispute" would mean dispute in suit.) ('08) 26 Mad 91 (95, 96) (FB). (The final decree in the appeal will thus be final decree in suit.) ('14) AIR 1914 Mad 564 (565); 7 Ind Cas 202 (204); 37 Mad 1.

(15) AIR 1915 Mad 1223 (1229, 1238); 39 Mad 195 (FB). ('16) AIR 1916 Mad 732 (732). (O. 41 R. 32 leads to the same conclusion.) ('16) AIR 1916 Mad 883 (884); 39 Mad 1196. ('14) AIR 1914 Cal 614 (615). ("Suit" includes appealable stage thereof.)

(18) AIR 1918 Mad 998 (1002, 1006); 40 Mad 1. (Value of subject-matter must be valuation at institution. 26 Mad 91 (FB). Followed.) ('19) AIR 1919 Loh 180 (181); 1919 Pun Re No. 79. (Therefore no person can appeal unless he is party to the suit.)

(01) 24 Mad 39 (41, 42). (Right of appeal subsisting on date of suit not lost by subsequent repeal of right of appeal. See Section 8, Madras General Clauses Act, 1891.)

('09) 2 Ind Cas 294 (295); 33 Bom 216. (Order of

Single Judge of High Court deciding rights of parties—Appeal lies under the Letters Patent.)

(18) 18 Ind Cas 258 (254) (Cal). (Letters Patent (Cal) Clause 15—Dissentient appellate judgment—Further appeal lies therefrom.)

(16) AIR 1916 Mad 883 (885); 39 Mad 1196. (Order by Single Judge on claim petition.)

(16) AIR 1916 Mad 1220 (1221); 39 Mad 235 (FB). (Order of Single Judge refusing to interfere in revision is a "judgment.")

(16) AIR 1916 Mad 745 (745). (Order of Single Judge staying further trial is not "judgment.")

(15) AIR 1915 Cal 771 (771); 42 Cal 735. (Order of Single Judge for security before granting leave to defend summary suit—No appeal lies.)

(17) AIR 1917 Bom 62 (78) (SB). (Appeal from the original side was heard by Bench of two Judges—Upon their differing, appeal should be decided by senior Judge—Clause 36, Letters Patent.)

(13) 87 Bom 572 (574). ('17) AIR 1917 Cal 494 (495). ('16) AIR 1916 Cal 888 (840). (Order discharging rule under Section 115 is not a judgment.)

(08) 85 Cal 1096 (1098). (Order of remand of Single Judge is judgment.) ('07) 84 Cal 619 (624). (Order granting leave to sue under Clause 12 of the Letters Patent is a judgment.)

(06) 83 Cal 1328 (1341, 1343). (Order refusing to enlarge time for preferring appeal is not a judgment.) ('90) 17 Cal 66 (83). (Order of one Judge in exercise of Admiralty or Vice-Admiralty jurisdiction—Appeal lies under Letters Patent.)

(09) 1 Ind Cas 14 (20); 34 Bom 1. (Order amounting to "judgment" within Clause 15 of the Letters Patent is appealable.)

(09) 2 Ind Cas 157 (158) (Bom). (Formal order or regulating procedure is not judgment.) ('07) 30 Mad 143 (144). (Order refusing to issue commission for examination of witnesses is a judgment.)

(21) AIR 1921 P C 80 (82, 83); 48 Cal 481; 48 Ind App 76 (PC). ('90) 17 Cal 387 (340). (Section applies to

decree in the suit⁶ and the appellate judgment stands in the place of the original judgment for all legal purposes.⁶

An appeal differs from a *review* in that the primary intention of the review is the re-consideration of the subject by the *same Judge* under certain conditions, while an appeal is a rehearing by *another tribunal*.⁷

An appeal differs also from a revision. In an appeal the points to be decided are those on which the parties are at variance. But a revision is a matter between a higher Court and a lower Court; in fact revisional powers may, in certain cases, be exercised without an appeal or an application by any of the parties concerned.⁸

The expression "appeal under the Civil Procedure Code" is not restricted to an appeal the *right* to prefer which is conferred by that Code but means an appeal the *procedure* in regard to which is governed by the Code.⁹

The use of the words "an appeal" in the Section does not mean "one appeal only." Where an appeal is dismissed for default, a fresh appeal will not be barred if brought within the period of limitation for filing the appeal.¹⁰

An appeal which, even if successful, would be entirely fruitless should be dismissed as being incompetent. Thus, where in execution the Court directed the sale in a particular order and the judgment-debtor appealed but before the appeal was heard the properties were sold, the appeal, even if successful, will become infructuous and should be dismissed.¹¹

4. "Court authorized to hear appeals."—This Section does not deal with *jurisdiction* of Courts but only with the *right of appeal*.¹ The jurisdiction to entertain appeals is given by the various Acts in the different Provinces² and it is only that Court to which jurisdiction is so given in any particular matter that can hear the appeal.³

A general rule adopted in the various Acts is that an appeal from a decree or order of a District Judge or an Additional District Judge or of a Sub-Judge in suits of

5. (17) AIR 1917 Mad 597 (598). (And on the filing of an appeal judgment ceases to be res judicata and becomes sub judice.)

(18) 15 Cal 94 (99).

(19) 28 Cal 23 (27).

(20) 81 Mad 268 (270).

(21) AIR 1915 Mad 1223 (1230, 1231): 39 Mad 195 (FB).

(22) 18 Bom 208 (205). (Though appeal be against a part of the decree and appeal simply confirms decree of lower Court.)

[See also (31) AIR 1931 Nag 17 (18): 27 Nag LR 251. (Difference between appeal and revision pointed out.)]

6. (15) AIR 1915 Mad 1133 (1134). (Therefore possession taken by a person pending an appeal is subject to the result of the appeal.)

[See also (33) AIR 1933 Pat 209 (209).]

7. (1859) 7 Moo Ind App 283 (304) (P C).

8. (32) AIR 1932 All 651 (653): 54 All 891.

(33) AIR 1933 Sind 200 (202): 28 Sind LR 167.

9. (20) AIR 1920 Mad 407 (408): 43 Mad 51.

[See also (29) AIR 1929 Mad 223 (225).]

10. (23) AIR 1923 Pat 514 (516): 2 Pat 739. (It can be held barred only if the order of dismissal of first appeal would operate as res judicata.)

(21) AIR 1921 Cal 455 (456): 48 Cal 157. (Which

seems to support the contrary view is a case under the special provision of the Bengal Tenancy Act and is clearly distinguishable.)

11. (12) 15 Ind Gas 529 (529) (Cal).

(16) AIR 1916 Cal 272 (274). (Unless before filing the appeal, the appellant has obtained an order for stay.)

[See also (32) AIR 1932 Nag 121 (126, 127): 28 Nag LR 233 (FB). (A case under Criminal Procedure Code.)]

Note 4

1. (86) 13 Cal 232 (235).

2. See the Bengal U. P. and Assam Civil Courts Act, 12 of 1887, ss. 20 and 21; The Bombay Civil Courts Act, 14 of 1869, ss. 8, 16, 17, 26 and 27; The Madras Civil Courts Act, 3 of 1873, s. 13; The Punjab Courts Act, 6 of 1918, ss. 38 and 39; The Oudh Civil Courts Act, 13 of 1879, ss. 20 and 21; The C. P. Courts Act, 12 of 1904, s. 15; The Sind Courts Act, 12 of 1866, ss. 6 and 8; The Lower Burma Courts Act, 1900, s. 28.

3. (96) 18 All 375 (378).

(18) AIR 1918 Cal 435 (436): 45 Cal 926.

(97) 24 Cal 249 (251). (Suit for rent against several tenants collectively—Aggregate amount sued for exceeding Rs. 100—Appeal lies to the Judicial Commissioner. (Bengal Act 1 of 1879).)

In order to give a person a right of appeal *under this Section*, two conditions must be satisfied —

1. The subject-matter of the appeal must be a decree, that is, a conclusive determination of "the rights of the parties with regard to all or any of

no locus standi to appeal from order of District Judge.)

(34) AIR 1934 Mad 360 (363) : 57 Mad 670. (Decree against Official Receiver—A creditor not a party to the suit cannot appeal under O. P. Code though he may under the Provincial Insolvency Act.)

(75) 24 South W R 259 (259).

(1862) 1 Mad H C R 8 (9).

(91) 18 All 290 (294, 295). (Party treated as representative can appeal.)

(98) 32 Bom 155 (156). (Suit by Advocate-General under S. 92—Relations cannot appeal.)

(83) 9 Cal 629 (630). (The defendant appealed in first Appellate Court making the 'next friend' alone respondent—Next friend appealed to High Court—Defendant cannot object.)

(99) 26 Cal 539 (541, 542). (Auction-purchaser though not party to a suit is a party to a proceeding—Second appeal lay at his instance.)

(95) 9 Cal W N 584 (588). (Whether a party is aggrieved by decree—Question of fact.)

(93) 16 Mad 290 (292). (Second appeal against person not party to first appeal does not lie.)

(92) 1892 All W N 189 (189).

(10) 6 Ind Cas 244 (247) (Cal). (Second requisite—that appellant has an interest in subject-matter—Third requisite—He had been prejudicially affected by judgment—Hindu wife.)

(12) 16 Ind Cas 693 (694) (Mad). (Decree against person not party to first appeal—He cannot prefer second appeal.)

(18) AIR 1918 Pat 364 (365). (Not a party to suit.)

(18) AIR 1918 Lab 263 (263). (Must be a party to a suit and aggrieved by decree.)

(04) 14 Mad L Jour 189 (140). (Suit on mortgage by Hindu widow—Reversioner made party as claimant under settlement can appeal from decree.)

(09) 4 Ind Cas 781 (783) : 12 Oudh Cas 390. (Person made defendant under order of Court has a right of appeal.)

(38) AIR 1938 Lab 70 (70). (Necessary party implicated in suit but not in appeal—Such party has right of second appeal.)

3. (73) 6 N W P H C R 19 (21, 23). (There is no appeal from a decision which is not a decree.)

(92) 19 Cal 485 (487). (Order made by Munsif under Bengal Tenancy Act, authorizing the zamindar to acquire raiyat's holding is not decree—Not appealable.)

(87) 14 Cal 312 (313). (Application under S. 93, Bengal Tenancy Act—Not a suit—No appeal.)

(85) 7 All 276 (277, 278). (Decree as amended is the decree in the suit, and therefore an appeal lies—Per Oudh, J.)

(34) AIR 1934 Oudh 307 (309) : 9 Luck 701. (Plaintiff's suit claiming contribution from father-in-law of defendant—Finding in favour of plaintiff but amount not determined—Finding amounts to preliminary decree.)

(35) AIR 1935 Mad 373 (377). (Order in proceeding under S. 44 of the Madras Hindu Religious Endowments Act is not decree.)

(36) 163 Ind Cas 75 (77, 79) : 62 Cal 701. (Appel cannot lie against a finding in a judgment.)

(36) AIR 1936 Pesh 79 (79, 80). (Order of remand under inherent powers under S. 151, C. P. C., 1908, is not decree—No appeal lies.)

(36) AIR 1936 Sind 166 (167) : 30 Sind L R 170. (Order in exercise of inherent jurisdiction in execution proceedings is not decree and hence not appealable.)

(37) AIR 1937 Oudh 381 (383) : 13 Luck 523. (Court ordering appointment of certain persons as trustees of wakf on their mere applications, not as Civil Court but as kazi under Mahomedan law—Order appointing mutawallis is not being 'decree' as not having been made in suit, appeal therefrom is not competent under S. 96.)

(38) AIR 1938 Oudh 18 (19). (There is no provision for any appeal against a mere finding irrespective of the decree or order.)

(39) AIR 1939 All 552 (554) : 1939 All W R (H C) 414 (416). (Declaration contemplated by cl. (2) of Section 33, U. P. Agriculturists' Relief Act, is a decree and is appealable.)

(39) AIR 1939 Bom 65 (65, 66). (Order of Appeal-Court refusing to stay execution is not appealable as it is not a decree.)

(39) AIR 1939 Bom 182 (183). (Order passed on petition praying that value of property to be sold in execution of decree should be stated in sale proclamation is not decree and is not appealable.)

(10) 4 Ind Cas 829 (830) : 34 Bom 182. (A decree is something different from a judgment.)

(12) 15 Ind Cas 935 (936) : 8 Nag L R 92. (Until the decree has been drawn there can be neither appeal nor execution.)

(12) 16 Ind Cas 45 (46) (Mad).

(25) AIR 1925 Cal 932 (932) : 52 Cal 662. (Right to pass a decision which is appealable as a decree is also appealable as such.)

(08) 4 Nag L R 54 (56). (Order refusing to pass order absolute on a conditional decree in a mortgage suit is appealable as a decree.)

(83) 7 Bom 464 (466). (Appeal does not lie from a judgment but only from the decree.)

(85) 7 All 411 (412). (Appeals lie only from decrees or from amended decrees.—Per Oudh, J.)

(68) 9 South W R 309 (311). (If there is no decree there is no appeal under this Section.)

[See also (24) AIR 1924 Cal 1006 (1007).]

(37) AIR 1937 Lab 800 (801). (Suit on pro-note executed by A, B, C and D—Court ordering that suit could not proceed against A on ground that pro-note was signed by him at place beyond that Court's jurisdiction—Order *held* was tantamount to rejection of plaint as regards A, and appeal therefore was competent—Even if no appeal lay, revision was competent as there was a case decided.)]

the matters in controversy in the suit,"⁴ and, 2. the party appealing must have been *adversely affected* by such determination.⁵ Further, he can appeal only in such matters as have

[See however ('29) AIR 1929 Mad 223 (225). (Appeal under S. 96 though decision may not be a decree.)]

4. See Section 2 (2), *supra*.

(34) AIR 1934 Mad 103 (107): 57 Mad 271 (F.B.) (Order of District Judge under S. 84 (2) of the Madras Hindu Religious Endowments Act, is not a decree since the proceeding commenced by petition and so cannot be regarded as a suit.)

(37) AIR 1937 All 694 (695). (Partition suit—Order passed between preliminary and final decree is an interlocutory order and not appealable.)

(28) AIR 1928 Lah 981 (981). (Order refusing instalment decree under O. 20 R. 11 not appealable unless incorporated in the decree.)

(30) AIR 1930 Lah 187 (188 to 190): 11 Lah 402. (Order for staying execution is a decree and is appealable—Conflict of views and case law discussed.)

(29) AIR 1929 Rang 198 (200). (Order under S. 73 of the Code is not appealable unless it comes under S. 47.)

(15) AIR 1915 Cal 272 (274). (Preliminary decree—Absence of formal expression will not prevent appeal.)

(12) 15 Ind Cas 985 (987): 8 Nag L R 92. (Preliminary adjudication not finally expressed is not appealable.)

(11) 12 Ind Cas 445 (450) (Cal). (Conditional order is no order until condition is fulfilled.)

(19) AIR 1919 Lah 418 (418). (Lower Court expressed opinion on points not necessary to decision—No appeal from such opinion.)

(26) AIR 1926 Pat 457 (459): 6 Pat 160. (Order of remand under S. 151 merely setting aside decree of lower Court but without deciding any of the matters in controversy is not a decree.)

(83) 7 Bom 464 (466). (No appeal lies against a merely incidental decision.)

(91) 18 Cal 469 (472). (Incidental order is not appealable.)

(12) 15 Ind Cas 566 (566) (All). (Preliminary adjudication not expressed in a decree not appealable.)

(13) 21 Ind Cas 887 (888) (Cal). (Decision on preliminary issues not appealable.)

(861) 7 South W R 222 (222). (Preliminary issues decided—No appeal lies.)

(95) 18 Mad 73 (87). (A provisional decree is appealable.)

(31) AIR 1931 Mad 471 (473, 474): 54 Mad 337. ('Decree' appealable though termed 'order' or 'decretal order'.)

(29) AIR 1929 Mad 404 (405). (To be a decree for appeal, the decision must be a final disposal which ever way it has been or may have been decided.)

(27) AIR 1927 Rang 148 (149): 5 Rang 838. (Order refusing adjournment and dismissing suit is a decree appealable.)

(13) 19 Ind Cas 922 (924) (Sind). (Set-off claimed—Suit dismissed as barred by limitation—Decision not being one deciding both the claim and

set-off is not a decree and no appeal lies. [See also ('34) AIR 1934 Pat 13 (14). (Order of remand without adjudication on merits but order drawn up in the form of a decree—Held not decree but non-appealable order.)

5. ('17) AIR 1917 Pat 585 (587, 589). (Whether a party is adversely affected by a decree is a question of fact to be determined in each case according to its peculiar circumstances.)

(37) AIR 1937 Pat 428 (429). (Suit against two persons—Claim to relief against both or either—Decree against one only—Appeal claiming relief against other is competent.)

(34) AIR 1934 All 677 (679). (Appeal lies only against that part of the decree which adversely affects him.)

(32) AIR 1932 Bom 78 (79, 80): 56 Bom 16. (Mere fact that they were parties in lower Court does not invest them with a right to appeal.)

(28) AIR 1928 Mad 854 (855). (99) 26 Cal 539 (544).

(15) AIR 1915 Cal 658 (659): 42 Cal 1. (Order refusing rateable distribution not affecting judgment-debtor—Latter cannot appeal.)

(05) 9 Cal W N 584 (588). (24) AIR 1924 Oudh 52 (53): 26 Oudh Cas 874. (Though the decree is not specifically passed against him.)

(31) AIR 1931 Oudh 242 (243). (68) 10 South W R 94 (94).

(98) 22 Bom 718 (721). (83) 6 Mad 185 (186, 187). (Suit for redemption—Defendant in possession on behalf of mortgagee and not claiming any interest in himself cannot appeal.)

(76) 1 All 266 (267). (05) 1905 All W N 162 (162). (Appeal by unsuccessful party—Party losing all interest in subject-matter, since—Appeal must be dismissed.)

(21) AIR 1921 Cal 380 (381). (Suit dismissed—Plaintiff can appeal notwithstanding some findings in his favour.)

(94) 7 C P L R 98 (98). (Unsuccessful party can appeal though he has lost his interest in the subject-matter since the decree.)

(07) 4 Low Bur Bul 95 (98). (Suit by agent dismissed on the ground that the agent cannot sue—Principal can appeal.)

(06) 3 All L Jour 844 (845). (Suit for pre-emption—Vendee has right to appeal.)

(16) AIR 1916 P C 14 (15, 16): 38 All 440 (446): 43 Ind App 170 (P C). (Party setting up a claim which he afterwards admits to be unfounded cannot appeal.)

(21) AIR 1921 Lah 349 (350). (Stake-holder is not aggrieved by decision between claimants.)

(71) 15 South W R 536 (536). (Person having locus standi cannot contest decree in appeal.)

(15) AIR 1915 Mad 1150 (1152). (Person having no title and no locus standi cannot contest decree.)

affected by the decision in any way and therefore cannot appeal.¹⁸ The following persons are not 'parties' for the purpose of preferring an appeal:

A. Defendants who are exempted from the operation of a decree.¹⁹
 B. Persons against whom the suit has been dismissed in appeal and the case remanded.²⁰
 C. Persons who ought not to have been impleaded, such as *pro forma*

defendants, but who are impleaded.²¹

On substitution of the Court of Wards in place of the original plaintiffs in a suit, the latter have no *locus standi* to appeal against the order dismissing the suit.²²

2. The legal representative of a deceased party affected by the decree can appeal if the right of the deceased party survives to him but he must first get himself impleaded as such in the suit record.²³

3. The transferee of the interest of a party pending the suit who is, so far as such interest is concerned, bound by the decree, can appeal from the decree provided he also gets himself placed on the record of the suit.²⁴ Where a decree has been passed against the transferor and his transferee, the former alone cannot appeal as he has no interest and is not affected by the decree.²⁵ A transferee *after the decree* cannot however apply to be impleaded for the purpose of preferring²⁶ or continuing²⁷ the appeal

('80) 3 All 75 (76).
 ('80) 3 All 152 (157).
 ('85) 7 All 606 (620) (FB).
 ('09) 4 Ind Cas 781 (786): 12 Oudh Cas 390. (Person impleaded under an order which is within the discretion of the Court to pass can appeal.)
 ('80) 6 Cal 19 (21).
 ('15) AIR 1915 Cal 579 (581, 583). (Decree for one of two alternative reliefs claimed—Plaintiff can appeal stating that the other relief ought to have been granted.)
 ('21) AIR 1921 Cal 380 (381).
 18. ('18) AIR 1918 Pat 364 (365).
 ('34) AIR 1934 Mad 360 (362, 363): 57 Mad 670. (Decree against Official Receiver—A creditor, not a party, cannot appeal under Civil P. C. though he can under Provincial Insolvency Act.)
 ('10) 6 Ind Cas 244 (247) (Cal).
 ('37) AIR 1937 Bom 63 (64): 1 L R (1937) Bom 425. (Trustee—Alienation by — Beneficiary allowed simply to appear and argue not as party respondent—Advocate-General representing all beneficiaries—Beneficiary has no right of appeal.)
 ('37) AIR 1937 Lah 313 (313).
 ('37) AIR 1937 Lah 347 (349).
 ('08) 32 Bom 155 (156). (Relators not party to suit cannot appeal where the Advocate-General does not think fit to appeal.)
 ('92) 1892 All W N 139 (139).
 ('19) AIR 1919 Lah 180 (181): 1919 Pun Re No. 79.

19. ('03) 30 Cal 134 (141).
 20. ('12) 16 Ind Cas 693 (694) (Mad).
 ('21) AIR 1921 Cal 156 (156). (New defendant ordered to be added in place of wrongly impleaded defendant—But latter disallowed costs—He can appeal for costs.)
 21. ('17) AIR 1917 Pat 585 (587). (But a person improperly brought on record as legal represen-

tative and his objection thereto was allowed but without costs—He can appeal on the question of costs—See (1890) 13 All 290 (291.)
 ('82) 4 All 237 (238). (Overruled on another point in 13 All 575.)
 22. ('35) AIR 1935 Oudh 486 (488). (Plaintiff substituted by Court of Wards cannot appeal against withdrawal under O. 28 R. 1, C. P. C.)
 23. ('18) AIR 1918 All 309 (313).
 ('66) 5 Suth W R 133 (134). (Appeal by legal representative not to be admitted without allowing his name to be entered in the register of suits.)
 ('96) 18 All 285 (287).
 (1900) 22 All 281 (282).
 ('71) 15 Suth W R 485 (485).
 ('18) AIR 1918 Mad 409 (410). (Person claiming under a party can appeal.)
 24. ('78) 2 Bom 248 (250). (In this case, such person was not allowed to continue the appeal.)
 ('71) 15 Suth W R 121 (123).
 ('84) 8 Bom 323 (326, 337, 338).
 ('35) AIR 1935 Lah 640 (640). (Suit on mortgage—Purchaser of property pending suit impleaded—Decree passed — No appeal filed by mortgagee—Vendee can prefer appeal.)
 ('85) 9 Bom 151 (155, 156, 157).

25. See ('17) AIR 1917 Pat 585 (587).
 ('75) 23 Suth W R 86 (87).
 26. ('71) 15 Suth W R 485 (485). (Transferee after disposal of suit cannot appeal unless he joins transferors as appellants.)
 ('71) 15 Suth W R 106 (107). (Do.)
 ('72) 18 Suth W R 438 (438). (Transferee after disposal of suit cannot appeal.)
 27. ('77) 2 Bom 248 (251).

against the concluded decree. Similarly a person whose name is brought on the record *after the decree* on the ground that he is the real owner, cannot appeal.²⁸

4. Where pending an appeal the appellant is declared an insolvent, the Official Receiver who represents the estate can continue the appeal.²⁹

5. A *benamidar* may appeal on behalf of the real owner.³⁰

6. The auction-purchaser can appeal from an order setting aside the execution sale on the ground of fraud.³¹

It has been held by the Madras High Court that where a decree has been passed against the manager of a joint Hindu family in his representative capacity, any other member of the family can appeal against the decree.³² But the Sind Judicial Commissioner's Court has taken a contrary view.³³

Where the appellant's right to appeal is challenged, it is incumbent upon the appellant to establish his right to appeal³⁴ though the practice is to require the respondent at the outset to indicate the grounds upon which his objections are based.³⁵ In cases of doubt as to the existence of the right of appeal, it has been held that the appellant should get the benefit of the doubt.³⁶

7. Co-plaintiffs.—It has been seen in Note 6 above that one of the conditions necessary for enabling a party to prefer an appeal is that the subject-matter of the appeal must be a "matter in controversy in the suit." It follows therefore that the matters which form the subject of dispute between the plaintiffs and defendants, will be outside the conditions,¹ and one plaintiff cannot be allowed to appeal against his co-plaintiff in respect of such matters.²

8. Co-defendants.—The same principles equally apply to appeals by one co-defendant against another. Where a case is raised not only between the plaintiffs and defendants, but between the defendants themselves *inter se* and the decision therein adversely affects a defendant, he is entitled to appeal against his co-defendants.³ As has already been seen in Note 6, a decision cannot be said to adversely affect a person, unless it will operate as *res judicata* against him in any future suit⁴ and where in substance a decision will so operate between the defendants it would be contrary to all

28. (20) AIR 1920 Pat 142 (143); 5 Pat L.J. 256.
29. (19) AIR 1919 Cal 1006 (1006). (Insolvent himself cannot appeal.)
(18) AIR 1918 Mad 294 (294).
(13) 18 Ind Cas 922 (922) (Mad).
30. (06) 28 All 44 (46).
(15) AIR 1915 Cal 454 (455).
31. See Notes to Section 47.
32. (37) AIR 1937 Mad 848 (845); 1 L.R. (1937) Mad 970.
33. (37) AIR 1937 Sind 94 (95); 30 Sind L.R. 467.
34. (16) AIR 1916 Cal 361 (364); 43 Cal 557.

Note 8

1. (87) 9 All 447 (450, 451).
(13) 20 Ind Cas 898 (899); 16 Oudh Cas 350.
(96) 1896 Bom P.J. 742.
(80) 5 Bom 264 (266, 267). (As an exceptional case, High Court allowed the appeal to be argued by consent of parties to avoid future litigation.)
2. (91) 15 Bom 145 (147). (Decree in favour of one of two co-plaintiffs—Appeal by the other is incompetent.)
(13) 20 Ind Cas 898 (899); 16 Oudh Cas 350.
36. (26) AIR 1926 Cal 1118 (1114).
Note 7
1. (94) 18 Bom 520 (521).
(12) 16 Ind Cas 127 (128) (Lab.). (Where it is open for a co-defendant to take a matter on appeal and he does not do so, it will operate as res judicata.)
2. See Note 46 to Section 11.

- (11) 12 Ind Cas 745 (747) (Cal).
(36) 62 Cal 701 (705); 163 Ind Cas 75 (77).
[See (35) 1935 All W.R. 1197 (1201). (Burden of proof lies on appellant to show that judgment appealed from is wrong.)]
(25) AIR 1925 Cal 561 (562, 563).]

principles of justice and equity to hold that a defendant is precluded from agitating the matter in appeal against the co-defendants.³

Illustrations

1. A brings a suit against B and C. A decree is passed against B alone, the suit being dismissed as against C. B can appeal against C and A in order to make C also liable for A's claim.⁴ The reason is that the liability of B and C to A was a question in controversy between A, the plaintiff, and B and C, the defendants, and that the decision on that point making B solely liable has adversely affected him.

2. A sues B and C to enforce his right of pre-emption on the allegation of a sale by B to C. B denies the sale to C but C asserting the sale, pleads waiver by the plaintiff of his right of pre-emption. The suit is dismissed on the finding that B did not sell to C. It was held that C cannot appeal against B and A against the finding because the said finding will not operate as *res judicata* against C and therefore does not adversely affect him.⁵

A view, different from that in illustration 1, however, has been expressed by

the Allahabad High Court to the effect that where a suit has been dismissed against one of two defendants and the plaintiff does not appeal against the portion dismissed, the defendant against whom the decree was passed cannot appeal against the decree seeking to make the co-defendant liable, and the Appellate Court cannot, even if such an appeal is preferred, modify or alter the decision against the co-defendant which the trial Court declined to pass, and in the decision of which the plaintiff has acquiesced.⁶ They declined to follow the view expressed by the Calcutta Full Bench in I. L. R. 31 Calcutta 643.⁷ But the rulings do not mention any principle as the ground of their decision and cannot be accepted as sound law, especially in view of O. 41 R. 33, which empowers the Court to pass such orders as the circumstances of the case require. Where a suit is dismissed and the judgment contains findings between the co-defendants which are not embodied in the decree nor necessarily implied therein, such findings cannot adversely affect the defendants and no appeal lies therefrom by one co-defendant against another.⁸

It is irregular for defendants with different defenses to a suit and with different grounds of appeal, to join in a single appeal.⁹

9. Appeal by minor. — When once a guardian *ad litem* is appointed in a suit for a minor, the appointment unless and until revoked by the Court, continues not only for the term of the suit, but also for purposes of appeal.¹ He is the only person therefore who can file an appeal from the decree passed against the minor.² If he does not choose to appeal against the decree, no other person, even though he be the natural guardian, can assume guardianship and prefer the appeal³ unless perhaps where the

7. ('04) 31 Cal 643 (646) (F.B.). (When decree has been given against one defendant only, Appellate Court can alter it so as to render liable another defendant against whom plaintiff preferred no appeal.)

8. ('11) 12 Ind Cas 167 (169) (Mad).
9. ('01) 23 All 137 (142): 27 Ind App 168 (PC).

Note 9

1. ('22) AIR 1922 All 332 (333): 44 All 619.
(24) AIR 1924 All 79 (80): 45 All 623.
- (92) 14 All 35 (37).
- (99) 22 Mad 187 (188).
- (99) 1899 All W N 203 (204).
- (05) 2 All L Jour 489 (490).
2. See the cases cited in Footnote 1, *supra*.
3. ('22) AIR 1922 All 332 (333): 44 All 619.
(93) 1893 All W N 161 (162).
- (24) AIR 1924 All 79 (80): 45 All 623.

3. ('24) AIR 1924 Mad 689 (690): 47 Mad 638.
- (35) AIR 1935 All 984 (985).
- (04) 31 Cal 643 (646) (F.B.).
- (865) 2 South W R 227 (230, 231).
- (09) 3 Ind Cas 917 (918): 12 Oudh Cas 260.
- (05) 28 Mad 229 (232).
- (But see ('67) 7 South W R 366 (366).
- (72) 17 South W R 373 (374).
- (68) 10 South W R 326 (328).
- (81) 3 All 152 (157) (F.B.).
- (05) 27 All 23 (25).
- (Following earlier decisions.)
- (08) 30 All 48 (49).
- [See also ('37) AIR 1937 All 368 (369). (A person who is implicated as a *pro forma* defendant in a suit as the person from whom plaintiff derived title but who has no interest in the property in suit, has no *locus standi* to appeal against the dismissal of the suit against which the plaintiff himself does not appeal.)

guardian *ad litem* is acting against the interest of the minor. But the mere fact that he does not prefer the appeal does not necessarily show that he is acting in dereliction of his duty. The natural inference, on the other hand, would be that he does not think it advisable in the interests of the minor to carry on the litigation further.⁴ See also Notes on Rules in Order 32.

10. Right of appeal, when lost.—Whatever may be party's right of appeal under the general law, there is no doubt that he may *agree* not to appeal or may *wave* or forgo his right of appeal, or may be *estopped* by his conduct from asserting such right.¹

Where a party *agrees* to abide by a decision and not to appeal therefrom, the agreement will be binding on him, provided it is a lawful one.² An agreement, for instance, by the guardian of a minor not to appeal is not binding on the minor in law as the same is not for his benefit.³ The agreement not to appeal must, however, be a *clear* one.⁴

A failure to abide by the terms of the decree does not disentitle a party to appeal.⁵

Where a party *waves* or *abandons* his right of appeal, the Appellate Court will refuse to allow him to prosecute the appeal.⁶ Whether a party has waived such right is a question of fact depending upon the circumstances of the case.⁷

3. (1889) 22 Q B D 577 (578), *Rhodes v. Swithen-bank*.
4. (196) 1896 Bom F J 424 (424).
5. (134) AIR 1934 All 531 (538).
6. (102) 29 Cal 577 (580). (Agreement to allow execution sale to stand good on certain conditions—Parties cannot appeal thereafter and contest legality of sale.)
7. (102) 29 Cal 906 (909). (Agreement to refer certain issues of fact to Commissioner and to abide by his decision—Parties cannot appeal from the decision.)

1. (171) 14 Moo Ind App 203 (207) (PC).
- [See (186) AIR 1986 Cal 424 (425). (The right of appeal given to a person by statute should not ordinarily be taken away, unless the appellant brings himself definitely within those classes of cases in which it has been laid down that by his conduct he had lost the right of appeal.)]
2. (175) 1 All 267 (269) (PB).
- (125) AIR 1925 All 503 (506); 47 All 637.
- (182) 8 Cal 455 (458). (Agreement by judgment-debtor not to appeal on immediate release from arrest.)
- (185) AIR 1985 Cal 239 (240); 62 Cal 229. (Where the parties to a suit agree and say that the determination of their disputes by a third person is to be final between them, it is to be regarded as an undertaking not to appeal.)
- (131) AIR 1931 Nag 126 (127). (1 All 267 (PB) followed.)
- (129) AIR 1929 Oudh 451 (452, 453); 5 Luck 391. (Agreement not to adduce evidence and to abide by any decision of Court is not void, and no appeal lies.)
- (179) 3 Cal L Rep 574 (575). (If a party prefers an appeal contrary to agreement, he will be liable in damages in a separate suit.)
- (186) 12 Cal 511 (514) (PB). (Consent to submit to a summary decree under Act XX of 1866.)

Note 10

1. (171) 14 Moo Ind App 203 (207) (PC).
- (1859) 8 Moo Ind App 91 (102) (PC).
- [See (186) AIR 1986 Cal 424 (425). (The right of appeal given to a person by statute should not ordinarily be taken away, unless the appellant brings himself definitely within those classes of cases in which it has been laid down that by his conduct he had lost the right of appeal.)]
2. (175) 1 All 267 (269) (PB).
- (125) AIR 1925 All 503 (506); 47 All 637.
- (182) 8 Cal 455 (458). (Agreement by judgment-debtor not to appeal on immediate release from arrest.)
- (185) AIR 1985 Cal 239 (240); 62 Cal 229. (Where the parties to a suit agree and say that the determination of their disputes by a third person is to be final between them, it is to be regarded as an undertaking not to appeal.)
- (131) AIR 1931 Nag 126 (127). (1 All 267 (PB) followed.)
- (129) AIR 1929 Oudh 451 (452, 453); 5 Luck 391. (Agreement not to adduce evidence and to abide by any decision of Court is not void, and no appeal lies.)
- (179) 3 Cal L Rep 574 (575). (If a party prefers an appeal contrary to agreement, he will be liable in damages in a separate suit.)
- (186) 12 Cal 511 (514) (PB). (Consent to submit to a summary decree under Act XX of 1866.)

Where a party *accepts* the order of a Court, *acts* under it and thereby gets *benefited* by it, he will be estopped from questioning the order later on.⁸ Thus, where a dismissal for default is set aside and the case remanded by the Appellate Court conditionally on the appellant paying a certain amount to the respondent as compensation, and the respondent *accepts* the compensation money, he will thereafter be estopped from appealing against the order of remand.⁹ But, where a plaintiff in a partition suit takes possession of the properties allotted to him under the partition decree, this does not preclude him from appealing against the decree on the ground that he is entitled to more. The reason is that his claiming a larger share of properties in appeal is in no way inconsistent with his taking possession of the share allotted under the decree appealed against and there is no question of estoppel.¹⁰ Where a vendee in a pre-emption suit appeals and obtains a stay of execution on his making a certain deposit, but before the appeal is heard he withdraws the deposit, he will lose his right of appeal.¹¹

11. Execution proceedings.—This Section does not apply to execution proceedings where the orders passed are not decrees within the meaning of Section 2 (2) of the Code.¹

12. Appeal against ex parte decree.—The Code of 1859 prohibited an appeal against an *ex parte* decree, but by judicial decisions the prohibition was held to apply only to cases where the defendant did not appear *at all* and not to cases where he, having once appeared, subsequently failed to appear.¹

The Code of 1877 removed the prohibition, but neither that Code nor that of 1882 made any *express* provision for an appeal against an *ex parte* decree. The conflict of decisions therefore continued as to whether, and under what circumstances, an appeal lay against an *ex parte* decree.²

contending that appellant is entitled only to certain sum and depositing the same—Appellant offering a portion of it as security for respondent's costs—*Filed* no estoppel — If success, no need for security for costs—If failure, it is appellant's money.)

(120) AIR 1920 Cal 96 (97). (Decree imposing conditions on plaintiff — Conditions not complied with — He does not thereby lose his right of appeal.)

(17) AIR 1917 Lah 28 (28); 1917 Pun Re No. 17 Or. (Appeal from redemption decree lies though redemption money ordered by lower Court is not deposited.)

(80) AIR 1930 Oudh 434 (437). (A resolution of the District Board to withdraw appeal, but not acted upon, is no bar to the appeal.)

8. (17) AIR 1917 Cal 546 (547) (SB). (13) 18 Ind Cas 525 (526); 35 All 168. (Party accepting compensation and waiving right of appeal is estopped.)

(36) AIR 1936 Cal 424 (425, 426). (The benefit must be one conferred by the decree or order itself—A's election as Municipal Commissioner declared invalid by lower Court's decree—Afterwards Local Government nominating A as Municipal Commissioner — A accepting appointment not precluded from appealing against decree.)

(10) 8 Ind Cas 79 (80) (Cal). (But if party accepts the order under protest, he can appeal.)

1. (78) 2 All 67 (71); 5 Ind App 233 (PC). (82) 4 All 387 (394) (FB). (Defendant who has not applied under S. 108 (O. 9 R. 13) cannot appeal.)

(86) 8 All 354 (357) (FB). (Appel — Respondent not appearing at hearing and not applying under O. 41 R. 21 may appeal against the Appellate Court decree.)

Note 12

S. 47—Appeal lies.)

question under O. 21 R. 66 is an order under (25) AIR 1925 Cal 318 (319). (Determination of execution is not necessarily appealable.)

(24) AIR 1924 Pat 683 (685). (Every order in party is a 'decree' and is appealable.)

party's right to be the representative of deceased. (25) AIR 1925 All 66 (66). (Order determining party's right to be the representative of deceased. (24) AIR 1924 All 794 (795). (Order refusing to execute proceedings.)

department—Not a decree.)

restore a miscellaneous application in execution. (24) AIR 1924 Pat 346 (347). (Section is restricted to suits only and cannot be extended to execution proceedings.)

1. (24) AIR 1924 Pat 346 (347). (Section is restricted to suits only and cannot be extended to execution proceedings.)

Note 11

11. (106) 7 Pun L R No. 76, p. 227 (230).

9. (18) 18 Ind Cas 525 (526); 35 All 168. (10) (35) AIR 1935 Mad 465 (466). (Person taking benefit under partition decree is not estopped from claiming more in appeal when he is entitled to what is already given.)

It was in order to remove the doubt and the conflict that clause (3) was added by Section 45 of the Civil Procedure (Amendment) Act VII of 1888.³ It is now quite clear that an appeal will lie from *every ex parte* decree whether the defendant has appeared once, or not at all.

There are four remedies open to a person to question a decree that has been passed *ex parte* against him, viz. —

- (1) an application under Order 9 Rule 13;
- (2) an appeal under Section 96 clause (2);
- (3) an application for review under Order 47,⁴ and
- (4) a suit on the ground of fraud.⁵

Both the remedies (1) and (2) can be prosecuted *concurrently* as long as no decision is given in either of them. The mere fact that one remedy has been resorted to will not *ipso facto* bar the other.⁶ Nor does the fact that no application has been filed under O. 9 R. 13 affect the maintainability of the appeal.⁷

Where the Appellate Court gives a *decision* in the appeal, then, as has been seen in Note 2 above, the decree of the first Court is *superseeded* and that Court cannot proceed with the application to set aside the *ex parte* decree.⁸ The Appellate Court may, however, withdraw the application from the first Court and deal with it itself.⁹ It has also been seen in Note 2 above that where during the pendency of the appeal, the application under O. 9 R. 13 is granted by the first Court, the decree appealed against becomes non-existent and the appeal abates.¹⁰

But suppose the first Court *refused* to set aside the *ex parte* decree. How does it affect the powers of the Appellate Court to deal with the appeal? There is a *consensus* of judicial opinion that neither the rejection of the application under O. 9 R. 13, nor the omission to file an appeal against that order is a bar to an appeal from the decree itself.¹¹ It has also been held that where the application is refused on the merits by the first Court, the Appellate Court is precluded in an appeal against the *ex parte* decree from discussing the *propriety* of the *ex parte* order itself apart from the merits

(178) 2 Bom 644 (648). (Appeal is not unmain-
tainable because procedure under S. 108 (O. 9
'82) 8 Cal 272 (273). (Procedure to set aside ex
parte decree not adopted—Appeal will still lie.)
(178) 2 Mad 75 (77, 78). (Non-application for re-
hearing is no bar to appeal.)
(81) 3 Mad 264 (265). (Non-applying under S. 108
(O. 9 R. 13) is no bar to an appeal.)
(86) 9 Mad 445 (446). (4 All 387 (F.B.), Dissented
from.)
(109) 1 Ind Cas 329 (330, 331): 12 Oudh Cas 25.
(Appeal lies though course under S. 108 (O. 9
R. 13) was not adopted.)
(3) (86) 8 All 354 (357) (F.B.).
(4) (84) 6 All 65 (66).
(5) (109) 1 Ind Cas 86 (88) (Cal). (An ex parte
decree may be challenged in proper proceedings
i. e., a suit on the ground of fraud.)
(6) (109) 3 Ind Cas 468 (469) (Cal). (Affirming 12
Cal W N 885.)
See also Note 10 to O. 9 R. 13 *infra* for other
cases.
7. (86) 9 Mad 445 (446).
(107) 30 Mad 54 (55) (F.B.). (See referring order.)
(82) 8 Cal 272 (274).

(89) 1883 Pun Re No. 60.
(122) AIR 1922 Bom 267 (267): 46 Bom 184.
(109) 1 Ind Cas 829 (830): 12 Oudh Cas 25.
[But see (82) 4 All 387 (894) (F.B.), (Which
held to the contrary — The case however was
one under the Code of 1887 and was dissented
from in a later Full Bench case, 8 All 854.)]
(8) (175) AIR 1915 All 2 (3): 37 All 208.
(17) AIR 1917 Nag 26 (28): 14 Nag L R 80.
(First Court's power is extinguished under O. 41
Rule 21.)
(9) (12) 15 Ind Cas 565 (566) (Nag).
(10) (17) AIR 1917 Nag 26 (28): 14 Nag L R 30.
(Where the ex parte decree is set aside pending
second appeal the second appeal abates and can-
not be proceeded with.)
(11) (178) 2 All 567 (568). (Second appeal without
appealing from the order refusing to re-hear the
appeal.)
(109) 1 Ind Cas 86 (88) (Cal). (In this case the
unsuccessful applicant instead of preferring an
appeal, instituted a suit on the ground of fraud
— Held suit was maintainable.)
(101) 38 Cal 475 (478) (P.C.). (D.O.)
(102) 29 Cal 395 (399): 29 Ind App 90 (P.C.). (D.O.)]

of the case on the law and the evidence.¹² This is in accordance with reason, because a special remedy by way of appeal against the order is provided for in the Code and where the law points out the remedy in particular way, it is in general that way that must be followed and not another. But where the application is dismissed in default of parties and there is no finding on the merits, it is competent for the Appellate Court to go into the question of the propriety of the *ex parte* order.¹³

But where no application is filed under O. 9 R. 13 and only an appeal is preferred against the *ex parte* decree, there is a conflict of opinion as to the power of the Appellate Court to question the propriety of the *ex parte* order itself and to remand the case for re-trial on that point. All the High Courts, except the High Courts of Allahabad and Rangoon and the Chief Court of Oudh, agree in holding that the Appellate Court can go into the question and, if necessary, remand the case under O. 41, R. 23 or under Section 151 for a fresh decision on the sufficiency of the cause for non-appearance.¹⁴ The Allahabad and the Rangoon High Courts, and the Oudh Chief Court, on the other hand, hold a contrary view, namely that the Appellate Court is *restricted* to a consideration of the *merits* of the case *only* on the question of law and the evidence let in, and cannot enter into the question of the sufficiency of the cause for the non-appearance of the defendant at the hearing.¹⁵ In view of O. 41 R. 23 under which the Appellate Court has wide powers of passing any order which the trial Court ought to have made, there does not seem to be any good reason why the Appellate Court should be prevented from discussing the question of the non-appearance of the party in cases where he has not applied under O. 9 R. 13, Civil Procedure Code. As stated by Mahmood, J., in *Ajudhia Prasad v. Balnikund*,¹⁶ "where two proceedings or two remedies are provided by statute, one of them must not be taken as operating in derogation of the other."

13. Appeal against amended decree.—An amended decree supersedes the original decree and obviously, against this decree, which is the decree in the suit, an appeal lies.¹⁷ See also Note 14 to Section 152, *infra*.

12. (20) AIR 1920 Mad 962 (963).
 (27) AIR 1927 Mad 1114 (1114).
 (36) AIR 1936 Pesh 1 (2). (Decree passed *ex parte*—Defendant trying to set aside *ex parte* decree under O. 9 R. 13, failing to prove want of due service of summons—Defendant barred to agitate the same question in appeal or revision and vice versa.)
 (90) 28 Mad 260 (261).
 (99) 28 Mad 445 (446). (Court refused to go into the question but remanded the case for re-trial under its inherent powers.)
 (17) AIR 1917 All 475 (476): 39 All 143.
 (09) 1 Ind Cas 86 (88) (Cal). (Application under S. 108 dismissed for default—Propriety of the *ex parte* order can be gone into.)
 13. (37) AIR 1937 Nag 268 (269) : 1 L R (1937)
 Nag 519.
 14. (07) 30 Mad 54 (60) (PB).
 (1900) 23 Mad 445 (446).
 (24) AIR 1924 Mad 107 (108). (30 Mad 54 (PB). Followed.)
 (28) 118 Ind Cas 409 (409) (Mad). (30 Mad 54 (PB), Followed.)
 (93) 17 Bom 733 (734).
 (22) AIR 1922 Bom 267 (270) : 46 Bom 184.
 (16) AIR 1916 Sind 34 (34) : 9 Sind L R 191.
 1. (27) AIR 1927 Cal 114 (116). (Therefore no revision lies against an order amending decree.)
- Note 13**
 Cas 664 (667) : 37 Mad 29.]
 [See also (15) AIR 1915 Mad 197 (199) : 12 Ind 16. (86) 8 All 354 (361) (PB).]
 (AIR 1923 Oudh 177, Disapproved.)
 (25) AIR 1925 Oudh 645 (646) : 28 Oudh Cas 85.
 (09) 1 Ind Cas 329 (330, 331) : 12 Oudh Cas 35. not subject-matter of an appeal.)
 (Held that question of due service of summons (24) AIR 1924 Rang 137 (138) : 2 Rang 108. circumstances has an inherent power of remand.)
 (01) 23 All 167 (171, 174). (Court under the circumstances that question of due service of summons (34) AIR 1934 Oudh 181 (181).
 15. (17) AIR 1917 All 475 (476) : 39 All 143.
 (08) 1908 Pun Re No. 138.]
 (04) 1904 Pun Re No. 91.
 [But see (17) AIR 1917 Lah 362 (362).
 (29) AIR 1929 Pat 609 (612) : 9 Pat 408. (30 Mad 54 (PB), Followed.)
 (25) AIR 1925 Pat 534 (535).
 (22) AIR 1922 Lah 439 (440) : 3 Lah 357.
 23 Cal 738).
 (28) AIR 1928 Cal 812 (814). (Dissenting from

14. **Appeal against decree passed without jurisdiction.**—A decree made without jurisdiction possesses nevertheless the qualities of a decree as between the parties thereto, and if there is a statutory appeal from decrees made in suits of that character, an appeal is competent though the decree is made without jurisdiction; and similarly, where jurisdiction is usurped by a Court in passing an *order* against which an appeal would lie if it had been passed with jurisdiction, an appeal cannot be defeated on the ground that the order was made without jurisdiction.¹

15. **Appeal against consent decree.**—Sub-clause (3) is new. The words "decree passed with the consent of parties" in the clause imply and involve an agreement between the parties and therefore a more failure to raise an objection to the grant of a relief or a more acceptance of an order offered by the Court cannot make the decree a consent decree.

The consideration for the agreement involved in a consent decree is that both sides give up their right of appeal.² Accordingly, a judgment by consent operates as an estoppel³ and all decrees, once they have been established to be by consent, are, by the policy of the Code, made unappealable⁴ and are as valid and binding on the parties as any other decree, unless and until they are set aside by a proper judicial proceeding.⁵

(181) AIR 1981 Cal 578 (579). (Amended by re-view or under S. 152 and no appeal lies from original decree.) (106) 3 Cal 1 Jour 188 (190, 191). (9 Cal W N 605, Followed.) (101) 24 Ind 646 (650). (105) 9 Cal W N 605 (607). (105) 32 Cal 908 (909). (115) AIR 1915 Nag 37 (39); 11 Nag L R 92. (93) 15 All 121 (122). (At first sight this decision appears to negative the right of appeal, but read carefully shows that the right of appeal is assumed to exist.) (28) AIR 1928 All 194 (196). (The only ground of such appeal may be error in the amendment.) [See also (10) 5 Ind Cas 304 (305) (Cal).] (132) AIR 1932 Nag 143 (144); 28 Nag L R 245.] [But see (24) AIR 1924 Cal 898 (899). (Appeal by one of the defendants is not affected by a subsequent review of the decree as against other defendants to which the appellant is neither a party nor by which the appellant is affected.)] Note 14

1. (17) AIR 1917 Cal 320 (325). 2. (10) 8 Ind Cas 26 (27) (Cal). (91) 13 All 575 (576). (High Court has right to set right the proceedings of lower Court.) (12) 16 Ind Cas 940 (942) (Cal). (8 Ind Cas 26, Followed.)

Note 15

1. (1890) 1890 W N 116 (116), Aldam v. Brown. (17) AIR 1917 Cal 564 (565). 2. (18) AIR 1918 Nag 66 (67); 15 Nag L R 39. 3. (1890) 1890 W N 116 (116), Aldam v. Brown. (1893) 10 T R 139, Hadda v. Fordham. (39) AIR 1939 Cal 500 (502). 4. (21) AIR 1921 Mad 696 (700). 5. (1895) 1 Ch 37 (49), Re. S. American Co. (33) AIR 1933 Sind 29 (31); 26 Sind L R 395. (37) AIR 1937 Sind 177 (178); 31 Sind L R 197. 6. (21) AIR 1921 Mad 696 (700). (32) AIR 1982 P C 251 (251, 252) (PC). (Same as of suit in original Court.)

(31) AIR 1931 PC 107 (105); 57 J.L.R. 251 (107). (1877) 6 Ch D 297 (302), *Essex v. Essex*. (36) AIR 1936 Bom 301 (301), *Essex v. Essex*. (decree is good and binding on parties to it). (37) AIR 1937 Sind 177 (178); 31 Sind L R 197. (Consent decrees are not subject to appeal). (37) AIR 1937 Sind 177 (178); 31 Sind L R 197. (38) 13 Bom 137 (137), *Essex v. Essex*. (of suit in original Court.)

(26) AIR 1926 Bom 39 (40). (29) AIR 1929 Bom 68 (70). (Section 30, Workmen's Compensation Act VIII of 1928). (22) AIR 1922 Lab 309 (311); 3 Lab 175. (12) 16 Ind Cas 957 (957, 958); 1913 Pun Ho No. 8. (Compromise decree.) (18) 18 Ind Cas 758 (760, 761) (Lab). (Decree on plaintiff agreeing to be bound by oath of defendant.) (101) 5 Cal W N 877 (878). (11) 9 Ind Cas 210 (211) (Cal). (Validity of consent decree cannot be gone into in appeal. 5 Cal W N 877, Followed.) (30) 125 Ind Cas 587 (589) (All). (Plaintiffs of minor parties agreeing to abide by decision of Court after local inspection and necessary evidence—No leave got for compromise—Alters can impugn validity of consent decree by appeal. (29) AIR 1929 Oudh 451 (452, 453); 5 Luck 391. (Agreement not to adduce evidence and to abide by any decision of the Court—Appeal barred under sub-clause 9.) (26) AIR 1926 Cal 512 (513). (11) 11 Ind Cas 568 (569); 36 Bom 77. (Consent decree cannot be set aside by a rule of Court but only by a separate suit.) (1898) 4 M & C 215 (228), *Alorion v. Alorion*. [See also (22) AIR 1922 Oudh 159 (159).] 25 Oudh Cas 213. (Award as evidence of fact compromise.) (31) AIR 1931 PC 107 (105); 57 J.L.R. 251 (107). (1877) 6 Ch D 297 (302), *Essex v. Essex*. (36) AIR 1936 Bom 301 (301), *Essex v. Essex*. (decree is good and binding on parties to it). (37) AIR 1937 Sind 177 (178); 31 Sind L R 197. (Consent decrees are not subject to appeal). (37) AIR 1937 Sind 177 (178); 31 Sind L R 197. (38) 13 Bom 137 (137), *Essex v. Essex*. (of suit in original Court.)

A consent decree, however, passed under the compulsion of the Court is not a decree that can be said to have been passed with the consent of the party.

Where one party *alleges* and the other *denies* or *withdraws* from a compromise entered into by the parties out of Court, and the Court finds in favour of the compromise and passes a decree, is such a decree "a decree passed with the consent of the parties"? There is a conflict of opinion on the point.

"The Nagpur and the Sind Judicial Commissioners' Courts answer the question in the negative. The Nagpur Court holds that where a Court records a compromise notwithstanding the denial thereof by one party, it is really a finding very much *against* the consent of one party. Another reason advanced is that the removal of the words "and such decree shall be final" from Section 375 of the old Code, corresponding to O. 23 R. 3, shows that a decree passed under O. 23 R. 3 is not *final* unless consented to by the parties before the Court, *at the time* the decree is passed.⁹ The Sind Court agrees that an appeal will lie from a decree passed under O. 23 R. 3 on the ground that the appellant did not consent to it.¹⁰ The Calcutta, Madras, Lahore and Patna High Courts, on the other hand, take the opposite view, the latter Court expressly dissenting from the Nagpur view.¹¹ According to the Madras High Court¹² the expression "a decree passed with the consent of parties" is not limited to a decree passed with the consent expressed *at the moment the decree is passed*, but includes decrees based on consent *proved* to have been out of Court, though subsequently withdrawn or repudiated before the Court. The reason is that a decree can be passed in one of two ways —

(a) by deciding the dispute on the merits, and,
(b) on the consent of the parties.

There is no third way of passing a decree, so that a decree on a finding that parties have consented out of Court, if it does not fall under the first category, must necessarily fall under the second category of consent decrees.

(91) 15 Bom 594 (598). (The only mode for setting aside compromise decree is either by review or by a suit. (1877) 6 Ch D 297, Flower v. Lloyd, followed.)

(1896) 1 Ch 678 (676, 680), Ainsworth v. Wilding. (84) 10 Cal 612 (615).

(1878) 9 Ch D 259 (268), Gilbert v. Tudemann. (1895) 2 Ch D 278 (284), Huddersfield v. Lister. (1897) 2 Ch D 534 (550, 552), Wilding v. Sanderson.

(21) AIR 1921 All 310 (310) : 48 All 266. (24) AIR 1924 All 570 (571) : 46 All 710. (25) AIR 1925 All 271 (272) : 47 All 456. (08) 26 Mad 76 (77).

(91) 15 Bom 594 (598). (The setting aside of a consent decree on the ground of coercion must be in a fresh suit or by review and not by an appeal.)

(17) AIR 1917 Mad 578 (580) : 40 Mad 177. (20) AIR 1920 Cal 724 (724). (12) 16 Ind Cas 988 (989) (Cal). (20) AIR 1920 P C 139 (140) : 47 Ind App 200 (P C). (Defendants consenting to decree notwithstanding claim barred by limitation—Decree is consent decree and no appeal lies.)

(18) 18 Ind Cas 758 (760) (Labh). (Case of confession of judgment by defendant.)

(26) AIR 1926 Bom 39 (40).

[See also (37) AIR 1937 Nag 413 (415). (The Court has jurisdiction to set aside the consent decree on any ground which would invalidate an agreement between the parties. Section 74, Contract Act, applies to the case of a compromise decree and it is open to a Court executing such decree to interfere with a stipulation by way of penalty contained in the compromise.)]

8. (23) AIR 1928 Lah 139 (130). (Under the circumstances parties are not estopped from appearing.)

[See (36) AIR 1935 Cal 231 (234) : 62 Cal 228. (On premature threat from Bench, pleader agreeing to settlement of case — Counsel held intimidated and Court had inherent power to set aside settlement.)]

9. (18) AIR 1918 Nag 129 (130). (29) AIR 1929 Sind 32 (35). 10. (18) 19 Ind Cas 450 (450) : 6 Sind L R 166. (Obiter.)

11. (21) AIR 1921 Mad 696 (699, 700). (35) AIR 1935 Cal 239 (240) : 62 Cal 229. (22) AIR 1922 Lah 309 (310, 311) : 3 Lah 175. (33) AIR 1933 Pat 306 (437) : 12 Pat 359. 12. (21) AIR 1921 Mad 696 (699). (Consent by pleaders on both sides. It dissents from AIR 1915 Mad 322.)

The Lahore High Court¹³ gives a further reason in support of the conclusion arrived at by the Madras High Court, *viz.*, that where a compromise is proved to have been effected outside Court, the Court *must*, under O. 23 R. 3, pass a decree in accordance therewith. The parties also, at the time of the consent, have contemplated the issue of the decree as a matter of course. The decree so passed is only a *formal expression* of the agreement of the parties and, under such circumstances, must be deemed to be one passed with the consent of the parties.

Having regard to the fact that in O. 43 R. 1 (m) an appeal is newly provided for from an order recording or refusing to record a compromise and construing this provision with sub-clause (3) of Section 96, it seems clear that the *only* appeal intended by the Legislature is an appeal against the "recording or refusing to record" the alleged agreement and not a further appeal again from the decree recording the compromise.¹⁴ The views of the Madras and Lahore High Courts are therefore to be preferred.

The proper method, therefore, of questioning a consent decree is either by *review* or by a regular *suit* and not by way of appeal.¹⁵ Where a suit is filed to set aside a consent decree, it can be set aside on any ground which would invalidate an agreement¹⁶ such as fraud, misrepresentation or mistake. In the last case, however, serious and

was committed to compromise—Remedy is not by adducing evidence of fraud in appeal but by taking proper action to get decree set aside.) (36) 156 Ind Gas 1035 (1085) (Fesh). (A decree passed by a Court on the basis of statements filed by the plaintiff and defendant specially praying that a decree may be granted in favour of the plaintiff against the defendant, as claimed is a decree passed with the consent of the parties and is therefore not open to appeal.) (36) AIR 1936 Rang 389 (390). (But review on ground of fraud or mistake does not lie—Remedy is by way of separate suit.) (26) AIR 1926 Cal 512 (513). (Objection by consenting party can be entertained only in review or in suit.) (01) 5 Cal W N 877 (878). (02) 6 Cal W N 82 (86). (Compromise by advocate under a valid authorisation is binding.) (29) AIR 1929 Lah 472 (472). (1896) 1 Ch D 673 (680), Ainsworth v. Wilding. (1894) 2 Ch D 273 (284), Huddersfield v. Lister. (1897) 2 Ch D 534 (552), Wilding v. Sanderson. (91) 15 Bom 594 (598). (11) 11 Ind Gas 568 (569): 36 Bom 77. (Note—Whether one remedy bars the other, See Note 63 to Section 9.) [See also (37) AIR 1937 Cal 222 (224). (High Court has no inherent power to vary consent decree by consent.)] [See however (30) AIR 1930 Bom 362 (363, 364): 55 Bom 372. (Interlocutory consent order not in the nature of final order can be set aside in the same suit on proper grounds.)] 16. (81) 6 Cal 687 (707).

(38) AIR 1933 Sind 53 (55). (36) 164 Ind 561 (564): 62 Cal 642. (35) AIR 1935 Pat 59 (61). (36) AIR 1936 Sind 99 (105): 29 Sind L R 455. (Compromise decree cannot be set aside on ground that the compromise was made in ignorance of law.) (37) AIR 1937 Nag 413 (414).

13. (22) AIR 1922 Lah 309 (311): 3 Lah 175. [See also (10) 6 Ind Gas 857 (859) (All).] 14. (14) AIR 1914 Lah 112 (113): 1914 Pun Re No. 96. (Order directing a compromise to be recorded is appealable under O. 43 R. 1, and not under Section 96 (3).) (38) AIR 1938 Bom 205 (207, 208): 57 Bom 206. (Order not challenged but decree can be challenged by review or under Section 151—As to appealability the second Judge took different view.) (38) AIR 1938 Cal 94 (95). (Appeal from order lies though decree is passed before filing of appeal and no appeal against it—AIR 1926 Cal 412 held overruled by AIR 1929 Cal 689 (PB).) (16) AIR 1916 Mad 1083 (1084). (Order under O. 23 R. 3 not appealed against—No appeal against decree.) (29) AIR 1929 Pat 318 (320): 8 Pat 528. (Order recording compromise appealable even though followed by a decree.) (38) AIR 1938 Pat 306 (427): 12 Pat 359. (22) AIR 1922 Mad 446 (446). (Doubted in AIR 1925 Mad 606.) (25) AIR 1925 Mad 606 (607). (Order and decree passed together—Appeal lies against order.) (24) AIR 1924 Lah 466 (468). (Order followed by decree—Order appealable.) [See (36) AIR 1936 Mad 385 (386). (Order recording compromise is appealable even when a decree is passed in terms of compromise.) (36) AIR 1936 Sind 59 (60): 29 Sind L R 437. (Order recording compromise under O. 23 R. 3 is appealable under O. 43 R. 1 (m).) 15. (09) 2 Ind Gas 129 (136). (Cal). (Cases reviewed fully.) (32) AIR 1932 P C 251 (252) (PC). (84) 10 Cal 612 (615). (03) 30 Cal 613 (615). (36) 164 Ind Gas 561 (564): 62 Cal 642. (36) AIR 1936 Mad 385 (386). (Party alleging that owing to fraudulent action of his vakil he

substantial injustice must be shown to have resulted from the mistake.¹⁷ But it is necessary to see in every case *what* it is that the parties have consented to.

If the parties merely agree to certain *deviations* in the procedure of the Court, as, for instance, by dispensing with particular kinds of evidence, but there is no clear agreement that they would be bound by the *conclusions* arrived at by the Court, the decree is not a "consent decree."¹⁸

If the parties *clearly agree to be bound by the conclusions* which the Court may arrive at by adopting a particular procedure, but such agreement does not result in the Court assuming jurisdiction *extra cursum curiæ* and does not involve the Court in going outside the ordinary course of procedure, then according to the Madras High Court, the decree may be a consent decree.¹⁹ According to the Allahabad High Court it will still be a consent decree.²⁰

If the parties *clearly agree to be bound* by the conclusions of the Court and such agreement results in the Court assuming jurisdiction *extra cursum curiæ*, then the Court is in the position of an arbitrator, and its decision will be a consent decree not open to appeal.²¹

(99) 26 Cal 891 (908). (Any judgment can be set

aside for fraud.)

(99) 2 Ind Cas 129 (140) (Cal). (Suit only is

appropriate remedy in cases of fraud, misrepresen-

tation, mistake, coercion, undue influence or

similar grounds.)

17. (28) AIR 1928 P C 184 (185) (PC). (Consent

order cannot be set aside unless substantial in-

justice is established.)

18. (27) AIR 1927 Lab 382 (382). (Suit under

Section 92—Party merely approving of appointment of X as a member of the committee of

management—Decree is not thereby a consent

decree.)

(84) AIR 1934 Lab 67 (67): 15 Lab 305. (Decree

on oath of defendant—Not consent decree—

Appealable.)

(23) AIR 1928 All 373 (373, 374). (Offer by one

party to abide by Judge's decision not accepted

by other party.)

(25) AIR 1925 All 348 (349). (Counsel on both

sides at trial stating that the Judge may dispense

with oral evidence and decide the case on the

document filed and on local inspection—Decision

accordingly—Not a consent decree.)

(29) AIR 1929 All 116 (117). (Do.)

(23) AIR 1928 Mad 444 (445, 446): 47 Mad 39.

(Parties requesting the Court to have a local in-

spection and agreeing to abide by its decision—

Right of appeal is not lost.)

(24) AIR 1924 Sind 134 (136): 18 Sind L R 306.

[See (34) AIR 1934 Mad 397 (397, 398): 58 Mad

31. (Here deviation from ordinary procedure

does not necessarily render proceeding *extra*

cursum curiæ—In such cases right of appeal

is not taken away unless it has been waived.]

19. (23) AIR 1923 Mad 444 (445): 47 Mad 39.

(Dissenting from 26 Mad 76 and AIR 1919 Mad

150.)

(34) AIR 1934 Mad 397 (398): 58 Mad 31. (Right

of appeal held waived by such agreement.)

20. (26) AIR 1926 All 90 (92). (But it does not

follow that unless the Court has proceeded out-

side its ordinary jurisdiction a right of appeal

always exists.)

(21) AIR 1921 All 310 (310): 43 All 266.

(29) AIR 1929 Oudh 451 (452, 453): 5 Luck 391.

(Agreement to abide by decision of Court bars

appeal.)

21. (25) AIR 1925 All 558 (558): 47 All 921.

(34) AIR 1934 Lab 176 (177): 15 Lab 726.

(18) AIR 1918 Upp Bur 14 (15): 3 Upp Bur 86.

(Though the High Court might interfere under

Section 115.)

(39) AIR 1939 Pat 514 (516): 18 Pat 261: 181

Ind Cas 42 (44).

(30) AIR 1930 All 127 (128). (Parties requiring

Court to decide on local inspection and oral state-

ments on the spot—No appeal lies.)

(29) AIR 1929 All 577 (577): 51 All 886. (Parties

agree to accept decision of Court on local inspec-

tion and documentary evidence—Decision is

virtually award—No appeal lies.)

(26) AIR 1926 All 90 (92). (Agreeing to be bound

by decision on documentary evidence alone.)

(26) 94 Ind Cas 7 (7) (All). (Consent to be bound

by decision after local inspection.)

(28) AIR 1928 Mad 127 (128). (Decree for main-

tenance passed with other party's consent in

order to avoid litigation—Decree is a consent

decree.)

(25) AIR 1925 Nag 463 (464): 21 Nag L R 84.

(20) AIR 1920 P C 139 (140): 47 Ind App 200 (PC).

(Defendant waiving plea of limitation though

suit was barred—Decree is a consent decree.)

(11) 9 Ind Cas 296 (297): 38 Cal 421. (Consent

to be bound by decision after local inspection.)

(23) AIR 1923 Mad 444 (445, 446): 47 Mad 39.

(99) 23 Bom 752 (755).

(02) 29 Cal 306 (310).

(24) AIR 1924 Cal 940 (945, 946, 951, 952, 953).

(Agreement in one suit to abide by the decision in

another of two cross suits binding on the parties.)

[See (28) 113 Ind Cas 365 (366) (Nag). (AIR 1925

Nag 463, Followed.)

(34) AIR 1934 Mad 397 (398): 58 Mad 31. (If

the proceeding is *extra cursum curiæ*, the deci-

sion is in the nature of an arbitrator's award and

Notwithstanding the above discussion there are nevertheless cases in which decrees, though passed with the consent of the parties, can be appealed against—

- (29) AIR 1929 Sind 32 (36).
29. (28) AIR 1928 Mad 922 (922).

(86) AIR 1986 Mad 856 (857). (When a party invites the Court to adopt a special procedure which is not contemplated by the Code of Civil Procedure, and is in fact a procedure *extra cursum curiae*, he cannot afterwards turn round and say that the Court is to blame for adopting that procedure.)

- generally the right of appeal is barred. If, on the other hand, it is not *extra curiam curia*, unless there is a clear waiver of the right, the right of appeal will not be lost—Agreement to be bound by decision of Court amounts to such waiver.)
- (86) AIR 1986 Mad 856 (857). (When a party invites the Court to adopt a special procedure which is not contemplated by the Code of Civil Procedure, and is in fact a procedure *extra curiam curia*, he cannot afterwards turn round and say that the Court is to blame for adopting that procedure.)
22. (84) AIR 1984 Lab 67 (67) : 15 Lab 305. (Agent of Court of Wards challenging defendant to take oath—Oath taken and decreed—*Held* it is not consent decree and appeal lies.)
- (38) AIR 1988 Nag 64 (65).
23. (95) 18 Mad 410 (414).
(07) 30 Mad 421 (423).
(95) 5 Mad L Jour 145 (147).
(08) 1908 Pun Re No. 77, page 359. (The terms so excluded might be enforced in a separate suit as a contract. See (1907) 34 Cal 456 (463).)
24. (92) 16 Bom 202 (212).
(1900) 23 Mad 101 (105, 106).
25. (29) AIR 1929 Sind 32 (36).
(10) 6 Ind Cas 857 (859) (Am).
(89) 1889 Pun Re No. 105, page 368. (See O. 43 R. 1 (m).)
26. (28) AIR 1928 Cal 108 (109).
27. (17) AIR 1917 Cal 607 (607) : 43 Cal 85.
28. (17) AIR 1917 Cal 607 (607) : 43 Cal 85.

Section 36 (3) does not apply to orders passed by consent of parties.³²

16. Appeal as to costs. — See Section 35, *ante*.

17. Nature of grounds. — See Order 41 Rule 1 *infra*.

18. Valuation for purposes of appeal.— "There has been a great divergence of judicial opinion on this subject. It is, of course, clear that the Judiciary jurisdiction of the Appellate Court is determined (as the various Acts conferring such jurisdiction upon other courts) by "the value of the original suit." It is *that* valuation and *not* that set up by the plea in defence² or the amount awarded by the decree³ that governs the return of the writ at a later stage in a matter of appeal."

(17) AIR 1957 Lah 147 (189).
only to the said company.
(11) II Ind Cas 691 (1945) : 33 All 681. (Value of
share to the value of the main relief claimed in
the suit and not incidental reliefs such as
depreciation claimed.)
(12) 15 Ind Cas 575 (574) (Lah). (Suits for de-
valuation of shares at three times the amount)
(19) 15 Ind Cas 517 (520) : 1912 Pan No. 83.
(Presumption suit of land valued at less than
Rs. 5,000 — There is payment of more than
Rs. 5,000—Appld Not to District Judge.)

Note 18
In the appointment of commissioners.

32. (19) AIR 1916 Cal 795 (797). (Ordering ap-
pointment of commissioners)

1. (188) 10 All 221 (1927).

[illegible][illegible]

not that awarded by Court determines forum of Appellate Court — But the valuation must be according to law at the date of the appeal and not at the date of the suit which led to it.) [See (52) 1 Mad 220 (221, 225).] [See also (38) AIR 1933 All 1 (6, 7) : 51 All 459. (Subject-matter of suit or appeal is not necessarily identical with subject-matter in dispute between parties.) 2. (30) 2 All 778 (780). (38) 10 All 524 (525). (86) 8 Bom 31 (38). (10) 6 Ind Cas 18 (19, 20) (Cal). (Course of appeal Court.) (15) AIR 1915 All 349 (349). (Do.) (27) AIR 1927 Mad 977 (980) : 50 Mad 557. (26) AIR 1926 Mad 71 (72). (10) 6 Ind Cas 18 (19, 20) (Cal). (Course of appeal Court.) (79) 4 Cal 1, 491 (496, 497) : 5 Cal 489. (Suit for property of more than Rs. 5,000 in value—No appeal lies to District Court.) (92) 6 Cal W N 346 (348). (92) 15 Mad 69 (70). (74) 7 Mad 11 C R 366 (367). (Suit for over Rupees 5,000—Decree for less—Appeal lies to the High Court.)

is determined by the value of the claim as brought and not only the decision on the claim. (123) AIR 1992 Pat 400 (402): 1 Pat 32. (Formal appeal in a real suit not allowed by the revenue)

(97) 12 All 286 (1907).
(98) AIR 1901 Cal 159 (1901) : 25 Cal 822. (Matter for sale for more than Rs. 5,000—Appellate decree for less than Rs. 5,000—Prothonotary to ratify District Judge and not to High Court.)
(99) AIR 1905 Mad 723 (721). (App. from order on application numbered 4, sit under Para 20, Sub 7, C. P. C.—Valuation for purpose of appeal same as valuation in original application.)
(100) AIR 1907 Oudh 12 (12) : 12 Ind 386. (Valuation of suit above Rs. 5,000—Suit decided by Subordinate Judge before Chief Court added Explanation to Rule 260, Oudh Civil Rule—Applied here to High Court.)
(101) 12 All 581 (586).
(11) 9 Ind Cal 671 (675) (All). (Suit for two-thirds together amounting to more than Rs. 5,000 as valued in plaint—Same value in appeal.)
(81) 8 Bom 31 (31).
(72) 9 Bom 11 C R 286 (288).
(26) AIR 1925 Cal 1076 (1081) : 53 Cal 14 (F. H.).
(90) 17 Cal 680 (683).
(96) 28 Cal 536 (542, 543).
(79) 4 Cal T. Rep. 491 (496, 497) : 5 Cal 489. (Suit for property of more than Rs. 5,000 in value—No appeal lies to District Court.)
(02) 6 Cal W N 846 (348).
(92) 15 Mad 69 (70).
(74) 7 Mad 11 C R 366 (357). (Suit for over Rupees 5,000—Decree for less—Appeal lies to the High

Not 15

32. (1) All 1916 and 1917 (1918-1919) (1920-1921) (1922-1923) (1924-1925) (1926-1927) (1928-1929) (1930-1931) (1932-1933) (1934-1935) (1936-1937) (1938-1939) (1940-1941) (1942-1943) (1944-1945) (1946-1947) (1948-1949) (1950-1951) (1952-1953) (1954-1955) (1956-1957) (1958-1959) (1960-1961) (1962-1963) (1964-1965) (1966-1967) (1968-1969) (1970-1971) (1972-1973) (1974-1975) (1976-1977) (1978-1979) (1980-1981) (1982-1983) (1984-1985) (1986-1987) (1988-1989) (1990-1991) (1992-1993) (1994-1995) (1996-1997) (1998-1999) (2000-2001) (2002-2003) (2004-2005) (2006-2007) (2008-2009) (2010-2011) (2012-2013) (2014-2015) (2016-2017) (2018-2019) (2020-2021) (2022-2023) (2024-2025) (2026-2027) (2028-2029) (2030-2031) (2032-2033) (2034-2035) (2036-2037) (2038-2039) (2040-2041) (2042-2043) (2044-2045) (2046-2047) (2048-2049) (2050-2051) (2052-2053) (2054-2055) (2056-2057) (2058-2059) (2060-2061) (2062-2063) (2064-2065) (2066-2067) (2068-2069) (2070-2071) (2072-2073) (2074-2075) (2076-2077) (2078-2079) (2080-2081) (2082-2083) (2084-2085) (2086-2087) (2088-2089) (2090-2091) (2092-2093) (2094-2095) (2096-2097) (2098-2099) (2100-2101) (2102-2103) (2104-2105) (2106-2107) (2108-2109) (2110-2111) (2112-2113) (2114-2115) (2116-2117) (2118-2119) (2120-2121) (2122-2123) (2124-2125) (2126-2127) (2128-2129) (2130-2131) (2132-2133) (2134-2135) (2136-2137) (2138-2139) (2140-2141) (2142-2143) (2144-2145) (2146-2147) (2148-2149) (2150-2151) (2152-2153) (2154-2155) (2156-2157) (2158-2159) (2160-2161) (2162-2163) (2164-2165) (2166-2167) (2168-2169) (2170-2171) (2172-2173) (2174-2175) (2176-2177) (2178-2179) (2180-2181) (2182-2183) (2184-2185) (2186-2187) (2188-2189) (2190-2191) (2192-2193) (2194-2195) (2196-2197) (2198-2199) (2200-2201) (2202-2203) (2204-2205) (2206-2207) (2208-2209) (2210-2211) (2212-2213) (2214-2215) (2216-2217) (2218-2219) (2220-2221) (2222-2223) (2224-2225) (2226-2227) (2228-2229) (2230-2231) (2232-2233) (2234-2235) (2236-2237) (2238-2239) (2240-2241) (2242-2243) (2244-2245) (2246-2247) (2248-2249) (2250-2251) (2252-2253) (2254-2255) (2256-2257) (2258-2259) (2260-2261) (2262-2263) (2264-2265) (2266-2267) (2268-2269) (2270-2271) (2272-2273) (2274-2275) (2276-2277) (2278-2279) (2280-2281) (2282-2283) (2284-2285) (2286-2287) (2288-2289) (2290-2291) (2292-2293) (2294-2295) (2296-2297) (2298-2299) (2300-2301) (2302-2303) (2304-2305) (2306-2307) (2308-2309) (2310-2311) (2312-2313) (2314-2315) (2316-2317) (2318-2319) (2320-2321) (2322-2323) (2324-2325) (2326-2327) (2328-2329) (2330-2331) (2332-2333) (2334-2335) (2336-2337) (2338-2339) (2340-2341) (2342-2343) (2344-2345) (2346-2347) (2348-2349) (2350-2351) (2352-2353) (2354-2355) (2356-2357) (2358-2359) (2360-2361) (2362-2363) (2364-2365) (2366-2367) (2368-2369) (2370-2371) (2372-2373) (2374-2375) (2376-2377) (2378-2379) (2380-2381) (2382-2383) (2384-2385) (2386-2387) (2388-2389) (2390-2391) (2392-2393) (2394-2395) (2396-2397) (2398-2399) (2400-2401) (2402-2403) (2404-2405) (2406-2407) (2408-2409) (2410-2411) (2412-2413) (2414-2415) (2416-2417) (2418-2419) (2420-2421) (2422-2423) (2424-2425) (2426-2427) (2428-2429) (2430-2431) (2432-2433) (2434-2435) (2436-2437) (2438-2439) (2440-2441) (2442-2443) (2444-2445) (2446-2447) (2448-2449) (2450-2451) (2452-2453) (2454-2455) (2456-2457) (2458-2459) (2460-2461) (2462-2463) (2464-2465) (2466-2467) (2468-2469) (2470-2471) (2472-2473) (2474-2475) (2476-2477) (2478-2479) (2480-2481) (2482-2483) (2484-2485) (2486-2487) (2488-2489) (2490-2491) (2492-2493) (2494-2495) (2496-2497) (2498-2499) (2500-2501) (2502-2503) (2504-2505) (2506-2507) (2508-2509) (2510-2511) (2512-2513) (2514-2515) (2516-2517) (2518-2519) (2520-2521) (2522-2523) (2524-2525) (2526-2527) (2528-2529) (2530-2531) (2532-2533) (2534-2535) (2536-2537) (2538-2539) (2540-2541) (2542-2543) (2544-2545) (2546-2547) (2548-2549) (2550-2551) (2552-2553) (2554-2555) (2556-2557) (2558-2559) (2560-2561) (2562-2563) (2564-2565) (2566-2567) (2568-2569) (2570-2571) (2572-2573) (2574-2575) (2576-2577) (2578-2579) (2580-2581) (2582-2583) (2584-2585) (2586-2587) (2588-2589) (2590-2591) (2592-2593) (2594-2595) (2596-2597) (2598-2599) (2600-2601) (2602-2603) (2604-2605) (2606-2607) (2608-2609) (2610-2611) (2612-2613) (2614-2615) (2616-2617) (2618-2619) (2620-2621) (2622-2623) (2624-2625) (2626-2627) (2628-2629) (2630-2631) (2632-2633) (2634-2635) (2636-2637) (2638-2639) (2640-2641) (2642-2643) (2644-2645) (2646-2647) (2648-2649) (2650-2651) (2652-2653) (2654-2655) (2656-2657) (2658-

18. Valuation for purposes of a

course of appeal. Where a plaintiff values his claim *definitively*, as in a suit for a debt, that value will determine the appellate *forum also* unless by fraud or misrepresentation the plaintiff deliberately *overvalues* or *undervalues* the claim for the purpose of choosing his own *forum*.⁵ In the latter case, it is the *true* value at which the plaintiff ought to have been valued that will represent the "value of the suit" for purposes of appeal.⁶

But in cases where the plaintiff is entitled to value his suit approximately or tentatively as in a suit for accounts or mesne profits, what is the value of the suit? It is on this point that there has been considerable divergence of opinion and four different views at least, have been expressed :

(1) The Madras and Allahabad High Courts have held⁷ that the "value of the suit" in such cases means the statutory value of the suit, that is, the value which the plaintiff was entitled to give under the Suits Valuation Act (1887) or other enactments. The Calcutta High Court in the under-mentioned Full Bench case⁸ expressed a similar view but did not refer to a contrary view expressed in an earlier Full Bench decision of the same Court.⁹ The Bombay High Court also held a similar view originally¹⁰ but has, in later decisions, held a different view.¹¹ The Patna High Court has also held that ordinarily the value of the suit as given by the plaintiff in his plaint is to be the determining factor in such cases as regards the value of the appeal.¹²

(2) The second view which has been held by Calcutta High Court is that the "value of the suit" which determines the course of appeal means the value of the suit as *decreed* by the Court, and not the tentative value given by the plaintiff in his plaint.¹³ According to a Full Bench decision of the Lahore High Court there is a further distinction between a case

4. (95) 1895 Bom P J 228 (228). (Suit for declaration.)
- (13) 20 Ind Cas 478 (478) (Lah). (Redemption suit.)
- (95) 1895 Pun Re No. 106, page 497 (PB). (Do.)
- (91) 18 All 320 (323). (Exaggerated claim—Fraud.)
- (93) 15 All 368 (365). (Value assigned by plaintiff—Fraud and negligence excepted.)
- (11) 10 Ind Cas 746 (747) : 35 Bom 239. (Consent of party cannot make value of suit different.)
- (12) 16 Ind Cas 940 (941) (Cal).
- (72) 17 Suth W R 243 (243).
- (11) 12 Ind Cas 464 (476) : 38 Cal 639. (Parties cannot by consent confer jurisdiction.)
- (90) 17 Cal 680 (683).
- (91) 18 All 320 (323).
- [See also (26) AIR 1926 Oudh 428 (429) : 1 Luck 202.
- (04) 31 Cal 849 (856).]
- (18) AIR 1918 Mad 998 (1002) : 40 Mad 1 (PB). (Principles well set forth in the order of reference.)
- (33) AIR 1933 Mad 330 (331, 332) : 56 Mad 705.
- (33) AIR 1933 Mad 721 (722) : 57 Mad 186.
- (25) AIR 1925 All 376 (377) : 47 All 534. (Following 16 All 286 and 33 All 97 and dissenting from 32 All 222 and 34 Cal 954 (PB).)
- (25) AIR 1925 Cal 1076 (1081) : 53 Cal 14 (PB). (34 Cal 954 (PB) which decides to the contrary has not been referred to in this. This decision
- (02) 1902 Pun Re No. 58. (High Court.)
- (33) AIR 1933 Lah 568 (569). (Suit for accounts—Amount decreed over Rs. 10,000—Appeal to High Court.)
- (28) AIR 1928 Lah 157 (158) : 9 Lah 23. (Suit for accounts.)
- (28) AIR 1928 Lah 670 (671). (Pre-emption suit.) of this is questioned in 22 Bom 963.)
- (96) 20 Bom 265 (268, 269). (But the correctness of 17 Cal 704 (706).
- (13) 16 Ind Cas 940 (941) (Cal).
- (04) 31 Cal 365 (369).
- side—Value is value of decree as passed.)
- Payment of Rs. 8,000—Appeal on execution
- (25) AIR 1925 Cal 212 (212). (Decree for Rs. 9,000 without referring to A I R 1925 Cal 1076 (PB).)
- High Court. Simply follows 34 Cal 954 (PB).
- Decree for over Rs. 5,000—Appeal lies to High Court. AIR 1926 Cal 378 (379). (Suit for Rs. 4,000 more than Rs. 5,000—Appeal lies to High Court.)
- profits valued at less than Rs. 5,000—Decree for 13. (07) 34 Cal 954 (959, 960) (PB). (Suit for mesne profits valued at less than Rs. 5,000—Decree for 12. (35) AIR 1935 Pat 396 (400) : 14 Pat 658 (S B). (35) AIR 1935 Pat 396 (400) : 14 Pat 658 (S B).
11. See foot-notes (16) and (13).
10. (84) 8 Bom 31 (33).
9. (07) 34 Cal 954 (959) (PB).
- pass decree beyond its pecuniary jurisdiction.)
- 1920 Cal 517 which held that a Court cannot AIR 1915 Cal 352 and 24 Cal V N 342 : AIR must be deemed to have overruled 43 Cal 650 :

where the decree is in excess of the amount claimed and a case where the decree is for a sum less than the amount claimed. In the former case it is the amount *decreed* that will be "value of the suit" while in the latter case it will be the tentative valuation originally given by the plaintiff.¹⁴ The third view which has been held by Mr. Justice Mukerjee in the Full Bench case in I. L. R. 34 Calcutta 954 is that the "value of the suit" for purposes of appeal is the value as *decreed and as accepted* by the plaintiff by payment of court-fees on the additional amount decreed.¹⁵ (4) The fourth view is that, in case of Courts of limited pecuniary jurisdiction, as that of the Munisifs and Second Class Subordinate Judges, the value of a suit *can in no case* exceed the pecuniary jurisdiction of the Court and the appeal will therefore always lie to the District Court.¹⁶

It is impossible to reconcile this divergence of opinion on legal principles. This conflict has arisen owing to the wrong method of interpreting statutes. When an enactment such as the Suits Valuation Act *entitles* the plaintiff to value a suit for accounts or for mesne profits in a particular manner, it is not in accordance with the accepted rules of interpretation to assume that that is not the value but something else, such as the amount *decreed* by the Court or the amount *decreed and accepted* by the plaintiff subsequent to the decree. In this view the first of the views set forth above must be taken as the soundest one.

Where on a plea of set-off, a Court gives a decree to the defendant for over Rs. 5,000, it is nevertheless the value of the suit as originally framed that determines the *form* of appeal.¹⁷ Formerly, however, (under Section 216 of the old Code) the amount of the *decree* in favour of defendant determined the *form* of appeal.¹⁸ See also Notes to Order 21 Rule 19, *infra*.

In suits for partition the proper valuation of the suit is the value of the share sought to be separated and not the value of the entire property.¹⁹ In suits for restitution of conjugal rights, the plaintiff's valuation must be accepted unless it is found that he has overvalued or undervalued it with any ulterior motives.²⁰

In suits for redemption, the court-fee is payable on the principal sum secured²¹ and this fixes also the *form* of appeal when the mortgagor appeals.²² As to the *form* of appeal when the mortgagee appealed, see the undermentioned case.²³

[See also ('25) AIR 1925 Lah 534 (534). (Appeal from an order in execution — Value is value of the execution proceedings.)] But where in an account suit in which the claim is less than Rs. 5,000 a preliminary decree is passed which does not award any sum, the value of suit will determine the *form* of appeal. See 14. ('34) AIR 1934 Lah 488 (488) (Lah.) ('09) 4 Ind Cas 929 (930) (Lah.) ('34) AIR 1934 Lah 545 (547): 15 Lah 512 (FB). ('34) AIR 1934 Lah 488 (FB). Followed. (A I R 1934 Lah 488 (FB). Followed.) 15. ('19) AIR 1919 Cal 447 (448). (34 Cal 954 (FB). Followed.) 16. ('13) 21 Ind Cas 788 (788, 789) (Bom.). 17. See O. 20 R. 19 (2). 18. ('88) 10 All 587 (598, 594). [See also ('93) 20 Cal 527 (581, 532.). 19. ('90) 12 All 506 (509).

('02) 24 All 381 (382). ('84) 8 Bom 31 (33). ('79) 4 Cal L Rep 417 (418, 419): 5 Cal 188. ('90) 13 Mad 25 (27). 20. ('06) 28 All 545 (551) (FB). ('86) 13 Cal 232 (236). (Such a suit is not one to which any special money value can be attached for the purposes of jurisdiction.) 21. ('86) 10 Bom 41 (46, 47). ('91) 14 Mad 480 (483). ('33) AIR 1933 Lah 155 (156). ('91) 13 All 94 (97). 22. ('09) 1 Ind Cas 870 (870): 1909 Pun Re No. 28. (This was, however, a case under the Punjab Courts Act S. 40 (1) (b).) 23. ('33) AIR 1933 Lah 155 (156). (Value of the subject-matter in redemption suit was the amount adjudicated by trial Court.)

97. [New.] Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

Synopsis

- 1. Scope and object of the Section.
- 2. Preliminary decree — See Section 2 (2).
- 3. Effect of not drawing up a preliminary decree.
- 4. Two or more preliminary decrees, if can be drawn up — See Note 10 to Section 2 (2).
- 5. Effect of final decree being passed pending appeal against preliminary decree.
- 6. Effect of reversal of preliminary decree on final decree — See Note 5.
- 7. Court-fees.

Other Topics (Miscellaneous)

Appeal from preliminary decree — If further proceedings to be stayed. See Note 5.
Both preliminary and final decrees — Appeal from—See Note 5.
Finding on a preliminary issue — If preliminary decree. See Note 3.
Preliminary decree not appealed against—Effect of. See Note 1.

1. Scope and object of the Section. — This Section is new. Under the old Code objections to the preliminary decree could be raised in the appeal against the final decree.¹ This was felt to be unreasonable as, thereby, a party was permitted to wait till proceedings were carried on to a final stage and large costs were incurred, and then, after the final decree, raise objections which could have been taken at an earlier stage.² It is therefore enacted by the present Section that the failure to appeal against a preliminary decree is a bar to raising any objection to it in the appeal against the final decree.³

A Court while passing a final decree cannot re-open questions determined by a preliminary decree.⁴

2. Preliminary decree. — See Section 2 (2), *ante*.

Section 97—Note 1

- 1. ('84) 12 Moo Ind App 157 (184, 185) (PC).
- ('09) 1 Ind Cas 86 (87, 88) (Cal).
- ('02) 1902 Pun L R No. 56, p. 203 (206) : 1902 Pun Re No. 49.
- ('96) 23 Cal 406 (412, 413). (Dwarris on Statutes and Maxwell on Interpretation of Statutes considered.)
- ('02) 29 Cal 758 (767) (FB).
- (1900) 24 Bom 302 (305).
- ('89) 14 Bom 232 (235). (Following the reasoning in 7 Moo Ind App 283 at pp. 302, 303 (P C).)
- ('15) AIR 1915 Cal 118 (118).
- (1865) 10 Moo Ind App 340 (361) (PC).
- (1859) 7 Moo Ind App 283 (302) (PC).
- 2. See Statement of Objects and Reasons. [See also ('12) 16 Ind Cas 159 (160): 36 Bom 536.
- 3. ('30) AIR 1930 Oudh 10 (12).
- ('37) AIR 1937 Rang 494 (496).
- ('36) AIR 1936 Oudh 81 (82).
- ('35) AIR 1935 Oudh 11 (12) : 10 Luck 238.
- ('33) AIR 1933 Oudh 352 (354, 355): 9 Luck 51 (FB).
- ('29) 124 Ind Cas 669 (670) (Oudh).
- ('30) AIR 1930 Lah 24 (26).
- ('19) AIR 1919 Cal 538 (539).
- ('15) AIR 1915 PC 116 (117) : 42 Cal 914 (PC).
- ('19) AIR 1919 Pat 420 (422) : 4 Pat L Jour 306.
- ('24) AIR 1924 Cal 80 (81).
- ('24) AIR 1924 Nag 419 (422).
- ('96) 23 Cal 279 (283).
- ('17) AIR 1917 Cal 701 (704). (Test suggested for determining whether an adjudication is or is not final and conclusive.)
- ('16) AIR 1916 Cal 249 (250).
- ('16) AIR 1916 Bom 305 (307) : 40 Bom 321.
- ('14) AIR 1914 Cal 804 (804).
- ('12) 36 Bom 536 (539).
- ('30) AIR 1930 Pat 557 (558).
- 4. ('29) AIR 1929 Ali 252 (253).
- ('29) AIR 1929 Ali 65 (66).

3. **Effect of not drawing up a preliminary decree.**—This Section does not apply unless a preliminary decree is actually *drawn up*.¹ As to whether there is a right of appeal even when no such decree is drawn up, see the discussion in Note 8 to Section 2 (2). It has been held in the undermentioned cases that no appeal will lie against a mere finding even if such finding is recorded in the form of a decree.²

4. **Two or more preliminary decrees, if can be drawn up.**—See Note 10 to Section 2 (2) where the subject is fully discussed.

5. **Effect of final decree being passed pending appeal against preliminary decree.**—Under the old Code an appeal from an order in the nature of a preliminary decree could not be preferred or maintained after a final decree was passed in the case.¹ Under this Code a preliminary decree is a "decree" within Section 2 (2) and is appealable under this Section. Two questions have arisen in this connection—

1. Where an appeal is preferred against the preliminary decree, does the passing of the final decree by the first Court affect the maintainability of the appeal?

2. Is an appeal against the preliminary decree preferable *after* the final decree has been passed in the suit?

On the first point, all the High Courts have held that a passing of a final decree subsequent to the institution of the appeal will not affect the maintainability of the appeal.² On the second point there is a conflict of opinion. The High Courts of Madras,³

Note 3

1. ('24) AIR 1924 Bom 88 (34). (Provisions of S. 97 whether applicable or not—Test applied.)

('12) 17 Ind Cas 687 (687) : 87 Bom 60.

('18) 19 Ind Cas 894 (895) : 37 Bom 480.

('14) AIR 1914 Bom 28 (25) : 88 Bom 381. (No adverse inference as to his right of appeal to be drawn from an omission on the part of a party to ask the Court to draw up a decree.)

('24) AIR 1924 Cal 1006 (1007, 1008).

('10) 84 Bom 182 (188).

('12) 15 Ind Cas 935 (936) : 8 Nag L R 92 (95).

('26) AIR 1926 Bom 237 (238).

('21) AIR 1921 Bom 220 (223, 224) : 45 Bom 627.

Note 5

1. ('09) 36 Cal 762 (765).

('10) 32 Ind 225 (227).

2. ('14) AIR 1914 Mad 473 (474) : 14 Ind Cas 394.

['See also' ('11) 11 Ind Cas 517 (517) : 38 All 528.

('38) AIR 1938 Bom 222 (222). (This will be so even if the appellant has not asked for stay of proceedings after institution of his appeal or has not filed an appeal against the final decree.)

('38) 40 Pun L R 123 (123).

('35) AIR 1935 Lab 482 (483) : 17 Lab 53.

('15) AIR 1915 Mad 197 (199) : 12 Ind Cas 664.

('668) : 87 Mad 29.

('18) 18 Ind Cas 730 (731) (Mad).

('28) AIR 1928 Mad 107 (115). (Appeal from preliminary order allowed—Appeal against final order on same grounds is unnecessary.)

('19) AIR 1919 Mad 870 (871).

('19) AIR 1919 Mad 91 (91, 92).

('14) AIR 1914 All 380 (380, 381) : 36 All 532 (FB).

('26) AIR 1926 All 665 (667) : 48 All 611. (Final decree—Appeal dismissed for default—A pending appeal from preliminary decree not affected.)

('12) 16 Ind Cas 157 (159) : 34 All 493. (Dissenting

from 38 All 528.)

('28) AIR 1928 Cal 804 (804, 805). (Appeal from preliminary order in execution limiting decree-holder's right to mesne profits—Execution subsequently dismissed—Appeal is still maintainable—Execution will proceed as per appellate judgment.)

('27) AIR 1927 Cal 559 (560). (If the appeal from preliminary decree is filed before final decree is passed the appeal can be continued and this principle applies also to second appeal.)

('28) AIR 1928 Cal 282 (282).

('16) AIR 1916 Pat 370 (371) : 1 Pat L Jour 406.

(Preliminary decree is not extinct after the passing of final decree.)

('16) AIR 1916 Cal 43 (46).

('13) 20 Ind Cas 576 (577) (Cal).

('18) 19 Ind Cas 680 (681) (Cal).

('13) 21 Ind Cas 510 (512) (Cal). (If appeal against preliminary decree is allowed the final decree will cease to be operative.)

('19) AIR 1919 Cal 898 (894). (Right to appeal against the preliminary decree is not taken away by the passing of final decree.)

('03) 30 Cal 683 (684).

('26) AIR 1926 Bom 43 (44). (But appellant must appeal against the final decree also or at least inform the Court of the passing of the final decree.)

('28) AIR 1928 Nag 68 (68).

('25) AIR 1925 Oudh 39 (42).

('25) AIR 1925 Sind 178 (180) : 18 Sind L R 133.

(Passing of the final decree does not render the appeal from the preliminary decree nugatory.)

[But see ('12) 16 Ind Cas 380 (381) (Mad).]

3. [See ('15) AIR 1915 Mad 197 (199) : 37 Mad 29.]

See also the Madras cases cited in foot-note (2) above.

6. Effect of reversal of preliminary decree on final decree. — See Note 5

above.

7. Court-fees. — An appeal from a preliminary decree or from a final decree must be stamped *ad valorem* on the amount of the subject-matter in dispute in the appeal.¹ But where a preliminary decree for partition declares plaintiff's rights to mesne profits and makes provision for its *subsequent determination*, an appeal against the preliminary decree need not bear a court-fee in respect of the mesne profits, even where the decision as to mesne profits is challenged in appeal.² Where a party appeals first from a preliminary decree and pays *ad valorem* fee thereon and subsequently appeals to the same Court from the final decree also, he need not pay *ad valorem* court-fee again on the *entire* amount awarded by the final decree but only on the amount, if any, in excess of that on which court-fee was already paid.³ An appellant can prefer a single combined appeal from both the preliminary and final decree if the dates permit him to do so, but court-fee must be paid only on the larger of the subject-matters in dispute in respect of the two decrees.⁴

See also Order 34 Rule 5, Note 25.

98. [S. 575.] (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law,⁶ they⁷ may¹¹ state the point of law upon which they differ and the appeal shall then be heard upon that point only⁸ by one or more of the other Judges,⁹ and such point shall be decided according to the opinion of the majority¹⁰ (if any) of the Judges who have heard the appeal, including those who first heard it.

Note 7

1. (10) 32 All 517 (522). (Not a fixed fee of Rs. 10.)
- (14) AIR 1914 Lah 507 (507) : 1915 Pun Re No. 7.
- (28) AIR 1928 Rang 194 (195) : 6 Rang 285.
- (27) AIR 1927 Sind 251 (252) : 23 Sind L R 277.
- (Appeal from preliminary decree.)
- (25) AIR 1925 All 734 (735) : 47 All 926. (Decree for foreclosure.)
- (23) AIR 1923 Mad 19 (19) : 49 Mad 280. (An appeal from a final decree passed under O. 20, R. 12 (2), Civil P. C., in respect of subsequent mesne profits.)
1. (10) 32 All 517 (522). (Not a fixed fee of Rs. 10.)
- (14) AIR 1914 Lah 507 (507) : 1915 Pun Re No. 7.
- (28) AIR 1928 Rang 194 (195) : 6 Rang 285.
- (27) AIR 1927 Sind 251 (252) : 23 Sind L R 277.
- (Appeal from final decree.)
- (25) AIR 1925 All 734 (735) : 47 All 926. (Decree for foreclosure.)
- (23) AIR 1923 Mad 19 (19) : 49 Mad 280. (An appeal from a final decree passed under O. 20, R. 12 (2), Civil P. C., in respect of subsequent mesne profits.)
- (24) AIR 1924 Pat 694 (694) : 3 Pat 815.
- (29) AIR 1929 Cal 815 (817) : 57 Cal 463.
4. (21) AIR 1921 Mad 406 (407).

(22) AIR 1922 Oudh 82 (84) : 25 Oudh Cas 30. (Appeal in foreclosure and redemption suits.)

2. (30) AIR 1930 Mad 597 (599, 600) : 53 Mad 540.

3. (32) AIR 1932 Mad 453 (455) : 55 Mad 664.

(12) 15 Ind Cas 573 (573) (Cal). (Suit for accounts.)

(23) AIR 1923 Lah 632 (632) : 4 Lah 406. (Appeal from a final decree does not contest anything beyond what is contested in the appeal from the preliminary decree.)

"(3) Nothing in this Section shall be deemed to alter or otherwise affect any provision of the letters patent of any High Court.¹² [1877, S. 575; See Letters Patent.]

a. Inserted by the Repealing and Amending Act, 1928 (XVIII of 1928), Section 2 and Sch. I.

Synopsis.

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| <p>9. Reference to be to one or more of the other Judges of the Court.</p> <p>10. Decision to be according to the opinion of the majority.</p> <p>11. Differing Judges not stating the point of law—Effect.</p> <p>12. Sub-section (3)—Clause 36 of the Letters Patent—Effect of.</p> <p>13. Letters Patent appeal, whether lies from a confirming judgment, under sub-section (2) of Section 98.</p> | <p>1. Legislative changes.</p> <p>2. Amendments after 1908.</p> <p>3. Scope and applicability of the Section.</p> <p>4. Difference of opinion in the decision of preliminary objection.</p> <p>5. Difference of opinion as to part of decree.</p> <p>6. "Differ in opinion on a point of law."</p> <p>7. Reference whether can be made by one of the differing Judges alone.</p> <p>8. "The appeal shall then be heard upon that point only."</p> |
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Other Topics (Miscellaneous)

Income-tax Act reference—Section applicable to. See Note 8.

Land Acquisition Act—Appeals under—Applicability of the Section. See Note 8.

Question of fact—Difference of opinion on. See Notes 6 and 12.

Second appeals—Applicability of Letters Patent to. See Note 12.

Senior Judge—Opinion of—When to prevail. See Note 12.

1. Legislative changes.—This Section corresponds to Section 575 of the old Code. The most important change is : the words "they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges and such point shall be decided" in the proviso to clause 2 have been substituted for the words "the appeal may be referred to one or more of the other Judges of the same Court and shall be decided." See Notes 6 and 8 below.

2. Amendments after 1908.—Sub-section (3) has been newly added by the Repealing and Amending Act XVIII of 1928. See Note 12 below.

3. Scope and applicability of the Section.—This Section deals with the question as to how a decision is to be arrived at in an appeal which is heard by a Bench of two or more Judges.

The Section refers in terms to appeals. But the question has arisen whether by virtue of Section 141 of the Code it is applicable to *other* proceedings. Under the old Code it was held that by virtue of Section 647 (corresponding to Section 141) Section 575 applied to miscellaneous proceedings¹ and applications to the High Court in its extraordinary jurisdiction.² But while the words used in Section 647 of the old Code were "the procedure *herein* prescribed" the words used in the present Section 141 are "the procedure provided in this Code *in regard to suits*." It has accordingly been held that Section 98, which prescribes the procedure in regard to *appeals*, cannot be extended by Section 141 to miscellaneous proceedings such as revision applications.³

Section 98 — Note 3

1. (179) 3 Bom 204 (205).
2. (181) 5 Bom 680 (681).
- [See also (191) 25 Bom 478 (484). (Question not decided.)]
3. (15) AIR 1915 Mad 1198 (1196). (Proceedings held to be regulated by Clause 36, Letters Patent (Madras).)
- (25) AIR 1925 Mad 281 (285, 287). (Clause 36 Letters Patent (Madras), applies.)

It was held by the Calcutta High Court in the undermentioned case¹ that a reference to the High Court under S. 66 of the Income Tax Act is not an *appeal from any decree* and Section 98 cannot be applied to such a proceeding by recourse to Section 141. The Income Tax Act has now been amended by Act XXIV of 1926 by adding Section 66A by which the provisions of Section 98 of the Code are expressly made applicable to reference under Section 66 of that Act.⁵

By virtue of Section 54 of the Land Acquisition Act, 1894, this Section applies to appeals in land acquisition cases.⁶

As to the effect of this Section on Section 10 (2) of the Punjab Courts Act, and Section 10 of the Central Provinces Courts Act (1917), see the undermentioned cases.⁷

4. Difference of opinion in the decision of preliminary objection.—The decision of a preliminary objection to the hearing of an appeal is not a "hearing" of the appeal but precedes the hearing. Section 98 does not apply to a difference of opinion in such a decision, the words of the Section being "where an appeal is heard," etc.¹

5. Difference of opinion as to part of decree.—Where the Judges agree that a part of the decree should be reversed, but differ as to the rest, then according to the Calcutta,¹ Madras² and Allahabad³ High Courts, the part as to which the Judges agree should be reversed, and rest of the decree confirmed. The Lahore High Court, on the other hand, has held that the *whole* decree should be confirmed in such a case.⁴

6. "Differ in opinion on a point of law."—The reference under Section 98 to other Judges must be only on a *question of law* and not on a question of fact.¹ For instances of points of law, see the undermentioned cases.² See also Notes to Section 100.

7. Reference, whether can be made by one of the differing Judges alone.—The use of the pronoun "*they*" in the present Section seems to show that the reference to other Judges must be made by *both* the differing Judges. The wording

[Given prior to the present Code it was held in ('70) 2 N. W. F. H. C. R. 117 that Section 575 did not apply to application for revision. In ('01) 3 Bom. L. R. 58 (68); 25 Bom. 478 (484) it was doubted whether in view of the explanation to Section 647 under which that Section was not applicable to execution proceedings, S. 575 could be extended to an application for revision in an execution matter—But in ('02) 25 Mad. 548 (551) S. 575 was applied to a revision case.]

4. ('24) AIR 1924 Cal 668 (668); 51 Cal 504. (Clause 36, Letters Patent (Madras), applies.)

5. ('81) AIR 1931 Lab 578 (580); 12 Lab 725 (FB). ('19) AIR 1919 Mad 626 (628); 41 Mad 943.

7. ('16) AIR 1916 Lab 113 (125); 1917 Pun. Re. No. 71 (FB). (On a difference of opinion on a point of law, reference must be under S. 98, C. P. Code and not S. 10 (2) of the Punjab Courts Act, as that Section applies only in the absence of any other provision.)

(32) AIR 1932 Nag 88 (89); 28 Nag L. R. 80. (This Section applies only to appeals while S. 10 of the Civil Courts Act applies to all other cases.)

Note 4

1. ('89) 11 All 176 (181). (Objection that the appeal was barred by limitation.)

Note 5

1. ('16) AIR 1916 Cal 582 (588).

2. ('28) AIR 1928 Mad 180 (188, 190); 51 Mad 291.

3. ('38) AIR 1938 All 473 (474); 55 All 564. (Dissenting from AIR 1926 Lab 65).

4. ('26) AIR 1926 Lab 65 (71); 7 Lab 179.

Note 6

1. ('32) AIR 1932 Nag 88 (88, 89); 28 Nag L. R. 80. (But if difference is on question of fact, lower Court's decree to be confirmed.)

2. ('16) AIR 1916 Lab 113 (125); 1917 Pun. Re. No. 71. (Whether there is any presumption that special training received by plaintiff, a Hindu, was at family expense.)

(94) 21 Cal 568 (569) (FB). (Whether what the plaintiff brought was an "actionable claim" within the meaning of S. 135 of the Transfer of Property Act.)

(94) 21 Cal 437 (455). (Whether suit prohibited by S. 244, C. P. Code.)

(16) AIR 1916 Cal 764 (770); 43 Cal 558 (570). (Whether interest of unregistered purchaser of portion of patti tenure is encumbrance within S. 161 of the Bengal Tenancy Act.)

in the previous Code "the appeal may be reversed" permitted a different view being held.¹

8. "The appeal shall then be heard upon that point only." — Under the old Code when the Judges hearing an appeal differed on a point of law, the whole case was referred to one or more of the other Judges.¹ Under the present Section, it is only the point of law on which they differ that can be so referred and the Judges hearing the reference can only hear arguments on the specific point and not the whole appeal.²

9. Reference to be to one or more of the other Judges of the Court. — The reference should be heard by one or more of the other Judges of the Court, according to the practice of the Bombay,¹ Calcutta² and Lahore³ High Courts. The Allahabad High Court, however, holds that the Bench hearing the reference should include also the Judges who originally heard the appeal.⁴ See also the undermentioned case of the Madras High Court.⁵

10. Decision to be according to the opinion of the majority. — Though the reference is, under the Section, to be heard by a Judge or Judges other than those who heard the case originally, the decision upon the point must be according to the opinion of the majority of the Judges who heard the appeal including those who first heard it.¹

11. Differing Judges not stating the point of law — Effect. — If the Judges differ on a point of law, but do not state the point for the decision of other Judges or Judges, the decree appealed from should be confirmed.¹ Where the differing Judges have, without stating the point as required by the Section, delivered their judgments without any reservation, they cannot subsequently state the point of law.² See also the undermentioned case under Section 23 of Act XXIII of 1861.³

12. Sub-section (3) — Clause 36 of the Letters Patent—Effect of. — Under Clause 36 of the Letters Patent as it originally stood, where there was a difference of opinion among the Judges hearing an appeal, the opinion of the senior Judge was to prevail,¹ while, under the present Section 98, if there is no majority concurring in reversing or varying a decree, the decree shall be confirmed.² After the amendment of

Note 7

Note 8

1. (12) 18 Ind Cas 358 (360) : 39 Cal 358.

- (1) 11 Mad L Jour 10 (18, 19) (FB).
- (98) 21 Mad 179 (215).
- (107) 14 Bur L Rep 59 (FB).

[But see (99) 2 Oudh Cas 149 (194).]

2. (18) 21 Ind Cas 288 (293) : 35 All 487 : 40 Ind

App 182 : 16 Oudh Cas 247 (PC).

(33) AIR 1938 All 861 (874, 875).

(14) AIR 1914 Cal 592 (594). (The differing Judges must come to a complete decision except on the

question of law.)

(22) AIR 1922 Oudh 189 (194) : 25 Oudh Cas 218.

(However, reference may be made to the facts for purpose of elucidating the point of law in the

reference.)

(22) AIR 1922 Cal 544 (549).

Note 9

1. (91) 15 Bom 424 (427).
- (04) 6 Bom L R 181 (209, 210).
2. (94) 21 Cal 437 (454).

1. (70) 13 Suth W R 209 (212).
2. (25) AIR 1925 Mad 1032 (1033).
- (07) 14 Bur L Rep 257.

Note 12

1. (No reference made to other Judge or Judges.)

2. (87) 9 All 625 (643) (FB). (Such reference is ultra vires.)
3. (66) 6 Suth W R 269 (273). (Under S. 23 of Act XXIII of 1861, it was held that where the Judges differed on point of law but did not state the points on which they differed, there was no determination of the case and if the case was referred to another Bench under the Section the whole case and not only the points on which they differed, was open to arguments.)

Note 11

1. (04) 6 Bom L R 181 (211) : 27 Bom 189.

Note 10

1. (1900) 27 Cal 724 (762). (No reference made to other Judge or Judges.)
2. (87) 9 All 625 (643) (FB). (Such reference is ultra vires.)
3. (91) 14 Mad 186 (191).
4. (84) 6 All 468 (476). (Dissented from in 27 Bom 189.)
5. (87) 1887 Pun Re No. 15, p. 32.

the Letters Patent in 1928, the procedure under Clause 36 of the Letters Patent on a difference of opinion is the same as that under Section 98³ except that —

- (1) a reference under Clause 36 is *obligatory*, while it is *optional* under Section 98, and
- (2) the reference under Clause 36 may be on a *point of fact as well as of law*, while under Section 98 it can only be on a *point of law*.

Before sub-section (3) of this Section was introduced by the Repealing and Amending Act (XVIII of 1928), there was a difference of opinion as to whether Section 98 or Clause 36 of the Letters Patent was to be applied in appeals to Chartered High Courts. The view generally taken was that Section 98 applied to appeals from *subordinate Courts*⁴ but that Clause 36 applied to appeals preferred under the Letters Patent.⁵ The Calcutta High Court in two cases held that Section 98 should be applied in all cases.⁶ The introduction of sub-section (3) shows clearly that the applicability of Clause 36 is not in any way controlled by this Section. It has accordingly been held by a Full Bench of the Madras High Court that Clause 36 applies to *all appeals* to Chartered High Courts, whether from subordinate Courts or under the Letters Patent, and that Section 98 applies only to High Courts *other than Chartered High Courts*, *e. g.*, the Chief Courts and Courts of Judicial Commissioners.⁷ The High Courts of Allahabad,⁸ Lahore⁹ and Patna¹⁰ have followed the view taken by the High Court of Madras.

13. Letters Patent appeal, whether lies from a confirming judgment under sub-section (2) of Section 98. — Before the amended Letters Patent of 1928 was passed, it was held that an appeal under Clause 15 of the Letters Patent lay against the confirming judgment passed under sub-section (2) of this Section.¹ Under the amended Letters Patent no such appeal lies to the High Court.²

Even before the Letters Patent was amended, there was no appeal against a decision arrived at *after the reference* under the proviso to sub-section (2), because the decision was necessarily that of a *majority* of the Judges, and the Letters Patent provided for an appeal only where there was an *equal* division of opinion between the Judges.³

3. ('32) AIR 1932 All 195 (196).
 ('33) AIR 1933 All 861 (875); 66 All 39 (SB).
 (Hearing by other Judges is confined to the specific points stated and does not cover the whole case.)
 4. ('19) AIR 1919 Bom 1 (4) : 48 Bom 438 (FB).
 (Second appeal.)
 ('25) AIR 1925 Pat 625 (667) : 4 Pat 510. (No conflict between the Code and the Letters Patent.)
 ('26) AIR 1926 Cal 121 (132, 139) : 52 Cal 1018.
 ('26) AIR 1926 Lah 65 (71) : 7 Lah 179.
 5. ('21) AIR 1921 P C 6 (7) : 45 Bom 718 : 48 Ind App 181 (PC). (Clause 36 of the Letters Patent (Bom) is not controlled by this Section.)
 ('24) AIR 1924 Rang 148 (152) : 1 Rang 584. (Clause 34 of the Letters Patent (Rang) does not override the provisions of this Section in all cases.)
 ('17) AIR 1917 Bom 62 (78, 79) (SB).
 ('06) 29 Mad 1 (24).
 ('04) 26 All 10 (13).
 ('23) AIR 1923 Bom 218 (224, 225).
 ('25) AIR 1925 Pat 625 (667) : 4 Pat 510.
 6. ('25) AIR 1925 Cal 845 (846, 847) : 52 Cal 894 (FB). (Per Subhawardy J.)
 7. ('29) AIR 1929 Mad 641 (659) : 52 Mad 563 (FB). (If, at any time, Clause 36 ceases to exist, Letters Patent (Rangoon).
 3. ('04) 6 Bom 1 R 280 (231).
 2. See amended Clause 15 of the Letters Patent (Madras, Bombay and Calcutta) : Amended Clause 10 of the Letters Patent (Allahabad, Lahore and Patna) : Amended Clause 13 of (11).
 1. ('86) 8 All 105 (107).
 ('94) 18 Bom 355 (362).
 ('89) 13 Bom 449 (458).
 ('16) AIR 1916 Cal 811 (811).
 ('01) 28 Cal 517 (520).
 ('93) 20 Cal 762 (766).
 ('84) 10 Cal 814 (816) (FB). (Notwithstanding the terms of Section 575 (old Code).)
 ('02) 25 Mad 548 (550, 551).
 Note 13
 10. ('33) AIR 1933 Pat 67 (68, 69) : 11 Pat 772.
 ('34) AIR 1934 Lah 371 (379) : 15 Lah 425 (FB).
 Patent applies.)
 9. ('33) AIR 1933 Lah 648 (648). (Difference of opinion on a question of fact—Clause 26, Letters Patent applies.)
 8. ('38) AIR 1938 All 641 (647, 649) : 11 R (1938) All 972 (FB).
 [But see ('32) AIR 1932 All 195 (196). (Not good law after above Full Bench decision.)
 9. ('33) AIR 1933 Lah 648 (648). (Difference of opinion on a question of fact—Clause 26, Letters Patent applies.)
 Section 98 will come into operation.
 8. ('38) AIR 1938 All 641 (647, 649) : 11 R (1938) All 972 (FB).
 [But see ('32) AIR 1932 All 195 (196). (Not good law after above Full Bench decision.)
 9. ('33) AIR 1933 Lah 648 (648). (Difference of opinion on a question of fact—Clause 26, Letters Patent applies.)
 ('34) AIR 1934 Lah 371 (379) : 15 Lah 425 (FB).
 10. ('33) AIR 1933 Pat 67 (68, 69) : 11 Pat 772.

99. [S. 578.] No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any mis-joinder of parties or causes of action or any error, defect or irregularity in the suit, not affecting the merits of the case or the jurisdiction of the Court. [1877, Ss. 577 and 578; 1859, S. 350; see O. 1, Rr. 1 and 3 and O. 2 R. 3.]

Synopsis

- 1. Alterations in the Section.
- 2. Scope and object of the Section.
- 3. Retrospective operation of the Section.
- 4. Misjoinder and non-joinder.
- 5. Error, defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court.
- 6. Analogous provisions of law.
- 7. Objections to error, etc., when to be raised.

Other Topics (Miscellaneous)

- Other Statutes — Indian Evidence Act. See Note 6.
- Suits Valuation Act. See Note 6.
- Stamp Act. See Note 6.
- Wrong admission or rejection of evidence. See Note 6.
- Wrong order of remand. See Note 5.

1. Alterations in the Section. — The words “any misjoinder of parties or causes of action” have been newly added. (See Note 4 below and also O. 2 Rr. 3, 4.) The words “whether in the decision or in any order passed in the suit or otherwise” have been omitted and the words “in any proceedings in the suit” have been substituted instead.

2. Scope and object of the Section. — This Section contains one of the most salutary rules of law. Its aim is “to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuitry of litigation.”¹ In other words, a decision which is correct on the merits and is within the jurisdiction of the Court, should not be upset merely for technical and immaterial defects.² The Section deals with objections raised in appeal as regards errors, defects or irregularities of procedure in the lower Court. As laid down by their Lordships of the Privy Council in *Maharajah Mahashur Singh v. Baboo Harnuch Narain*,³ “the law that an error or irregularity cannot be raised as a ground of appeal only refers to errors, defects or irregularities of *procedure*, not to rules of law or conditions which affect the substantive rights of the parties.” A non-compliance with every rule of procedure does not *ipso facto* destroy the validity of the whole proceeding. The purpose of the rule violated must, in each case, be examined.⁴

Section 99 — Note 2

- 1. (86) 8 All 366 (375).
(37) AIR 1937 P C 233 (234) : 1 L R (1937) All 655 : 64 Ind App 250 : 31 Sind L R 590 (PC).
[See also (33) AIR 1938 All 295 (297) : 55 All 216.]
- 2. (92-96) 1892-1896 Upp Bur Bul 282.
(91) 1891 Pun Re No. 65, p. 319.
(26) AIR 1926 Cal 95 (96). (Appellant's case extremely weak — Court should not interfere)
- 4. (20) A I R 1920 Cal 597 (598, 599) : 46 Cal 978. (Mookerjee, J.)

under Section 99 with irregular order.)
(87) 1887 All W N 231 (231).
(26) AIR 1926 Cal 1101 (1104).
(26) AIR 1926 Lah 402 (402).
3. (1861) 9 Moo Ind App 268 (282) (P C).
[See also (09) 32 Mad 83 (85). (Section has no application to illegalities but only to irregularities.)]

An error, defect or irregularity of procedure must, in order to be a valid ground of appeal, be a material one, that is, should have either —

- (a) affected the *merits* of the case,⁵ or
- (b) affected the *jurisdiction* of the Court.⁶

The merits of a case are said to be affected when the law or error has resulted in an error of judgment.⁷ The term "jurisdiction" in this Section is used in the sense of pecuniary or local jurisdiction or jurisdiction relating to the subject-matter; it does not mean the legal authority of a Court to do certain things.⁸

A mere irregularity, therefore, which does not affect the merits of the case or the jurisdiction of the Court, is no ground for reversing or varying a decision in appeal.⁹

- (28) AIR 1928 Mad 919 (921). (Defendant examining himself as his own witness and cross-examining at the instance of co-defendant, examining by co-defendant.)
- (11) 36 Bom 58 (61). (Attachment of properties at the instance of assignee decree-holder without hearing objections of the judgment-debtor is not condoned.)
- (11) 9 Ind Cas 977 (978) (All). (Death of sole appellant—Appeal heard without any application to bring legal representatives on record.)
- (88) 1888 All W N 61 (62). (Non-compliance with O. 41 R. 31 (old S. 574) is not condoned.)
- (25) AIR 1925 Cal 98 (100). (Admission of important additional evidence in appeal without necessity and without recording reasons.)
- (23) AIR 1923 Nag 58 (59, 60). (Improper refusal to examine important witnesses.)
- (86) 1886 All W N 285 (286). (Non-compliance with S. 574, i. e., O. 41 R. 31.)
- (84) 1884 All W N 99 (99). (Do.)
- (24) AIR 1924 Pat 245 (247). (First Appellate Court dealing with a number of cases together, thus affecting the merits.)
- (12) 17 Ind Cas 891 (892) : 37 Bom 289. (Order of remand contrary to Section 562.)
- (9) 2 Ind Cas 404 (404). (Judgment without reasons.)
- (81) AIR 1931 Cal 164 (165). (Judgment—Judges failure to apply his mind to the case.)
- (74) 11 Bom H C R 129 (135). (Objection to validity of document is one affecting merits.)
- (71) 15 South W R 534 (535). (Decree against party not liable is an error affecting merits.)
- (82) 8 Cal 884 (886). (Dismissal of suit instead of return of plaint under S. 57, O. 7 R. 10.)
- (73) 20 South W R 2 (3) (Civ.).
- (05) 1905 Pun L R No. 5, p. 40 : 1904 Pun Re No. 91. (Judgment without hearing parties or their pleadings.)
- (6) (1900) 27 Cal 488 (493). (Transferee Court recognizing assignment of decree acts without jurisdiction.)
- (35) AIR 1935 Pesh 151 (152).
- (38) AIR 1938 Lah 749 (752) : 15 Lah 123.
- (17) AIR 1917 Nag 99 (101) : 14 Nag L R 71.
- (Death of party—Court proceeding to trial without out legal representative on record acts without jurisdiction.)
- (89) 12 All 510 (514) (P B). (Infringement of Section 564 of old Code affected jurisdiction.)
- (25) AIR 1925 Lah 209 (210) : 5 Lah 492. (Omission to pass order under S. 22 (4) of the Punjab Pre-emption Act is an illegality.)
- (26) AIR 1926 All 650 (652).
- (11) 11 Ind Cas 935 (935) : 33 All 645. (Omission to refer dispute to arbitrator as per agreement of parties affects jurisdiction.)
- (18) AIR 1918 Cal 435 (436) : 45 Cal 926. (Lower Court entertaining and deciding appeal which it had no jurisdiction to do.)
- (17) AIR 1917 Cal 320 (325). (Mookerjee, J.)
- (10) 6 Ind Cas 454 (455) (All). (Order affecting jurisdiction covered.)
- (07) 1907 Pun Re No. 109, p. 875. (Want of authority in agent is fatal.)
- (12) 17 Ind Cas 891 (892) : 37 Bom 289. (Illegal order of remand contrary to provisions of Section 562.)
- (09) 2 Ind Cas 677 (680) (All). (Order without jurisdiction is not cured.)
- (83) 6 Mad 192 (196). (Want of jurisdiction cannot be cured.)
- (80) AIR 1930 Mad 714 (718). (Decree passed affecting persons not implicated—Want of jurisdiction cannot be cured.)
- (12) 16 Ind Cas 940 (942) (Cal). (Decree without jurisdiction not covered by Section 99.)
7. See cases cited in foot-note (5) above.
- (01) 28 Cal 324 (330).
- For exhaustive discussion on question of jurisdiction, see Section 9.
- [See also (73) 5 N W P H C R 55 (59). (Decree by Judge who had no jurisdiction to receive the plaint.)]
- (01) 5 Cal W N 627 (629). (Application under Ss. 244 and 623, Civil P. C. — Court acting under S. 244 whereas really S. 623 applied.)
- (35) AIR 1935 All 738 (739). (Omission to record compromise does not affect validity of decree.)
- (35) AIR 1935 Nag 56 (57) : 31 Nag L R 266. (Plaintiff allowed to withdraw suit with permission to bring fresh suit on payment of defendant's costs—Order fixing no date for payment in contravention of O. 30 R. 1.)
- (36) AIR 1936 Nag 246 (248). (Court instead of passing separate order with respect to filing of award combining it and judgment into one.)
- (91) 15 Bom 809 (820). (Two suits tried together, such trial not affecting merits or jurisdiction.)

It has been held under the Code of 1882 that the error, defect or irregularity should have been *subsequent to the institution* of the suit and not in the frame or institution.¹⁰ The present Section however will apply to *all* irregularities whether subsequent to the suit or not. But irregularities in *prior* suits and *different* proceedings are, of course, not within the Section.¹¹

This Section applies to objections raised in appeals against original decrees as well as in appeals from *appellate* decrees by virtue of Section 108 of the Code.¹²

- (70) 14 Subh V R 141 (142) (Civ.).
 (70) 30 All 136 (137). (Proceedings on Sunday with consent of parties.)
 (71) AIR 1924 Lab 545 (548): 5 Lab 218. (Absence of party on date on which case is posted for arguments—Decision under O. 17 R. 3.)
 (69) 11 Subh V R 177 (178) (Civ.). (Return of plaint under S. 31 of the old Code.)
 (27) AIR 1927 Oudh 468 (469). (Suit under Sec. 108 (16), Oudh Rent Act—Enquiry into defendant's liability.)
 (69) 14 Subh V R O C 11 (14). (Striking out names of parties against whom there was no cause of action.)
 (28) AIR 1923 Nag 7 (7). (Judge not signing deposition of witness.)
 (91) 1 Mad L Jour 478 (479). (Judge omitting to date his order.)
 (87) 9 All 508 (510). (Want of permission under S. 3 of the Bengal Aliens Act, XLI of 1858.)
 (93) 15 All 880 (881).
 (81) 8 All 824 (827). (Proceeding on wrong onus of proof without objection by parties.)
 (28) AIR 1928 Nag 62 (63). (Wrong view by Court as to onus—Merits unaffected.)
 (14) AIR 1914 Low Bur 210 (212): 7 Low Bur 347. (Wrong party beginning the case and no prejudice.)
 (99) 27 Cal 61 (64, 65). (Oral reference to arbitration.)
 (97) 24 Cal 418 (428). (Grant of permission by the Collector under S. 89 (S. 92) without adverting to plaintiff's interest in the trust.)
 (01) 5 Cal W N 91 (98). (Non-compliance with S. 347 of the Code of 1882.)
 (78) 2 Cal L Rep 257 (258). (Technical error not affecting merits.)
 (31) AIR 1931 Oudh 22 (25): 5 Luck 116. (Modification of prior order by consent.)
 (26) AIR 1926 Cal 95 (96). (Appellate's case extremely weak—Appellate Court will not interfere with lower Courts irregular order.)
 (84) 10 Cal 1061 (1068). (Delay in filing suit.)
 (18) 19 Ind Cas 918 (919) (Cal) (F B). (Allowing claim to set-off without court-fees being paid thereon.)
 (08) 6 Oudh Cas 135 (139). (Insufficiency of court-fees.)
 (25) AIR 1925 Rang 65 (67): 2 Rang 462. (Error as to court-fees.)
 (92) 15 Mad 288 (289). (Order of Appellate Court to pay additional court-fees not obeyed—Suit cannot be dismissed on that ground.)
 (02) 29 Cal 651 (654). (Non-payment of full court-fee.)
 (79) 2 All 889 (890, 891). (Deficiency of court-fee.)
 (12) (18) AIR 1918 Cal 435 (436): 45 Cal 926 (929).
 (37) AIR 1937 Pat 147 (148).
 (11) (01) 23 All 499 (500, 501). (Execution application made by a general attorney of the decree-holder.)
 (10) 5 Ind Cas 577 (578): 37 Cal 552. (Error affecting the admission of the suit itself.)
 (02) 26 Bom 259 (266).
 (37) AIR 1937 Pat 147 (148). (Heirs of deceased defendant not formally substituted.)
 (29) AIR 1929 Sind 12 (12, 13). (Decree in terms of compromise without a formal order recording the compromise.)
 (31) AIR 1981 All 453 (454): 58 All 669. (Failure to give full ten days time for objections to award—No prejudice proved.)
 (30) AIR 1980 Bom 225 (227).
 (08) 2 Low Bur 117 (120).
 (09) 2 Ind Cas 173 (174): 34 Bom 72. (Decree obtained against a firm instead of against the individual partners.)
 (14) AIR 1914 Nag 8 (10): 10 Nag L R 150. (Order implying amounting to a redemption but not formally so.)
 (07) 34 Cal 396 (398, 399). (Recording evidence in English which is not the language of the Court.)
 (38 R. 5 and 6 instead of under O. 21 R. 42.)
 (17) AIR 1917 All 153 (155). (Order passed under postal to Sub-judge.)
 (15) AIR 1915 Mad 446 (447). (Case remanded to District Judge—Latter transferring it for disposal to Sub-judge.)
 (24) AIR 1924 Pat 618 (616): 3 Pat 244. (Question of paramount title in mortgage suit raised and decided.)
 (28) AIR 1928 Nag 306 (307). (Question of paramount title in mortgage suit raised and decided without hearing arguments.)
 (26) 98 Ind Cas 291 (292) (Oudh). (Decision given without bearing arguments.)
 (28) AIR 1928 Pat 438 (439). (Judge allowing another to examine witnesses.)
 (92) 15 Mad 241 (246). (Suit triable by Court A tried by Court B also having jurisdiction to try the suit.)
 (19) AIR 1919 Cal 799 (799). (First Subordinate Judge inviting Second Subordinate Judge to read his judgment in Court.)
 (75) 24 Subh V R 167 (167) (Civ.). (Not taking proper court-fee is no ground for interference.)
 (71) 15 Subh V R 179 (180). (Decision as to stamp not affecting merits.)
 (84) 7 Cal 348 (352). (Insufficiency of court-fee.)

Though the Section refers in terms to *decrees*, yet, it is illustrative of a general principle.¹⁸

In *Muhammad Husain Khan v. Babu Kishva Nandan*,¹¹ their Lordships of the Privy Council held that although the provisions contained in the Civil Procedure Code do not regulate the procedure of the Privy Council in hearing appeals from India, yet, as the rule embodied in this Section proceeds upon a sound principle, and is calculated to promote justice, the rule should be followed by the Privy Council also. It will be useful in dealing with this Section to refer to the provisions of Section 105 which provides *affirmatively* that an error, defect or irregularity in any order affecting the decision of the case can be raised as a ground of appeal in an appeal from the decree in the suit.¹⁵

The Section applies to proceedings under the Agra Tenancy Act.¹⁶

8. Retrospective operation of the Section.—This Section regulates the procedure of the Appellate Court and therefore is applicable to all appeals heard after the new Code came into force even though the suit itself was instituted under the old Code.¹⁷

4. Misjoinder and non-joinder.—Section 578 of the old Code provided that no decree should be varied or reversed "on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit or otherwise not affecting the merits of the case or the jurisdiction of the Court." This, as has been seen already in Note 2 above, was interpreted to mean errors and irregularities subsequently committed in a suit which had been *properly instituted*.¹ A mere *misjoinder of causes of action* which did not affect the merits of the case or the jurisdiction of the Court was held cured by the Section.² But a misjoinder whether of parties or causes of action or of both which affected the *very institution* of the suit was held to be outside the scope of the Section.³ The introduction of the words "on account of any misjoinder of parties or causes of action" in the present Section makes it clear that the Appellate Court cannot now dismiss a suit for such misjoinder⁴ unless it affected the merits of the

13. (35) AIR 1935 Nag 83 (84) : 31 Nag L R 212. (Principle governs insolvency proceedings so far as may be.)

14. (37) AIR 1937 P C 283 (284) : 1 L R (1937) All 655 : 64 Ind App 250 : 81 Sind L R 590 (PC).

15. (27) AIR 1927 Rang 150 (154) : 5 Rang 80. (These two Sections are supplementary rather than mutually destructive.)

16. (36) AIR 1936 All 200 (202).

Note 3

1. (12) 22 Mad L Jour 225 (226, 227). (Even though instituted before new Act.)

Note 4

1. (02) 26 Bom 259 (266).

2. (10) 6 Ind Cas 15 (16) : 84 Mad 55. (Misjoinder generally vitiates.)

(10) 6 Ind Cas 248 (249) (Cal).

(81) 7 Bom H O R A C 19 (20).

(09) 3 Ind Cas 382 (383) : 36 Cal 780. 36 Ind App 103 : 1909 Pun Re No. 93 (PC).

(05) 2 All L Jour 91 (94). (Defendants not prejudiced.)

(04) 2 Cal L Jour 602 (608, 609) (Mookerjee, J., case law reviewed.)

(03) 30 Cal 794 (800).

(19) AIR 1919 Pat 325 (327).

(70) 2 N W P H O R 418 (444).

3. (03) 26 Bom 259 (266).

(07) 1 Sind L R 181 (183).

(97) 24 Cal 540 (544, 545).

4. (12) 22 Mad L Jour 225 (226). (Misjoinder of causes of action.)

(17) AIR 1917 Lah 96 (96) : 37 Ind Cas 197 (197).

(37) AIR 1937 P C 42 (45) : 16 Pat 149 (PC).

(39) AIR 1939 Oudh 145 (148).

(15) AIR 1915 Mad 859 (859).

(14) AIR 1914 Cal 813 (815) : 42 Cal 586.

(15) AIR 1915 Mad 320 (320).

(11) 10 Ind Cas 515 (520) : 1911 Pun Re No. 12.

(69) 6 Bom H O R A C 177 (179, 180).

(10) 5 Ind Cas 466 (467) (Mad).

(70) 13 South W R 175 (176).

(20) AIR 1920 Cal 35 (37).

(24) AIR 1924 Oudh 337 (337) : 27 Oudh Cas 35.

(18) AIR 1918 Mad 705 (705).

(13) 21 Ind Cas 537 (538) (Cal). (This Court holding no misjoinder—Appellate Court cannot dismiss.)

(10) 8 Ind Cas 889 (859) (Cal).

(09) 3 Ind Cas 382 (355) : 36 Cal 780. 36 Ind App 103 : 1909 Pun Re No. 93 (PC).

(29) AIR 1929 All 143 (143).

(26) AIR 1926 Mad 57 (57).

case' or the jurisdiction of the Court.⁸ It may, however, in order to meet the ends of justice, allow a party to amend the plaint⁹ or to withdraw the suit against the mis-joined defendants with liberty to bring a fresh suit,⁸ or give a finding against each misjoined defendant separately.⁹

Though the Section uses the words "misjoinder of parties or causes of action," a misjoinder of both the parties and causes of action has also been held to be within the Section.¹⁰ There is some conflict of opinion as to whether the word "misjoinder" in this Section includes "non-joinder."¹¹ This has been due to the fact that the Legislature, while it has newly introduced the word "non-joinder" in Order I Rule 9 (which provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties) has not so done in Section 99.

This Section is limited in its application to where an appellant raises an objection that *there has been a misjoinder* in the lower Court. It does not deal with a case where the lower Court decides that there is a misjoinder and the appellant contends that there is *no misjoinder*. The observations of the Lahore High Court in the undermentioned case,¹² treating such a case as being one under the Section, do not seem to be sound.

5. Error, defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court.—The following irregularities of procedure under the Code have been held to be *mere* irregularities which do not entail a reversal or variation of the decree of the lower Court. For other cases of irregularities, see Note 2.

(a) (Section 15). Court of higher grade trying suit triable by a Court of lower grade.¹

- (30) AIR 1930 Sind 170 (173): 24 Sind L R 145.
- (28) 108 Ind Cas 544 (544) (Mad).
- (68) 10 South W R 45 (46).
- [See (30) 122 Ind Cas 597 (598) (All). (Non-joinder of necessary party.)]
5. (94) 16 All 279 (283). (Where it was held that the misjoinder of parties and causes of action would most probably affect the merits of the case.)
- (26) AIR 1926 Cal 416 (417). (Merits affected by non-joinder—Section does not apply.)
- (88) 1888 Pun Re No. 189, p. 487. (Misjoinder of causes of action—Defendants not jointly interested—It is not a mere irregularity.)
- (97) 24 Cal 540 (544). (Misjoinder of causes of action—Plaintiff not jointly interested.)
- (93) 17 Mad 168 (175, 176). (Misjoinder affecting merits cannot be condoned.)
- (10) 6 Ind Cas 15 (16): 34 Mad 55. (Misjoinder affecting merits is not to be treated as a mere irregularity.)
- (04) 27 Mad 80 (84). (Misjoinder which would affect merits of the case cannot be taken as a mere irregularity.)
- (20) AIR 1920 Lah 19 (20): 1 Lah 295 (297).
- (15) AIR 1915 Mad 320 (320).
- (24) AIR 1924 Oudh 309 (310).
- (13) 21 Ind Cas 438 (441) (Cal).
- (11) 11 Ind Cas 274 (276) (Sind). (Misjoinder in arbitration proceedings does not involve question of jurisdiction.)
7. (98) 15 All 380 (381).
- [See (14) AIR 1914 Cal 795 (795).]
8. (93) 15 All 380 (381).
9. (11) 34 Mad 55 (57).
10. (26) AIR 1926 Lah 145 (146).
- (05) 2 All L Jour 91 (94). (Case under the old Code.)
- (37) AIR 1937 P C 42 (45): 16 Pat 149 (PC).
- (13) 17 Cal W N 128 (129).
- (94) 16 All 279 (283). (Case under old law.)
11. (23) AIR 1928 Mad 387 (387). (Whether misjoinder includes non-joinder.)
- (33) AIR 1933 Mad 664 (667). (Does not include non-joinder.)
- (93) 17 Mad 122 (126, 127). (Appears to include non-joinder.)
- (10) 5 Ind Cas 774 (775): 33 Mad 436. (Includes non-joinder.)
- (09) 1 Ind Cas 530 (534) (Cal). (Do.)
- (69) 1869 Pun Re No. 3. (Non-joinder was held covered by S. 350 of the Code of 1859.)
- (22) AIR 1922 Mad 317 (320). (Includes non-joinder.)
- (84) 3 Moo Ind App 229 (242) (PC). (Non-joinder—No objection in lower Court—Not allowed in appeal to Privy Council.)
- (84) 6 All 57 (58, 59). (Non-joinder not affecting merits—Section applies.)
- (09) 1 Ind Cas 530 (534) (Cal). (Do.)
- (22) AIR 1920 Lah 19 (20): 1 Lah 295.
- Cf. (12) 22 Mad L Jour 225 (227).
- Note 5
1. (90) 17 Cal 155 (159).
- (85) 7 All 230 (243). (Rule of procedure and not of jurisdiction.)

- (b) (Section 26). Receiving a plaint presented on a Sunday or holiday.³
- (c) (Section 50). Application for substitution of legal representative of judgment-debtor entertained by the Court to which the decree is transferred for execution.³ The Allahabad and Madras High Courts hold, however, that the application must be made to the Court which passed the decree.⁴
- (d) (Section 92). Collector granting permission under Section 92 without advertising to the plaintiff's interest in the trust.⁵
- (e) (Order 2 R. 2). Splitting up of claims and filing separate suits thereon.⁶
- (ee) (Order 2 R. 4). Leave not obtained to try other causes of action in suit for immovable property.⁷
- (f) (Order 3 R. 2). Institution of suit under a defective power of attorney.⁸
- (g) (Order 6 R. 3, 14 and 15). Defective frame⁹ or signature¹⁰ or verification¹¹ of plaint or petition. (But when X purports to sue on behalf of X without any authority from him, there is no valid presentation of the plaint at all, and Section 99 will not apply.)¹²
- (h) (Order 6 R. 17). Allowing amendment of plaint at late stage.¹³
- (i) (Order 13 R. 2). Enlarging time to file the documents.¹⁴

(199) 23 Mad 867 (371). (Ganjam and Vizagapatnam Agency Courts Act — Rule of procedure and not of jurisdiction.)

(188) 1888 Pun Re No. 184, p. 480.

[See (25) AIR 1925 All 569 (570) : 47 All 925. (Part heard small cause — Trial concluded by Mustif with no small cause powers — No pre-judice.)

2. (71) 16 Suth W R 230 (231). (Receiving plaint on Sunday or holiday.)

(08) 30 All 136 (137). (Proceedings on Sunday with consent of parties.)

3. (95) 22 Cal 558 (562).

(26) AIR 1926 Lah 34 (35).

(25) AIR 1925 Oudh 448 (450) : 28 Oudh Cas 330. (Judgment-debtors and application made after execution has commenced in transferee Court — Acquiescence by the legal representative.)

[But see (1900) 27 Cal 488 (493).]

4. (95) 17 All 431 (433). (Application must be made to the Court which passed the decree.)

(05) 28 Mad 466 (472) (FB). (Defect is not a mere irregularity.)

5. (97) 24 Cal 418 (428).

6. (68) 5 Bom H C R A C 30 (32).

7. (24) AIR 1924 Pat 613 (616) : 3 Pat 244.

8. (23) AIR 1923 Bom 44 (44) : 47 Bom 227.

(37) AIR 1937 Rang 482 (483).

(31) AIR 1931 All 507 (512) : 54 All 57 (SB). (Plaint — Irregularity in presentation — No substantial defect.)

[But see (1907 Pun W R No. 109, p. 875 : 1907 Pun Re No. 109. (Want of authority of agent is fatal.)]

9. (16) AIR 1916 Nag 84 (86) : 12 Nag L R 90. (16) AIR 1929 Cal 445 (447, 448). [See also (29) AIR 1929 Cal 445 (447, 448). (Want of Court's permission under O. 1 R. 8 also as a plaintiff.)

(31) AIR 1931 Oudh 375 (377). (Do.)]

10. (11) 10 Ind Cas 781 (732) : 7 Nag L R 33. (99) 22 All 55 (59). (Plaint presented by advocate not signed by plaintiff — Presumption is that advocate had authority to present, and the want of signature is a mere irregularity.)

(24) AIR 1924 Pat 114 (117). (Person authorized to instruct pleader signing plaint to the knowledge of the litigant.)

(28) AIR 1928 Pat 51 (53). (Agent of plaintiff signing plaint without power — But subsequent ratification by plaintiff — Held defect cured.)

(23) AIR 1923 Rang 206 (206) : 1 Rang 42. (Plaint not signing pleadings — No objection raised — Section 99 applies.)

(26) AIR 1926 Sind 145 (149) : 20 Sind L R 277. (Plaint not signed by plaintiff — Only a formal defect.)

(30) AIR 1930 Lah 735 (735).

(96) 1896 Pun Re No. 48, p. 188. (Plaint signed by two out of four plaintiffs.)

(20) AIR 1920 Pat 636 (638). (Application under O. 21 R. 66 not signed by decree-holder but by his karpardar.)

(07) 4 Low Bur Rul 284 (286). (Plaint signed by authorized agent only.)

(06) 10 Cal W N 841 (844). (Plaint on behalf of Government signed by Collector and a pleader.)

11. (96) 18 All 396 (399, 400).

(12) 15 Ind Cas 583 (584) (Cal). (Non-verification of plaint.)

12. (69) 6 Bom H C R A C 20 (22).

(24) AIR 1924 All 54 (56) : 45 All 701. (Major plaintiff — Plaint signed by a next friend — Defect affects jurisdiction.)

13. (82) 1882 Pun Re No. 186, p. 542. (28) AIR 1928 Cal 57 (58). (Or addition of formal party defendant in course of suit.)

14. (1865) 2 Suth W R 237 (238).

(09) 2 Ind Cas 946 (948) (Cal).

- (j) (Order 13 R. 10). Refusal to send for a document.¹⁵
- (k) (Order 14) Issues not framed or wrongly framed.¹⁶
- (l) (Order 16) Refusal to summon witnesses at a late stage.¹⁷
- (m) (Order 20 Rr. 1 and 8). Delivery of judgment out of Court,¹⁸ or in the absence of parties and without notice to them,¹⁹ or by a successor on the depositions taken by his predecessor,²⁰ or by one Judge for and at the request of another.²¹ See also the case cited below.²²
- (n) (Order 21 R. 13). Omission to verify inventory of property in execution application.²³
- (o) (Order 21 R. 16). Recognizing assignment of decree without a formal application.²⁴
- (p) (Order 21 R. 30). Execution sale without attachment.²⁵
- (q) (Order 22 R. 3). Appeal on behalf of minor decided without knowledge of the fact of the death of the next friend pending appeal.²⁶
- (r) (Order 26). Refusal to issue a commission to examine a *wardamashin* lady²⁷ or to administer oath under the Oaths Act²⁸ or the omission to file the depositions taken on commission with the report of the commissioner.²⁹ So also, the issue of a commission behind the back of the defendant.³⁰
- (rr) (Order 30 R. 3). Service on partner without obtaining directions under Order 30 Rule 3.³¹
- (s) (Order 32 Rr. 3, 4 and 15). Absence of a formal order of appointment of a guardian *ad litem* for a minor party, when the minor was as a fact represented,³² or the absence of notice to the guardian when he actually appears in the suit,³³ or the want of a proper description of the minor as required by O. 32 R. 1.³⁴ Where the minor is not represented, the absence of an order of appointment as guardian *ad litem* would be fatal

15. ('09) 2 Ind Cas 958 (953) (Cal).
16. ('26) AIR 1926 Bom 384 (385).
17. ('13) 18 Ind Cas 625 (630) (Cal).
17. ('94) 16 All 218 (220). (Refusal not affecting merits.)
18. Marsh 327.
19. ('93) AIR 1933 Nag 12 (12, 13) : 28 Nag L R 308.
20. ('67) 4 Bom H C R A C 98 (100).
21. ('19) AIR 1919 Cal 799 (799).
22. ('20) AIR 1920 Cal 597 (598, 599) : 46 Cal 1978.
23. ('06) 28 All 244 (245, 246).
24. ('99) 26 Cal 250 (253).
25. ('18) AIR 1918 Mad 1262 (1263, 1264).
26. ('06) 28 All 328 (330).
27. ('98) 25 Cal 807 (815, 816) : 25 Ind App 117 (P O).
28. ('94) 7 C F L R 122 (124).
29. ('82) 1882 Pun Re No. 161, p. 485.
30. ('38) AIR 1938 Nag 530 (532).
31. ('32) AIR 1932 Cal 541 (542) : 59 Cal 496 (500).
32. ('97) 1897 Pun Re No. 67, p. 308.
33. ('16) AIR 1916 Pat 375 (378).
34. ('86) 14 Cal 159 (163) (P B).

(16) AIR 1916 Low Bur 87 (88). (Minor not really represented, hence decree set aside.)

(10) 6 Ind Cas 788 (788) : 32 All 287 : 37 Ind App 77 : 13 Oudh Gas 123 (P O). (Appointment of guardian *ad litem* but affidavit not forthcoming.)

(89) 1889 Pun Re No. 166, p. 577.

(87) 9 All 508 (510). (Court allowing suit to proceed in the absence of certificate of guardian-ship of minor plaintiff.)

(86) 14 Cal 204 (209) (P B). (Minor properly represented—No formal order appointing guardian *ad litem*.)

(03) 30 Cal 1021 (1032) : 30 Ind App 182 (P O). (Do.)

(16) AIR 1916 Cal 51 (56). (Absence of next friend in suit by lunatic.)

(21) AIR 1921 Nag 152 (153). (Petition by next friend of minor dismissed—Allowing another next friend to represent him in appeal.)

(83) 10 Cal 626 (634) (P O). (Minor who had a right to sue, represented by manager of Court of Wards without authority.)

to the suit.³⁵ Major defendant represented as a minor but himself appearing and contesting the case without objection.³⁶

(t) (Order 34.) Allowing execution of preliminary mortgage decree to proceed without a final decree being passed.³⁷

(u) (Order 41 R. 1.) Allowing decree copy to be filed after the filing of the appeal but within the period of limitation.³⁸

(v) (Order 41 R. 23.) Wrong order of remand³⁹ unless the same has affected the merits⁴⁰ or the jurisdiction of the Court.⁴¹

(w) (Order 41 R. 27.) Improper admission of additional evidence in appeal.⁴²

(x) (Order 41 R. 31.) Irregular mode of hearing or deciding an appeal.⁴³

(y) Wrong exercise of discretion⁴⁴ as distinguished from an arbitrary exercise of it.⁴⁵

6. Analogous provisions of law. — The principle of this Section that a technical objection should not stand in the way of upholding a decision which is substantially just and correct on the merits, has been recognised in other Acts also. Under Section 167 of the Evidence Act, an improper admission or rejection of evidence is not of itself a ground, for a new trial or reversal of any decision in any case, if it appears that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision,¹ or that if the rejected evidence had been received, it would not have varied the decision.²

Under Section 11 of the Suits Valuation Act it is provided that an under-valuation or overvaluation of a suit or appeal will not be a ground of appeal even if it

35. ('21) AIR 1921 Cal 584 (585).

('82) 1882 Pun Re No. 100. (No appointment of

guardian *ad litem* and no representation.)

('86) 11 Bom 53 (56). (Minor not represented.)

36. ('24) AIR 1924 All 94 (95) : 45 All 608.

37. ('27) AIR 1927 Bom 181 (193) : 51 Bom 125.

(Formal defect.)

('08) 5 Bom L R 389 (392).

38. ('67) 2 Agra 85 (85).

39. ('89) 18 Bom 449 (457, 458). (Document not

properly stamped wrongly admitted.)

('70) 18 Suth W R 284 (284).

('01) 28 Cal 824 (830).

('07) 14 Bur L Rep 122.

('81) 1881 All W N 121 (121). (If substantially

and equitably just.)

('89) 14 Bom 282 (285).

('14) AIR 1914 Cal 163 (164) : 20 Ind Cas 39 (40) :

41 Cal 108.

('07) 11 Cal W N 380 (386).

('04) 2 Cal L Jour 496 (497).

('07) 5 Cal L Jour 328 (333).

('67) 8 Suth W R 207 (207).

40. ('96) 19 Mad 479 (481). (Illegal order of

remand affecting merits.)

('94) 18 Mad 421 (422, 423). (Do.)

41. ('89) 11 All 35 (39, 40). (Remand order pas-

sed ultra vires, is not cured.)

('96) 19 Mad 479 (481). (Remand for a revised

finding is ultra vires and will affect merits.)

('07) 29 All 660 (663). (Remand to one Court—

Case tried by another—Defect affects jurisdiction.)

42. ('15) AIR 1915 Mad 762 (762).

('19) AIR 1919 Cal 311 (312).

reference to Section 167 of the Evidence Act.)

2. ('24) AIR 1924 Cal 370 (371). (Decided without

irrelevant evidence.)

('18) AIR 1918 Cal 971 (973) : 45 Cal 159.

irrelevant evidence.)

('17) AIR 1917 Cal 28 (28). (Admissibility of

inadmissible evidence affecting case on merits.)

('81) 7 Cal 293 (296).

('04) 31 Cal 380 (384).

original.)

('86) 8 All 576 (607) (F B).

('14) AIR 1914 Cal 255 (256). (Admission of

secondary evidence without proof of the loss of

original.)

('19) AIR 1919 Nag 3 (5). (Admission of second-

ary evidence without proof of the loss of

original.)

('68) 10 Suth W R 180 (180).

('75) 24 Suth W R 392 (393).

('74) 11 Bom H O R 129 (131).

copy of document.)

1. ('95) 5 Mad L Jour 81 (82). (Admission of

copy of document.)

grant time to party to produce evidence.)

45. ('01) 28 Cal 37 (52). (Arbitrary refusal to

discuss under Section 42, Specific Relief Act.)

('87) 9 All 622 (624). (Do.)

44. ('86) 8 All 365 (376). (Irregular exercise of

(Omission to comply strictly with O. 41 R. 31.)

('20) AIR 1920 Sind 12 (13) : 14 Sind L R 132.

point being simple.)

adopting lower Court's view without reasons, the

('81) 8 Cal L Rep 597 (599). (Appellate Court

43. ('83) 1883 All W N 220 (221).

evidence allowed — Merits unaffected.)

(Case not coming under O. 41 R. 27—Additional

('21) AIR 1921 Sind 155 (157) : 16 Sind L R 17.

Note 6

affects the pecuniary jurisdiction of the Court trying the suit or appeal, unless

(a) the objection thereto is taken at the earliest possible opportunity or,

(b) that by reason of such overvaluation or undervaluation the disposal of

the suit or appeal has been affected on the merits.³

Before the Act was passed, an overvaluation or undervaluation of a suit was considered as an irregularity governed by the provisions of Section 350 of the Code of 1859 or Section 378 of the Code of 1882, corresponding to Section 99 of the present Code. Accordingly it was held that where such valuation affected the jurisdiction of the Court it was a valid ground of appeal.⁴ Under the present Act, even if such valuation affects jurisdiction, it will not be a ground of appeal unless the merits of the case are also affected thereby.⁵

The Section has however been held to be restricted in its applicability to cases where the valuation depends upon the *discretion* of the parties or the Court. It is not applicable to cases where the valuation is in violation of the *rules* of the Court-fee Act.⁶

Under Section 36 of the Stamp Act, 1899, where an instrument has been admitted, the admission cannot be called into question at any subsequent stage of the proceedings, whether in the original Court itself or in the Appellate Court on the ground that the instrument has not been duly stamped.⁷ But the Appellate Court may make

[See (17) AIR 1917 Cal 812 (814).]

6. (94) 1894 Pnn Re No. 182, p. 500.
(15) AIR 1915 Lab 185 (185). (Case under rules framed under the Suits Valuation Act.)
(10) 1910 Pnn L R No. 214, p. 655.
(20) AIR 1920 Lab 112 (112). (Valuation fixed by the rules of Chief Court.)
7. (09) 4 Ind Cas 1086 (1088) : 1907-09 Upp Bur Rul. Stamp Act, page 3. (Admission of pro-note with an uncanceled stamp.)
(23) AIR 1923 Lab 143 (144). (Cal.)
(15) AIR 1915 Cal 280 (281).
(10) 7 Ind Cas 582 (583) (Cal.)
(19) AIR 1919 Cal 285 (289).
(16) AIR 1916 Upp Bur 2 (3).
(94) 18 Bom 737 (738).
(79) 2 All 554 (559). (Mere irregularity under S. 578 of the Code of 1882.)
(82) 5 Mad 220 (221). (Reception of unstamped document held not to be a ground of appeal under S. 578 of the Code of 1882.)
(78) 1 All 725 (726). (Reception of unstamped document held to be a mere irregularity under S. 850 of the Code of 1859.)
(74) 11 Bom HCR 129 (131). (Mere irregularity under S. 578 of the prior Code.)
(67) 8 Suth W R 367 (368).
(69) 3 Beng L R A C 235 (237).
(98) 8 Mad L Jour 66 (68). (Case under S. 34 of the Stamp Act of 1879 (present Section 36).)
(75) 23 Suth W R 170 (170).
(78) 3 Cal 737 (738, 739).
(82) 4 Mad 137 (140).
(70) 5 Beng L R A C 10 (10).
(81) 5 Bom 621 (627).
(69) 3 Beng L R A C 126 (130).
(71) 16 Suth W R 6 (7).
(1865) 2 Mad H C R 321 (321, 322).
(66) 3 Mad H C R 297 (298). (Admission of unstamped document—Objection in second appeal

3. (10) 8 Ind Cas 545 (545) (Mad).
(93) AIR 1933 All 249 (252) : 55 All 315 (P B).
(90) 14 Mad 183 (185). (Overvaluation enabling higher Court to try suit.)
4. (69) 11 Suth W R 257 (257).
(68) 10 Suth W R 207 (207).
(70) 14 Suth W R 195 (196).
(82) 8 Cal 834 (836).
(82) 4 All 289 (291). (Valuation not affecting jurisdiction.)
(1864) 1 Bom HCR 163 (164). (Error in valuation not affecting jurisdiction is no ground for interference.)
(75) 24 Suth W R 225 (226). (Error not affecting jurisdiction is no ground for interference.)
(69) 4 Beng L R A C 139 (142). (Undervaluation not affecting jurisdiction is no ground for interference.)
(70) 18 Suth W R 925 (926). (Valuation not affecting jurisdiction.)
5. (97) 1 Cal W N 136 (137). (If suit is not prejudicially affected, defect of jurisdiction is cured by Section 11, Suits Valuation Act (7 of 1887).)
(03) 25 All 174 (178).
(14) AIR 1914 All 128 (128) : 36 All 58.
(97) 24 Cal 661 (667).
(17) AIR 1917 All 79 (80).
(04) 31 Cal 849 (856).
(12) 16 Ind Cas 46 (47) (Cal).
(05) 15 Mad L Jour 487 (488).
(01) 24 Mad 43 (45).
(18) AIR 1918 Mad 590 (591). (A mere change of forum due to undervaluation cannot be said to affect the case on the merits.)
(18) AIR 1918 Lab 369 (370) : 1918 Pnn Re No. 21. (Case heard by inferior Court which should have been heard by superior Court.)
(19) AIR 1919 Cal 984 (985). (District Munsif trying suit triable by higher Court may be said to cause prejudice to the trial.)

back upon it afterwards.⁶ There cannot, however, be a waiver of a total want of jurisdiction,⁷ or of an objection affecting Government revenue,⁸ nor can the mere failure to appeal against an illegal order be taken to operate as a consent to the passing of such an order.⁹

APPEALS FROM APPELLATE DECREES

100. [S. 584.] (1) Save where otherwise expressly provided in the body of this Code³ or by any other law for the time being in force,⁴ an appeal shall lie to the High Court⁶ from every decree⁸ passed in appeal⁵ by any Court subordinate⁷ to a High Court, on any of the following grounds, namely:—

- (a) the decision being contrary to law¹²⁻²⁰ or to some usage having the force of law;²¹
- (b) the decision having failed to determine some material issue of law or usage having the force of law;²²
- (c) a substantial²⁴ error or defect in the procedure²⁵⁻²⁷ provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.²⁴

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.⁶⁴

[1877, S. 584; 1859, S. 372.]

101. [S. 585.] No second appeal shall lie except on the grounds mentioned in section 100.²⁸⁻⁵⁴

[1877, S. 585.]

- (69) 12 Moo Ind App 495 (503) (P C). (Improper rejection of evidence.)
 (87) 11 Bom 320 (324). (Admission of copy of a copy.)
 (82) 1882 Pun Re No. 161, p. 485. (Omission to file record of evidence with report of commission.)
 (81) 6 Cal 666 (670). (Document received in Court below without objection.)
 6. (14) AIR 1914 Lah 339 (341). (Commissioner not formally appointed—Parties accepting the appointment.)
 (18) AIR 1918 Pat 315 (316). (Acceptance of pecuniary jurisdiction in lower Court will cure defect.)
 9. (79) 1 Ind Cas 746 (746) : 32 Mad 83.
 8. (79) 2 All 554 (559, 560).
 (1864) 2 Bom H C R 162 (166). (Failure to object limitation.)
 (01) 1901 Pun L R No. 47, p. 147 : 1901 Pun Re No. 35.
 (85) 7 All 230 (243). (Per Mahmood, J.)
 (69) 6 Bom H C R A C 20 (22). (Non-objection to defect affecting jurisdiction.)
 7. (09) 2 Ind Cas 677 (680) (All).
 (69) 6 Bom H C R A C 20 (22). (Non-objection to defect affecting jurisdiction.)
 (24) AIR 1924 All 94 (95) : 45 All 608. (Major defendant represented in suit as minor, but himself conducting the case without objection.)

30. Legal effect of document or transaction.
31. Meaning of words.
32. Inference from proved facts—Presumptions and onus of proof.
33. Admission or rejection of evidence and documents. See Note 27.
34. Relevancy and sufficiency of evidence.
35. Nature of tenancy.
36. Nature of possession.
37. Nature of property.
38. Nature of contract or transaction.
39. State of mind, acquiescence, good faith, consent, intention, negligence, wilful neglect, misconduct, reasonable care, reasonable and probable cause and waiver.
40. Existence of liability.
41. Existence of custom. See Note 21.
42. Status.
43. Merger.
44. Limitation.
45. Existence of legal necessity for, and binding nature of, transaction.
46. Existence of nuisance.
47. Interpretation and applicability of the law.
48. Abandonment.
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23. Errors or defects in procedure—General—Clause (c).
24. But the errors or defects must be substantial and must be such as to possibly produce error or defect in the decision on the merits.
25. Omission to frame or try issues of facts properly.
26. Defective judgment.
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28. Question of law, question of fact and mixed questions of law and fact—General.
29. Construction of documents.

Other Topics (miscellaneous)

Allowing additional evidence in appeal. See Notes

13, 16, 26 and 52.

Adverse possession. See Notes 28, 36 and 57.

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Court. See Note 16.

Dismissal of first appeal for default. See Note 5.

Decision based on irrelevant evidence. See Notes

13 and 21.

Erroneous view of law. See Notes 12, 21, 47, 53

and 56.

Erroneous or perverse finding of fact. See Notes

23 and 52.

Finding based on no reason or bad reasons. See

Notes 23 and 53.

Interpretation of leading cases. See Notes 47

and 55.

and 55.

1. Legislative changes. — The following are the changes introduced in

Section 100 —

1. The words "save where" have been substituted for the words "unless

when" which occurred in the old Section.

2. The word "expressly" is new. Even under the old Code it had been held

that the right of second appeal conferred by the Code was a valuable

substantive right, that such a right could not be taken away by mere

implication; and that when the Legislature intended to take away the

right it would do so expressly. The insertion of the word "expressly"

in the present Section makes the position clear. (In this connection,

vide Note 3 below.)

3. The words "body of" are new.

4. The words "for the time being in force" are new.

5. The word "specified" which occurred before the word "law" in the old

Section has been omitted. This change was introduced to set at rest

certain doubts entertained under the old Section, as to whether the

words "specified law" meant statute law or law specified in the memo-

randum of appeal.

6. The word "some" occurring before the word "usage" is new.

Section 101 corresponds to Section 555 of the Code of 1882 without any change.

2. Scope, object and applicability of the Sections. — It has been seen in

Note 2 to Section 96 *ante* that a right of appeal is not a natural or inherent right

attaching to litigation, and does not exist and cannot be assumed unless *expressly given*

by statute or by rules having the force of statute. It has also been seen that parties

cannot confer a right of appeal upon themselves in any matter by agreement or mutual

consent. These principles apply with equal force to second or special appeals and

therefore, a right of second appeal does not exist unless expressly given by statutory

Sections 100 & 101 — Note 1

1. (98) 11 Mad 809 (812) (F B).

2. (94) 17 Mad 167 (168).

(83) 9 Cal 838 (839).

3. (85) 7 All 649 (653) (F B).

(91) 18 Cal 23 (26) : 17 Ind App 122 (P C).

2. See also (1862) Marsh 4.

(96) 19 Mad 199 (200).

App 160 (P C).

[See also (88) 11 Mad 26 (34, 35, 36) : 14 Ind

1. (95) 62 Cal 701 (705).

Note 2

(98) 20 Cal 93 (99, 100) : 19 Ind App 223 (P C).

provisions. Section 100 is such an express provision, and it declares that a second or special appeal shall lie from every decree passed in first appeal on the grounds mentioned therein. Section 101 enacts that no second appeal shall lie except on the grounds mentioned in Section 100.³

The scope of a first appeal differs from that of a second appeal in that the former is not limited to any particular grounds of appeal such as is provided by this Section. The reason for imposing limitations on the grounds that may be taken in second appeal is based on grounds of public policy expressed in the maxim *interest reipublice ut sit finis litium* — it concerns the State that there be an end to litigation.⁴ The conditions mentioned in the Section must therefore be strictly fulfilled before a second appeal can be maintained and no Court in India or elsewhere has any power to add to or enlarge those grounds.⁵ When a second appeal is brought up for admission, the Judge has jurisdiction to see whether the grounds mentioned in the Section exist and to reject the appeal if no such grounds exist.⁶ And even if an order of admission had been passed *ex parte* by a single Judge of the High Court, it may be impugned and set aside by the Bench before whom the appeal is brought up for hearing, on the ground that the reasons for the admission are erroneous or inadequate.⁷

Sections 100 and 101 read together make it quite clear that —

- (1) a second appeal will lie only on the ground of an error in law or procedure⁸ and that
(2) a second appeal will not lie merely on the ground of an error on a question of fact.⁹

It is the decision of *lower Appellate Court* that is to be referred to in the grounds of second appeal, and not that of the original Court,¹⁰ and no decree can be asked for in second appeal against a person against whom there was no first appeal.¹¹ Further, the decision of the lower Appellate Court will be considered only on the point raised by the appellant, and the rejection of the appeal does not mean that the High Court necessarily affirms all the findings which the lower Appellate Court may have incidentally come to.¹²

A decision that a particular question is not in dispute cannot be attacked in special appeal; the proper procedure in such a case is to apply for review.¹³ The rule that a finding of fact cannot be attacked in second appeal does not apply to second appeals to which the provisions of Sections 100 and 101 of the Civil Procedure Code do not apply.¹⁴

3. ('39) AIR 1939 Rang 59 (63). (Section 100, C. P. O., is an enabling Section—S. 101 however restricts power.)
 4. ('21) AIR 1921 Oudh 98 ('99) : 24 Oudh Cas 221. (Even at the cost of occasional error.)
 - [See also ('18) AIR 1918 P O 92 (94) : 46 Cal 189 : 45 Ind App 183 (P C). (There must be some measure of finality in cases where the balance of evidence arises for decision.)]
 5. ('91) 18 Cal 23 (30) : 17 Ind App 122 (P C). ('80) 5 Cal 711 ('12).
 - ('89) 16 Cal 753 ('55) : 16 Ind App 125 (P C).
 - ('99) 26 Cal 53 (70).
 - ('34) AIR 1934 Cal 633 (635) : 61 Cal 365.
 6. ('06) 1906 All W N 63 (64).
 - ('93) 15 All 367 (369).
 7. ('75) 1 All 34 (37, 38, 39, 43) (P B).
 - ('87) 9 All 11 (15). (Being barred by limitation.)
9. See Note 56 below.
 10. ('13) 21 Ind Cas 232 (232) : 7 Low Bur Rui 39.
 11. ('08) 12 Cal W N 625 (627).
 12. ('71) 15 South W R 91 (92).
 13. ('26) AIR 1926 Cal 941 (942, 943).
 14. ('06) 1906 All W N 186 (186). (An appeal under the Agra Tenancy Act, 1901, is not a second appeal of the description referred to in this Section.)

As to the jurisdiction of the lower Courts, after an appeal is filed, over the subject-matter of the litigation and the effect of the exercise of such jurisdiction on the second appeal, see Section 96 Note 2, *ante*.

The grounds of appeal set forth in this Section have been extended to second appeals under various local or special enactments.¹²

The High Court will not set aside, in second appeal, a decree of the lower Appellate Court unless it is shown to be wrong.¹³

3. "Save where otherwise expressly provided in the body of this Code,"— A second appeal will always lie to the High Court from an appellate decree of a Court subordinate to a High Court, unless precluded by some express provision of law.¹ Thus, where any Section of the Code has declared that any decision shall be *final*, no second appeal will lie from such decision. The following are some of such provisions—

- (i) Section 102;²
(ii) Section 104;³
(iii) Order 17 Rule 7;⁴
(iv) Paragraph 16 clause (2) of the Second Schedule;⁵

4. "Or by any other law for the time being in force." — The following are instances of other laws barring second appeal —

1. Section 27 of the Provincial Small Cause Courts Act declaring that the decrees and orders of a Small Cause Court are *final*.
2. Section 388 of the Succession Act, 1925 corresponding to Section 26 of the Succession Certificate Act, 1889 now repealed.¹

Succession Certificate Act, 1889 now repealed.

(126) AIR 1926 Cal 229 (281). (Do.)
(121) AIR 1935 Pat 803 (803). (Do.)
(135) AIR 1935 Lah 962 (962). (Application under O. 21 R. 90—No second appeal lies.)
(135) AIR 1935 Pat 109 (110). (No second appeal lies from order modifying an award against which an appeal lies under Sec. 104 (c) of Civil P. C. But if the appeal is preferred from the decree and not from the order the form of the appeal might justify an admission of second appeal.)
(39) AIR 1939 Sind 62 (63) : 1 L R (1939) Kar 417. (Order under O. 21 R. 92 — Second appeal does not lie.)
(36) AIR 1936 All 763 (764). (No second appeal lies from an order rejecting application under Order 21 Rule 90.)
(36) AIR 1936 Pat 119 (120). (Order allowing deposit and setting aside execution sale—Second appeal does not lie.)
(89) 13 Bom 496 (499). (No second appeal lies from an appellate order allowing review. But where the lower Appellate Court's order is against the decretal order as amended in review, second appeal lies.)
(58) 10 All 8 (12).
(26) 92 Ind Gas 600 (600) (All).
(28) AIR 1928 Oudh 1 (3) : 3 Luck 1. (Trial Court setting aside award — Lower Appellate Court decreeing suit in terms of award—Second appeal lies.)

Note 4

1. (94) 17 Mad 167 (168). (The words "shall be final" in S. 26, cl. 3 were held to preclude second appeal.)

O. 39 R. 1—No second appeal lies.

(28) AIR 1928 Cal 450 (451, 452). (Do.)
[See also (91) 18 Cal 802 (810) : 17 Ind App 392 (PO). (Appeals before the Punjab Chief Court from the Assistant Commissioner.)
15. Agra Tenancy Act, No. III of 1926, ss. 246 and 254.
N W P and Oudh Act, No. XX of 1890, ss. 116 and 119-B.
Madras, Gaujam and Vignapatnam Act, XXIV of 1889, Rules 47 (2) and 48.
The Bengal Tenancy Act, VII of 1885, s. 109 (A) (3).
The Provincial Insolvency Act, V of 1920, s. 75. See also the Burma Courts Act, XI of 1922, Section 11.
16. (38) AIR 1938 All 116 (117).

Note 3

1. (14) AIR 1914 P C 87 (89) : 37 Mad 443 : 41 Ind App 258 (PC).
[See also (12) 13 Ind Gas 193 (193, 194) : 39 Cal 241.]
2. (24) AIR 1924 Lah 619 (619).
(99) 22 Mad 229 (233).
(37) AIR 1937 Oudh 244 (245) : 18 Luck 204.
3. (78) 1 Mad 401 (402).
(38) AIR 1938 Mad 838 (838). (Case falling under O. 21 R. 90—No second appeal lies.)
(11) 9 Ind Gas 666 (667) : 33 All 479.
(02) 4 Bom L R 138 (139). (Case falling under O. 39 R. 1—No second appeal lies.)

3. Section 102 of the Bengal Code VIII of 1869.² Where, however, this Section did not apply, a second appeal was held to lie.³

4. Section 109 A clause (3) of the Bengal Tenancy Act (VIII of 1885).⁴

5. "Appeal shall lie to the High Court from every decree passed in appeal."—An appeal will lie under this Section to the High Court from every decree passed on appeal by any Court subordinate to the High Court, and the jurisdiction of the High Court in this respect cannot be limited without express words in any law to this effect.¹ A second appeal will lie from the decree of an Appellate Court disallowing

- (71) 16 Subh W R 235 (236). (Do.)
 (73) 19 Subh W R 200 (200). (Do.)
 (73) 19 Subh W R 201 (202). (Where the decision is by the Additional Judge on transfer of the case to him, a second appeal lies.)
 [But see (74) 21 Subh W R 320 (322, 323) (FB). (Per Full Bench—Additional Judge comes within the meaning of S. 102 and hence a second appeal is barred—Jackson, J., dissenting.)]
 4. (78) 15 Cal 231 (233). (Section 153, Bengal Act VIII of 1885—Suit for arrears of rent—Amount below Rs. 100—No question of title to land or interest in land—No second appeal.)
 (89) 16 Cal 596 (597). (Do.)
 (1900) 27 Cal 484 (488). (Do.)
- Note 5**
1. (83) 9 Cal 838 (839).
 (14) AIR 1914 Bom 30 (31) : 38 Bom 340. (A special appeal from the decision of the Civil Judge at Vinchur under Bombay Regulation XIII of 1890, Cl. 5, lies to the High Court.)
 (97) 1 Cal V N 341 (343). (A second appeal lies from the judgment of the Judicial Commissioner under Chota Nagpur Landlord and Tenant Procedure Act, I of 1879, S. 144.)
 (84) 10 Cal 761 (763, 764). (A second appeal lies to the High Court from Sonthal Parganas in all Civil suits whereof the matter in dispute exceeds Rs. 1,000—Bengal Act, XXXVII of 1855.)
 (14) AIR 1914 Mad 135 (136, 137) : 38 Mad 655. (Decree of a Deputy Collector under S. 213 of the Madras Estates Land Act—Appeal to District Judge therefrom—Second appeal from appellate decree lies.)
 (22) AIR 1922 Mad 119 (121, 122) : 44 Mad 697. (Decree for rent under the Madras Estates Land Act—Second appeal lies even if the subject-matter is less than Rs. 500—S. 102, Civil Procedure Code, does not apply.)
 (88) 11 Mad 309 (314) (FB). (An appeal lies to the High Court from a decision of the District Court passed under Sec. 10 of the Madras Forest Act 1882, on appeal from decision of a Forest Settlement Officer.)
 (16) AIR 1916 P C 21 (23) : 39 Mad 617 : 43 Ind App 192 (PC). (Do.)
 (14) AIR 1914 P C 87 (89) : 37 Mad 443 : 41 Ind App 258 (PC). (Even if there was an implied rule against second appeals under the Madras Rents Recovery Act, VIII of 1865 a second appeal lies unless the right is taken away by any express enactment.)
 (1900) 10 Mad L Jour 398 (399, 400). (Second appeal lies against the decision of the District

- (81) 6 Cal 40 (41). (No appeal lies from any order of the District Judge refusing an application to re-call a certificate granted under Act XXVII of 1860, Succession Certificate Act.)
 (93) 20 Cal 641 (642). (No appeal from any order directing security for grant of certificate.)
 [See also (75) 1 Cal 127 (130). (S. 6 of Act XXVII of 1860 limited to property or otherwise of a grant of certificate—No special appeal as to any other matter.)]
 2. (72) 17 Subh W R 119 (119). (Where no right to vary or enhance rent decided—No second appeal by virtue of S. 102.)
 (73) 20 Subh W R 270 (271). (Do.)
 (75) 23 Subh W R 436 (437). (Do.)
 (77) 3 Cal 151 (158, 159, 161) (FB). (Do.)
 (75) 24 Subh W R 49 (49). (Do.)
 (75) 24 Subh W R 114 (114). (Do.)
 (75) 24 Subh W R 469 (470).
 (72) 17 Subh W R 189 (189). (No second appeal from an order of District Judge on an application connected with the sale of a tenure in execution of a decree for arrears of rent below Rs. 100.)
 (80) 5 Cal 594 (595). (Do.)
 (72) 18 Subh W R 42 (43). (No second appeal, where no question of title to land was decided.)
 (75) 24 Subh W R 213 (213). (Do.)
 (74) 22 Subh W R 205 (205). (Do.)
 (75) 23 Subh W R 268 (269). (Do.)
 (82) 8 Cal 712 (713). (Do.)
 (76) 25 Subh W R 153 (154). (Do.)
 (78) 2 Cal L Rep 558 (560). (Do.)
 (74) 21 Subh W R 36 (37). (No second appeal where title is set up in a stranger.)
 (74) 22 Subh W R 826 (826). (Do.)
 (75) 23 Subh W R 227 (227). (Do.)
 (75) 23 Subh W R 408 (408). (Do.)
 (76) 25 Subh W R 14 (15). (No second appeal simply because the genuineness of a mokurari patra was decided.)
 3. (74) 22 Subh W R 446 (446). (A second appeal lies where the District Judge has given no finding at all.)
 (83) 9 Cal 596 (598) (FB). (Where the subject-matter is not shown not to exceed Rs. 100 a second appeal lies.)
 (72) 17 Subh W R 495 (496). (A second appeal lies where the right to enhancement of rent is determined though below Rs. 100.)
 (73) 20 Subh W R 15 (15). (A second appeal is where a question as to the area of holding is involved.)
 (71) 16 Subh W R 132 (132). (Where the decision is by the Sub-Judge on transfer of the case to him, a second appeal lies.)

7. "Court subordinate to a High Court." — See Section 3, *ante*.

The Court of the Political Agent of the Southern Mahratta Country has been held to be a Court subordinate to the High Court, and a second appeal will lie therefrom to the High Court.¹ But a special Judge under Section 104 clause (2) of the Bengal Tenancy Act, 1885, is not a Court subordinate to the High Court and no second appeal will lie from his decision.² Similarly, where under a scheme-decree of the High Court directing the District Judge to select a trustee who latter does so, he acts simply as a *persona designata* and no second appeal will lie from his selection.³

8. "Decree," meaning of. — See Section 2 (2), *ante*.

As to decrees passed without jurisdiction and the right of appeal therefrom, see Note 15 below.

It is only where the decision of the Lower Appellate Court amounts to a decree that an appeal lies therefrom to the High Court under this Section;¹ otherwise not.²

9. Execution cases. — Where an order in execution amounts to a decree under Section 2 (2) read with Section 47, a second appeal will lie therefrom as in the case of every other decree.¹ Where, however, a second appeal is barred in the suit itself, *e. g.*, suits of a small cause nature, no second appeal will lie from an order in execution in such a suit though such order may fall under Section 47 and amounts to a decree.²

Note 7

1. ('69) 6 Bom H C R A C 75 (76).

2. ('90) 17 Cal 326 (328, 329).

('94) 21 Cal 776 (781).

('94) 21 Cal 935 (938).

3. ('26) AIR 1926 Bom 167 (167).

Note 8

1. ('81) 6 Cal 319 (323) (F B).

('03) 26 Mad 224 (229).

('17) AIR 1917 All 184 (185, 186).

('15) AIR 1915 Mad 322 (322). (First Court's compromise decree confirmed in appeal — Second appeal lies.)

('87) 10 Mad 292 (294). (Decree disallowing cross-objections.)

('26) AIR 1926 Cal 1105 (1105). (Order that appeal was not admissible as being time-barred is a decree.)

('86) 12 Cal 20 (31). (Dc.)

('04) 8 Cal W N 64 (65). (Rejection of appeal on the ground that no appeal lies, amounts to a decree.)

('29) AIR 1929 Rang 166 (166): 7 Rang 136. (Suit for enforcement of award paying also that award be filed — Second appeal lies.)

('07) 10 Oudh Cas 245 (245). (Dismissal of suit in appeal — Second appeal lies.)

('37) AIR 1937 All 284 (285). (Application by appellant's pleader for postponement on ground of inability to argue — Appeal dismissed for want of prosecution — Dismissal of appeal amounts to a decree and second appeal is maintainable.)

('38) AIR 1938 Cal 639 (640). (Order that appeal abates not only with regard to deceased respondent but with regard to all respondents is a decree and as such appealable.)

2. ('14) AIR 1914 Cal 795 (795). (No second appeal for dismissal of suit for misjoinder of parties.)

('33) AIR 1933 Mad 695 (696): 56 Mad 934. (Application under S. 4 (2) is not suit and order refusing it is not a decree.)

('05) 15 Mad L Jour 487 (488). (No appeal lies against the decision of an Appellate Court to exercise the powers conferred by S. 11 of the Suits Valuation Act, VII of 1897.)

('82) 1882 Pun Re No. 185, p. 541. (An order returning plaint in appeal for presentation to proper Court — Appeal lies.)

('69) 6 Bom H C R A C 205 (211). (Order relating to execution — Open to second appeal.)

('15) AIR 1915 Lab 213 (213). (If lower Appellate Court dismisses appeal on the ground that notices were not served within three weeks as required by S. 169, Companies Act, second appeal is not competent.)

('97) 24 Cal 319 (320). (Order granting review of judgment set aside on appeal — No second appeal lies.)

('01) 28 Cal 177 (179). (Order under S. 206 of the old Code amending decree is not a decree and no second appeal lies.)

('28) AIR 1928 Lah 352 (353): 9 Lah 176. (Appellate order under S. 151 or S. 152 of the Code correcting omissions in judgment — No second appeal.)

('02) 29 Cal 60 (62, 63). (Order dismissing a suit for default of appearance is not a decree — First or second appeal barred.)

[See ('82) 8 Cal 126 (129). (Dc.)]

Note 9

1. ('33) AIR 1933 All 57 (59): 54 All 1031. 2. See Section 102, Note (1).

In the case of orders in execution which do not amount to decrees, no second appeal will lie, though a *first appeal* may lie if the order falls under Section 104, as an appealable order.

10. Separate appeals against separate decrees. — Where, in appeals relating to the same matter between the same parties, the lower Appellate Court passes separate decrees, then separate appeals should be filed with respect to those decrees. Where two appeals were preferred against a single decree by two sets of defendants and the result of the appeals was that the suit was dismissed, it was, however, held that the plaintiffs need not file two second appeals, and that it was enough if they filed one second appeal.

11. Grounds of second appeal — General. — A second appeal will lie on the following main grounds —

- (1) The decision being *contrary to law*.
- (2) The decision being *contrary to usage* having the force of law.
- (3) Failure to determine some material issue of law.
- (4) Failure to determine some material issue of usage having the force of law.
- (5) Substantial error or defect in procedure which may possibly have affected the decision of the case on the merits.

12. Contrary to law — General. — A Court commits an error of law if it acts contrary to, or fails to apply the provisions of, any law¹ or any legal principle.² Thus, the failure to draw a presumption under Sections 79 to 85 of the Evidence Act, 1872, is an error of law. But the word "law" is not limited to statute law alone³ but will also include *general principles of law*.⁴ In deciding disputes before them, Courts should act in accordance with such principles of law. Thus —

- (1) They should clearly understand the issue or the matter in dispute before them. A *misconception* of issue or of the true questions in controversy in the case is an error of law.⁵
- (2) They should arrive at their findings of fact *from the evidence* tendered before them. A finding based on *no evidence* or in *disregard* of evidence⁶ or on *inadmissible evidence*⁷ or on assumptions of facts without inquiry⁸ is an error of law.
- (3) They are *bound to draw*, for the purpose of deciding the issue before them, such inferences of fact as are reasonable from the facts placed

3. See Section 104 clause (2).

Note 10

1. (188) 11 Mad 280 (282).
2. (1932) AIR 1932 Mad 689 (691).

Note 12

1. (1905) 27 All 688 (691). (Refusal to apply the law to the case.)
2. (1926) AIR 1926 Lah 653 (654). (Error as to [See (1936) 164 Ind Cas 315 (316) (Par.)] App 140 (P C).)
- (1913) 27 Bom 271 (276).
- (1913) 19 South W R 267 (267).
- (1914) 23 South W R 160 (161).
- (1927) AIR 1927 Nag 180 (184).
- (1938) AIR 1938 Nag 470 (472) : 1 L R (1938) Nag 535.
6. (1937) AIR 1937 Sind 36 (36). (No evidence to support finding.)
- See also Note 13, *infra*.
7. (1916) AIR 1916 Cal 691 (691).
- (1923) 3 L R All Rev 222 (224).
- (1925) 23 South W R 87 (88, 89).

before them.⁸ A refusal to draw *any* inference from proved facts one way or the other⁹ or the drawing of an inference which cannot be drawn from, and is not warranted by the facts is an error of law.¹⁰

(4) The Appellate Court is bound to remember the rule that the *onus* is on the appellant to show that the decision of the lower Court is wrong.¹¹ The overlooking of this principle is an error of law.¹²

13. Decision not based on legal evidence. — A decision of a Court must, in law, be based on the evidence, oral and documentary, legally adduced in the case. A Court will therefore be committing an error of law —

(1) if it bases its decision on no evidence at all,¹ and on mere surmises and conjectures;²

(2) if it bases its decision on irrelevant³ and inadmissible evidence⁴ as such

evidence is no *legal* evidence;

8. ('30) AIR 1980 Lab 448 (444). (Documents creating obligation in hands of the obligor — Court may presume that the obligation is discharged.)
 9. See Note 32, below.
 10. ('66) 11 Moo Ind App 7 (23) (P C). See also Notes 28, 29 and 58.
 11. ('22) AIR 1922 Lab 127 (130).
 12. ('17) AIR 1917 Lab 297 (300) : 1917 Pun Re No. 106.
- Note 13**
1. ('24) AIR 1924 Pat 67 (68).
 - ('32) AIR 1932 Lab 61 (62).
 - ('90) 17 Cal 875 (882) (P C). (Absence of evidence.)
 - ('25) AIR 1925 Oudh 525 (526) : 27 Oudh Cas 331. (Entire absence of evidence.)
 - ('29) AIR 1929 Rang 257 (258) : 7 Rang 751.
 - (1868) 2 Hay 668.
 - (1868) 2 Hay 419.
 - ('28) AIR 1928 Lab 607 (607, 608).
 - ('32) AIR 1932 Lab 293 (294) : 18 Lab 116.
 - ('14) AIR 1914 Low Bur 198 (200).
 - ('07) 11 Cal W N 88 (84).
 - ('06) 4 Cal L Jour 198 (203). (A misreading of evidence is not a ground of second appeal.)
 - ('94) 1894 Bom P J 109.
 - ('76) 25 Suth W R 101 (101). (Finding on basis of document not proved.)
 - ('91) 1891 Bom P J 346.
 - ('87) 14 Cal 740 (747) : 14 Ind App 101 (P C). (When possession for a long period is proved, there is not an entire absence of evidence of ownership.)
 - ('75) 28 Suth W R 250 (250, 251).
 - ('74) 22 Suth W R 316 (319) : 2 Ind App 1 (P C).
 - ('74) 22 Suth W R 814 (316).
 - ('19) AIR 1919 P C 29 (30) : 47 Cal 107 : 46 Ind App 140 (P C).
 - ('14) AIR 1914 P C 67 (71) : 41 Cal 972 : 41 Ind App 110 (P C).
 - ('14) AIR 1914 Cal 832 (832).
 - ('37) AIR 1937 Sind 36 (36).
 - ('35) AIR 1935 Mad 26 (26).
 - [See also ('32) AIR 1932 Lab 293 (294) : 13 Lab 399.]
 - (But see ('14) AIR 1914 Mad 118 (119). (But a finding though based on no positive evidence parties.)
 - ('20) AIR 1920 Lab 322 (323). (Basing judgment on document not tendered and not on record.)
 - ('68) 9 Suth W R 450 (450). (No legal evidence.)

2. ('82) 1882 All W N 6 (6).
- ('72) 17 Suth W R 218 (214).
- ('72) 8 Beng L R 26 (28, 29). (Speculative reasons.)
- ('74) 22 Suth W R 402 (403). (Mere suspicion.)
- ('20) AIR 1920 Pat 264 (266).
- ('23) 5 Lab L Jour 106 (107).
- ('26) AIR 1926 Lab 659 (660) : 8 Lab 30.
- ('30) AIR 1930 Lab 150 (151).
- ('30) AIR 1930 Lab 238 (239).
- ('31) AIR 1931 Lab 213 (214).
- ('25) AIR 1925 Lab 572 (572).
- ('24) AIR 1924 Lab 465 (466).
- ('18) AIR 1918 Pat 632 (633). (Court proceeding on mere suspicion and drawing inferences from facts proved such as no reasonable man would draw.)
- ('85) 7 All 649 (654) (P B). (Conjecture.)
- ('18) AIR 1918 Lab 135 (136). (Conjectures and presumptions.)
- ('35) 39 C W N 1233 (1234).
- [See ('35) AIR 1935 Oudh 165 (169). (Court's decision should not rest on suspicion.)
- ('35) AIR 1935 Mad 190 (191).
- ('07) 34 Cal 456 (461). (When the finding is merely an expression of opinion and does not indicate on what grounds it is based.)]
3. ('13) 20 Ind Cas 810 (810) (Cal).
- ('12) 17 Ind Cas 358 (356, 359) : 36 Mad 168. (Personal knowledge of Judge of facts but not proved by evidence.)
- ('27) AIR 1927 Pat 209 (212) : 6 Pat 698 (P B). (Question of fact decided by Court holding itself bound by a previous decision of its High Court.)
4. ('86) 1886 Bom P J 284.
- ('33) AIR 1933 Nag 383 (383).
- ('32) 33 Pun L R 225 (227).
- ('14) AIR 1914 Cal 534 (535).
- ('21) 63 Ind Cas 811 (811) (All).
- ('22) AIR 1922 All 439 (440).
- ('23) AIR 1923 Lab 630 (631). (Inadmissible evidence cannot be made admissible by consent of parties.)
- (20) AIR 1920 Lab 322 (323). (Basing judgment on document not tendered and not on record.)
- ('68) 9 Suth W R 450 (450). (No legal evidence.)

SECOND APPEAL

(3) if it misreads the evidence, i.e., assumes certain
there is none⁵ or vice versa;⁶
(4) if it disregards or fails to consider material evidence or document in arriving at the conclusion.⁷

But the mere fact that it has not been accepted as a possession at the time made, it erred in law.)
 274 (274). (Documents impro-
 not accept a possession at the time made, it erred in law.)
 504 (505) (Cal). (Cal).
 699 (699) (Cal).

Such W R 219 (1993) (Where a judge admitted.)
8 Ind Cas 131 (132) (All). (Where a judge
further evidence which how-
kind expected by him and
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more with generalities than with the actual ev
(19) AIR 1919 Lah 386 (387). (Judge
(21) 62 Ind Cas 691 (692)
(22) 63 Ind Cas 691 (692)
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(17) AIR 1917 Lab 267 (26T). (Omission)
 (20) AIR 1920 Mad 688 (68C). (Omission)

(17) AIR 1971 (115). (Considered evidence ignored.)
 (15) AIR 1915 Lab 414 (415). (Considered evidence admitted in first appeal without reasons.)
 (16) AIR 1915 Lab 414 (415). (Wrong exclusion of material irregularity in procedure.)
 (18) N 1028 (1030). (Wrong exclusion of reasons.)

(07) 11 Cal V 2 (1977) of settlement proceedings.)
(08) 30 Cal 207 (210).
(09) 1890 Bom F J 77.
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(74) 22 South W N 380 (389).
deration of evidence.
11 Cal W N 380 (389).
All W N 6 (6).

and used in the part of the opinion that he could not be allowed to hold that he could not be allowed on a special appeal.)

[illegible]

(126) AIR 1928 Cal 515 (Cal).
 posed admission which was
 (127) 15 Ind Cas 515 (516) (Cal).
 AIR 1916 Cal 514 (514).
 B 278 (279).
 (128) AIR 1925 Oudh 381 (385), (Om)
 15 Ind Cas 30 (31, 32) (Cal).
 AIR 1925 Oudh 381 (385), (Om)
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(74) 20 South W R 474 (478, 479)
 (73) 20 South W R 474 (478, 479)
 (66) 20 South W R 474 (478, 479)

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(73) AIR 1956 (133) AIR 1956 (133)
[See also (73) AIR 1956 (133)]
the effect of a statement, the
537. (When the lower Court
can decide whether!

(91) AIR 1978 Cal 136 (1977). (Parties proceeding under effect of plaintiff's documents.)
 (92) 6 Cal 4th 1039 (1979).
 (93) 10 Penn 477 (1839).
 (94) 10 Cal 4th 1039 (1979).
 (95) AIR 1978 Cal 136 (1977). (Parties proceeding under effect of plaintiff's documents.)
 (96) AIR 1978 Cal 136 (1977). (Parties proceeding under effect of plaintiff's documents.)
 (97) AIR 1978 Cal 136 (1977). (Parties proceeding under effect of plaintiff's documents.)
 (98) AIR 1978 Cal 136 (1977). (Parties proceeding under effect of plaintiff's documents.)
 (99) AIR 1978 Cal 136 (1977). (Parties proceeding under effect of plaintiff's documents.)
 (100) AIR 1978 Cal 136 (1977). (Parties proceeding under effect of plaintiff's documents.)

(17) AIR 1977 Pat 562 (563). (Comm-Jones's re-
Mand and before the Comm-Jones's re-
Court regarding evidence before Comm-Jones's re-
in that Court.

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without jurisdiction is nevertheless a decree and is open to appeal. The fact that even a decree is appealable only "save as otherwise expressly provided" was not adverted to in those decisions. It is submitted that the decisions cannot be accepted as correct.

No second appeal will, in any case, lie against the decision of the lower Appellate Court without jurisdiction where such decision will not be appealable even if passed with jurisdiction. Thus, where the first Appellate Court entertains without jurisdiction an appeal against an order, no second appeal will lie because no such appeal will lie under Section 104 clause (2) even if the first Appellate Court had entertained the appeal with jurisdiction.⁹ But where the lower Appellate Court erroneously dismisses an appeal on the ground that no appeal lies to it, the dismissal is nevertheless a decree and is open to second appeal.¹⁰

16. Exercise of discretion by the lower Appellate Court. — Where a discretion to do or not to do a particular act is vested in the Court by the provisions of the Code, the Court is bound to exercise such discretion in one way or other. A refusal to exercise it or a non-exercise of it is an error or defect in procedure within the meaning of the Section.¹ Where a Court does exercise its discretion it must do so judicially,² i. e., on sound legal principles.³ An exercise of discretion in an arbitrary, unreasonable⁴ or non-judicial⁵ manner or which is based on wrong conclusions of fact⁶ is an error of law which will be a valid ground of second appeal. But where the Court has exercised its discretion in a judicial manner, there is no error either of law or of procedure and consequently, such exercise of discretion cannot be interfered with in second appeal.⁸ The Patna High Court has in the undermentioned

9. (21) AIR 1921 Lah 156 (157).
 10. (04) 8 Cal W N 64 (65). (Provided a second appeal is otherwise entertainable having regard to the nature of the original suit.)
 Note 16
 (10) 5 Ind Cas 158 (160) (Cal).
 1. (01) 28 All 121 (122).
 (25) AIR 1925 All 288 (289) : 47 All 412. (Addi-

tional evidence rejected not in exercise of a discretion but due to supposed insuperable difficulty — Second appeal lies.)

2. See Note 6 to the Preamble.
 (39) AIR 1939 Nag 110 (112) : 11 R (1939) Nag 452.
 3. See Note 6 to the Preamble and the cases cited in foot-notes (4) to (6) below.

4. (26) AIR 1926 Cal 677 (678).
 (33) AIR 1938 All 294 (295).
 (37) AIR 1937 Sind 263 (271).

(36) AIR 1936 Lah 742 (743). (Lower Court arbitrarily rejecting plea under S. 5, Lim. Act.)
 5. (14) AIR 1914 All 74 (75) : 36 All 510 (512).
 [See however (34) AIR 1934 Cal 5 (6, 7). (Where it was held that the question whether or not there had been a proper discretion in issuing

certificates is question of fact.)]
 6. (08) 12 Cal W N 312 (316). (Improper admission or rejection of documents.)
 (26) AIR 1926 Lah 445 (446).
 (28) AIR 1928 All 455 (456) : 45 All 432.

(36) AIR 1936 Lah 742 (743). (Plea under S. 5, Lim. Act—Discretion used non-judicially.)
 (37) AIR 1937 Sind 263 (267, 271).
 7. (19) AIR 1919 Pat 503 (505) : 4 Pat L J 381.

(28) AIR 1928 Pat 587 (588). (Improper exercise of discretion under O. 13 R. 1.)

- (12) 18 Ind Cas 120 (122) (Cal). (Erroneous reasons as to applicability of S. 90, Evidence Act.)
 (34) AIR 1934 All 469 (471). (Misapprehension of fact.)
 8. (12) 15 Ind Cas 429 (430) (Low Bur). (Even if the discretion is exercised wrongly.)
 (67) 7 Buth W R 208 (208). (On a question of costs alone.)
 (99) 23 Bom 513 (517, 518).
 (04) 26 All 327 (328).
 (87) 9 All 244 (246).
 (02) 25 All 71 (72).
 (72) 17 Buth W R 314 (314, 315).
 (12) 17 Ind Cas 315 (316) (Oudh).
 (20) AIR 1920 Cal 24 (25).
 (29) AIR 1929 Rang 221 (222) : 7 Rang 561.
 (Matter of discretion—Appellate Court is always reluctant to interfere.)
 (05) 28 Mad 508 (512) : 32 Ind App 261 (P.C.).
 (Amount of maintenance.)
 (22) AIR 1922 All 335 (335).
 (70) 13 Buth W R 22 (23). (Award of damages within legal limits.)
 (30) AIR 1930 Mad 707 (707). (Refusal to act under O. 41 R. 33 is not error of law.)
 (31) AIR 1931 Lah 370 (371). (Discretion in application of O. 41 R. 33 not properly exercised — Still no interference.)
 (84) 10 Cal 505 (506). (Dismissal of a suit under O. 11 R. 21.)
 (68) 10 Buth W R 174 (174). (Dismissing or decreeing a suit for non-attendance of a party when ordered by the Court to attend in person.)

case⁹ observed as follows: "In short, these exercises of discretion by lower Courts, whether the trial Court or the first Appellate Court, must be remedied, if at all, at once by the superior Court on the application of the party aggrieved and it is too late if that party allows the case to proceed and then seeks to interfere with the discretion in appeal." The above observations do not appear to be sound as the assumption on which they are based *viz.*, that the aggrieved party would, in every case, have a remedy even apart from an appeal from the ultimate decision of the case, is not correct. The question whether an appeal lies or not from any particular exercise of discretion is, however, largely an academic one, as it is necessary to examine in each case the facts of the case, before the question can be answered. If on such examination the exercise of the discretion is found to be vitiated by any of the above-mentioned circumstances, the second appeal will be upheld; if, on the other hand, it is found to have been exercised judicially, the appeal would fail.¹⁰ The following are all discretionary matters in which the High Court will not, in second appeal, interfere unless the discretion has not been exercised by the lower Appellate Court in a judicial manner and in accordance with legal principles —

Granting of adjournments, summoning and enforcing the attendance of witnesses. — Granting adjournments,¹¹ enforcing the attendance of a witness by any particular method of coercive process,¹² refusing to punish a recusant witness,¹³ refusing to summon witnesses on the ground of delay,¹⁴ refusing to summon plaintiff as a witness for the defendant,¹⁵ and refusing to allow the calling of more witnesses after the case is closed.¹⁶

Regarding omission to examine a witness tendered, see the undermentioned case.¹⁷

Admission or refusal to admit documents. — Refusal of an adjournment in order to send for documents,¹⁸ admitting or refusing to admit documents not produced at the first hearing.¹⁹

Admission or rejection of secondary evidence. — Admission or rejection of secondary evidence,²⁰ disallowing presumptive evidence,²¹ and drawing a presumption under Section 90 of the Indian Evidence Act for or against the genuineness of documents.²²

Directions for local investigation or inquiry. — Directing local investigation or local enquiry,²³ or refusal to issue a commission,²⁴ or refusal to remand the case for

- (01) 23 All 121 (122). (Refusal in the exercise of discretion to admit additional evidence is not an error or defect.)
(86) AIR 1936 Lah 708 (709).
(35) AIR 1935 Pat 256 (260).
(36) AIR 1936 Lah 200 (201).
(38) AIR 1938 Sind 206 (209): 31 Sind L R 167.
(35) AIR 1935 All 174 (178).
9. (37) AIR 1937 Pat 550 (552): 16 Pat 600 (SB).
10. (28) AIR 1928 Oudh 224 (225).
11. (14) AIR 1914 All 230 (232).
(37) AIR 1937 All 284 (285). (Lower Appellate Court dismissing application for adjournment of appeal in exercise of its discretion — No ground for second appeal.)
12. (27) AIR 1927 Lah 424 (424).
13. (67) 7 South W R 460 (461).
14. (76) 25 South W R 71 (71).
(03) 30 Cal 947 (949). (Refusal of process to witnesses.)
15. (68) 10 South W R 134 (134).

16. (69) 12 South W R 455 (456).
17. (93) 20 Cal 740 (744).
18. (81) 7 Cal 560 (565).
19. (11) 11 Ind Cas 289 (290) (Oudh).
(33) AIR 1933 Lah 892 (893).
(26) AIR 1926 Cal 106 (106).
[See also (35) AIR 1935 Pat 470 (471).]
20. (24) AIR 1924 Lah 303 (304).
(30) AIR 1930 All 550 (551).
(35) AIR 1935 Rang 502 (503, 504).
21. (23) AIR 1923 Cal 285 (286).
22. (26) AIR 1926 Oudh 362 (363).
(37) AIR 1937 Lah 17 (18). (Discretion properly exercised in not drawing presumption — High Court will not interfere.)
23. (1864) 1 South W R 141 (142).
(1864) 1 South W R 195 (196).
(1864) 1 South W R 249 (250).
(66) 5 South W R 248 (248).
(08) 12 South W R 76 (76).
24. (33) AIR 1933 Pat 542 (543).

further enquiry when the Court is not satisfied with the local inquiry made.²⁵ But where a previous commission to examine a witness had returned unexecuted, a refusal to examine the witness on commission on the ground that his evidence was not important, was held to be a ground of second appeal.²⁶

Amendment of plaint and addition of parties. — Refusal of application to amend the plaint²⁷ and refusal to add parties.²⁸

Declaration and injunctions. — Granting declaratory decrees though not asked for,²⁹ granting injunctions³⁰ and refusing a specific performance of a contract on the ground of delay.³¹

*Award or refusal of costs.*³² — Where however the lower Appellate Court interferes with the discretion properly exercised by the trial Court in the matter of award of costs, a second appeal will lie on the ground that the action of the lower Appellate Court is contrary to law.³³

Award or refusal to award damages. — Refusal to award damages in a suit for defamation,³⁴ and award of damages under Section 10 of Act X of 1859 which though excessive is within legal limits.³⁵

*Award of future interest.*³⁶

Payment of decrees by instalments. — Directing payment of decree amount in instalments is a matter of discretion in which the High Court will not examine whether

- (25. (19) AIR 1919 Cal 672 (673).
- (26. (175) 23 Suth W R 457 (457).
- (27. (68) 10 Suth W R 87 (88).
- (38) AIR 1938 Nag 388 (389); I L R (1939) Nag 194. (Judge allowing an amendment on a wrong view of law—High Court can interfere.)
28. (1864) 1 Suth W R 228 (228).
- (1865) 2 Suth W R 158 (158).
- (68) 10 Suth W R 108 (110).
- (35) AIR 1935 Rang 23 (24). (Addition of defendants—Trial Court exercising discretion properly by adding them—Appellate Court setting aside order—Order of Appellate Court set aside in second appeal.)
- [See (37) AIR 1937 Mad 520 (522). (Lower Court wrongly refusing equitable relief under O. I R. 9—High Court can interfere in second appeal.)]
29. (177) 1877 Pun Re No. 55, p. 139.
- (30) AIR 1930 All 620 (621). (Discretion in granting declaration as a fit relief—No interference.)
30. (05) 27 All 688 (691).
- (26) AIR 1926 Cal 536 (537).
31. (84) 10 Cal 1061 (1068, 1069).
32. (26) AIR 1926 All 419 (420).
- (34) AIR 1934 Lab 739 (739).
- (33) AIR 1933 Nag 49 (50); 29 Nag L R 8.
- (33) AIR 1933 Oudh 455 (457).
- (76) 1 Cal 385 (388).
- (28) AIR 1928 Oudh 224 (225). (Interference of lower Appellate Court with a non-appellable order of awarding costs—Second appeal lies.)
- (29) AIR 1929 Oudh 406 (412).
- (30) AIR 1930 Mad 707 (708). (Costs refused to party trying to profit by his fraud—Discretion is not improperly exercised.)
- (12) 15 Ind Cas 429 (429, 430) (Low Bur).
- (86) 12 Cal 179 (181). (But when matter of principle is involved second appeal lies.)
- (21) AIR 1921 Cal 604 (605). (Do.)
- (19) AIR 1919 Pat 257 (258). (When matter of principle is involved second appeal lies.)
- (21) AIR 1921 Upp Bur 8 (11); 4 Upp Bur Rul 83. (Do.)
- (1864) 1 Suth W R 97 (98).
- (05) 8 Oudh Cas 251 (252, 253).
- (66) 3 Mad H C R 113 (114). (Ordering defendant to pay plaintiff's costs, while plaintiff's suit is dismissed for want of cause of action is a ground of second appeal.)
- (86) 12 Cal 271 (272). (Do.)
- (03) 7 Cal W N 647 (648, 649). (Do.)
- (03) 6 Oudh Cas 52 (57). (Do.)
- (66) 4 Bom H C R A C 41 (42). (Awarding costs to losing party can be questioned in second appeal.)
- (30) AIR 1930 Lab 229 (230). (Successful party deprived of costs illegally—Second appeal allowed.)
- (74) 6 N W P H C R 222 (224) (PB). (Arbitrarily order.)
- (98) 15 All 338 (338, 334). (Do.)
- (23) AIR 1923 Lab 513 (514). (Do.)
- (26) 27 Pun L R 391 (393). (Do.)
- [But see (66) 1 Agra 270 (271). (Costs disallowed by the lower Court for no reason—In appeal costs were awarded.)
- (19) AIR 1919 Lab 418 (418). (The High Court in this case interfered with the order of costs passed by the lower Court.)
33. (34) AIR 1934 Oudh 259 (260).
- (20) 2 Lab L Jour 310 (311, 312).
- (21) 64 Ind Cas 962 (963) (All).
- (28) AIR 1928 Oudh 224 (225).
34. (76) 25 Suth W R 22 (22).
35. (70) 13 Suth W R 391 (392).
36. (23) AIR 1923 Lab 513 (514).

the discretion has been properly exercised or not, where, at the time of second appeal the decree-holder has already recovered a substantial sum and there is no hardship.³⁷ But a decree for payment in instalments without any provision for interest is arbitrary and is liable to be set aside in second appeal.³⁸

Direction as to mode of execution. — Order for execution of a decree by arrest of the judgment-debtor instead of by sale and attachment of his property³⁹ and direction as to the manner of execution of a joint decree.⁴⁰

*Excusing delay under Section 5 of the Limitation Act.*⁴¹

*Refusal to allow a guardian to go on with an appeal after the minor on whose behalf the appeal was filed had attained majority.*⁴²

*Refusal by the lower Appellate Court to allow a point not mentioned in the memorandum of appeal.*⁴³ — But allowing a point to be raised when the finding on it has not been appealed from will be a ground of second appeal.⁴⁴

*Admission of additional evidence in appeal.*⁴⁵ — In a case, however, where the lower Appellate Court had not exercised its discretion judicially but had refused to admit additional evidence on the ground that there would be no end to litigation, it was held broadly by a majority of the Full Bench of the High Court of Madras⁴⁶ that a refusal to admit additional evidence is, in no case, a ground of second appeal. Sadastiva Aiyar, J., dissented from this view and held that the question whether the discretion was exercised properly was a question of law and could be interfered with in second appeal. The view of the majority of the Full Bench is based on no other reason than that it has been the practice of the Courts not to entertain second appeals on that point and that whether the lower Appellate Court "requires" any additional evidence is for that Court alone to say, and it is not for a superior Court to control its discretion. It is respectfully submitted that the view of the Full Bench is not correct.

37. (11) 11 Ind Cas 736 (737) (Cal).
[See also (98) AIR 1938 All 52 (53).]

38. (66) 1 Agra 116 (117).
 39. (67) 8 South W R 318 (320).
 40. (75) 24 South W R 286 (287).
 41. (68) 10 South W R 178 (178).
 - (93) AIR 1938 All 294 (295).
 - (02) 25 Mad 166 (181).
 - (04) 26 All 329 (331).
 - (08) 25 All 71 (72).
 - (12) 14 Ind Cas 59 (60) (All).
 - (14) AIR 1914 Bom 111 (111) : 38 Bom 618.
 - (82) 8 Cal 261 (252, 253). (Exercise of discretion in appeal—Second appeal lies.)
 - (98) 6 Bom 304 (307). (Reverse exercise—Second appeal lies.)
 - (12) 18 Ind Cas 943 (943) (All). (Misapprehension of facts—Second appeal lies.)
 - (37) AIR 1937 Lah 767 (769).
 - (36) AIR 1936 Lah 200 (201).
 - (38) AIR 1938 Pat 418 (421). (Discretion exercised in improper manner—High Court can interfere.)
 - (36) AIR 1936 Lah 742 (743). (Discretion not judicially exercised—High Court will interfere.)
 - (35) AIR 1935 Oudh 30 (33) : 10 Luck 250.
 42. (69) 3 Beng L R App 115 (116).
 43. (28) AIR 1928 Lah 536 (537).
 44. (82) 9 Cal 635 (636, 637).
45. (11) 9 Ind Cas 265 (266) : 33 All 379.
- (93) AIR 1933 Lah 1014 (1014).
- (1900) 1900 All W N 195 (195, 196).
- (85) 11 Cal 139 (142, 143). (Here failure to record reasons for taking additional evidence is no ground of second appeal.)
- (86) 12 Cal 37 (38). (Do.)
- (92) AIR 1932 Lah 98 (94). (Order 41 Rule 27—Refusal to admit material document—Matter of discretion—No interference.)
- (31) AIR 1931 Lah 506 (506). (Refusal to admit additional evidence — No ground for second appeal.)
- (37) AIR 1937 Lah 115 (116). (Appellate Court examining witnesses on its own motion for good reasons—High Court cannot interfere in second appeal.)
- [See (98) AIR 1938 Rang 170 (172). (Refusal by lower Appellate Court to admit new evidence is not substantial error or defect in procedure — But in peculiar circumstances of case, the documents in question were held to be not new evidence, that the trial Court committed a substantial error in procedure in refusing to admit these documents and that the lower Appellate Court perpetuated this error by refusing to admit these documents.)]
46. (19) AIR 1919 Mad 1166 (1171) : 42 Mad 737 (737). (Followed in AIR 1927 Mad 1099.)

17. *Withdrawal of appeal.*—Refusal to allow an appeal to be withdrawn⁴⁷ and refusal to restore an appeal withdrawn.⁴⁸
Discretion under Order 41 Rule 4.⁴⁹

17. Omission to consider facts, evidence and proof. — See Note 13 above.
18. Findings on no evidence, or on surmises or on irrelevant and inadmissible evidence. — See Note 13 above.

19. Misappreciation of evidence. — See Note 13 above.

20. Disbelieving witnesses on grounds opposed to law. — It is the function of the Court to come to a conclusion after weighing the evidence let in on both sides. Its decisions as to the *credibility* of the witnesses is neither an error of law nor of procedure and will not be interfered with in second appeal¹ unless the witnesses are disbelieved on grounds which are opposed to law.² Thus, where a witness is disbelieved on vague or general grounds,³ e. g., that he belongs to a particular class and witnesses of that class are not credible,⁴ the Court commits an error of law which can be attacked in second appeal.

21. Contrary to usage having the force of law. — The expression "usage having the force of law" means a local or family usage as distinguished from the general law.¹ A usage is a rule obtaining in a particular family or in a particular local area in derogation of the ordinary law.² A decision on the question whether parties in a particular case belong to one system of law and not to another is not a decision on any usage.³
In order that a usage may have the force of law it is essential that it should be ancient, invariable, certain and reasonable.⁴ Questions as to existence of a custom or usage having the force of law are generally questions of mixed law and fact,⁵ the

47. ('66) 6 South W R Act X 24 (24).
48. ('70) 13 South W R 167 (168).
49. ('14) AIR 1914 All 74 (75) : 36 All 510.
(Refusal in the proper exercise of discretion —
No second appeal.)
(85) 8 Mad 192 (193).
Note 20
1. ('14) AIR 1914 Mad 106 (106).
(76) 25 South W R 166 (168).
(75) 24 South W R 13 (14).
(14) AIR 1914 Oudh 128 (124) : 20 Ind Cas 894
(895) : 17 Oudh Cas 1.
(75) 24 South W R 61 (61). (Inference from fact against credibility—No second appeal.)
(70) 2 N W P H C R 207 (208).
(66) 6 South W R 292 (292). (Disbelieving a witness as being interested—No error of law.)
(25) AIR 1925 Oudh 537 (537). (Trial Court disbelieving witnesses with reference to certain statements—Appellate Court believing them as to other statements—No second appeal lies.)
(17) AIR 1917 All 35 (38, 39) : 39 All 426. (Summary of evidence for finding is not open to second appeal.)
(35) AIR 1935 All 293 (294).
(35) AIR 1935 Bom 371 (376).
2 May 421.
2. ('76) 25 South W R 167 (168).
Witness on the has signed a :

- Note 21
(11) 12 Ind Cas 751 (764) (Mad).
4. ('72) 17 South W R 161 (161, 162). (Because they are wearers or cultivators.)
3. ('15) 29 Ind Cas 673 (673). (U P B R.)
(73) 20 South W R 474 (475, 476).
(75) 24 South W R 251 (252).
(74) 21 South W R 436 (438).
(73) 19 South W R 299 (300). (Assumption that witness being tenant of a large landholder must have given false evidence.)
4. ('72) 17 South W R 161 (161, 162). (Because they are wearers or cultivators.)
(11) 12 Ind Cas 751 (764) (Mad).
Note 21
1. ('93) 20 Cal 98 (99) : 19 Ind App 228 (P C).
(Overruling 7 All 649.)
(18) AIR 1918 Mad 1166 (1167) : 40 Mad 1108.
(The decision does not refer to the Privy Council decision in 20 Cal 93, but approves of the decision in 7 All 649 which was overruled by the Privy Council decision. It cannot therefore be accepted as correct.)
2. ('75) 3 Ind App 259 (285) (P C).
(17) AIR 1917 Mad 255 (256).
3. ('15) AIR 1915 Mad 711 (716) : 38 Mad 1052.
(17) AIR 1917 Mad 255 (256).
(16) AIR 1916 Lah 97 (98).
4. ('75) 3 Ind App 259 (285) (P C).
(72) 14 Moo Ind App 570 (585, 586) (P C).
(36) 160 Ind Cas 990 (992) (Nag).
5. ('17) AIR 1917 P C 33 (39) : 40 Mad 709 : 44 Ind App 147 (P C).
(33) AIR 1933 Mad-390 (391).

- (18). (Disbelieving
Main Patwari,
Ind App 147 (P C).
(33) AIR 1933 Mad-390 (391).
5. ('17) AIR 1917 P C 33 (39) : 40 Mad 709 : 44 Ind App 147 (P C).
(36) 160 Ind Cas 990 (992) (Nag).
(72) 14 Moo Ind App 570 (585, 586) (P C).
4. ('75) 3 Ind App 259 (285) (P C).
(16) AIR 1916 Lah 97 (98).
(17) AIR 1917 Mad 255 (256).
3. ('15) AIR 1915 Mad 711 (716) : 38 Mad 1052.
(17) AIR 1917 Mad 255 (256).
2. ('75) 3 Ind App 259 (285) (P C).
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sion in 7 All 649 which was overruled by the
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(18) AIR 1918 Mad 1166 (1167) : 40 Mad 1108.
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(73) 20 South W R 474 (475, 476).
(75) 24 South W R 251 (252).
(74) 21 South W R 436 (438).
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(16) AIR 1916 Lah 97 (98).
4. ('75) 3 Ind App 259 (285) (P C).
(72) 14 Moo Ind App 570 (585, 586) (P C).
(36) 160 Ind Cas 990 (992) (Nag).
5. ('17) AIR 1917 P C 33 (39) : 40 Mad 709 : 44 Ind App 147 (P C).
(33) AIR 1933 Mad-390 (391).

Judge first finding what were the *things actually done* in the alleged pursuance of custom and then determining whether these facts so found satisfy the requirements of law. The former is a question of fact and the latter one of law. Where, therefore, a question relating to usage having the force of law is raised in second appeal, the High Court cannot interfere with the findings on all facts from which the custom or usage having the force of law was inferred, or with the *credibility* or sufficiency of the evidence in support of those facts. Thus, the High Court cannot interfere with the findings as to the instances adduced for or against the custom, or as to the prevalence

- (10) 32 All 368 (373) : 37 Ind App 191 (P C). (Question involved one of fact.)
- (72) AIR 1922 All 88 (89).
- (31) AIR 1931 Bom 167 (168).
- (31) AIR 1931 All 499 (502) : 51 All 6 (S D).
- (32) AIR 1922 Mad 290 (293).
- (26) AIR 1926 Lah 251 (252).
- (26) AIR 1926 All 215 (216).
- (25) AIR 1925 Oudh 239 (240).
- (24) AIR 1924 Oudh 167 (168) : 26 Oudh Cas 356.
- (38) AIR 1935 Bom 492 (494).
- (39) AIR 1935 All 500 (501) : 1935 R D 231 (234).
- (39) AIR 1939 Oudh 210 (213) : 181 Ind Cas 70 (73).
- (29) AIR 1929 Lah 426 (427) : 10 Lah 568.
- (Question to be decided on authorities — question involved one of law.)
- (35) AIR 1935 Oudh 203 (208). (Finding that custom has been introduced is one of fact.)
- (35) AIR 1935 All 754 (755). (Whether a right of privacy exists by custom and the nature and limits of such a custom, if it does exist, are questions of fact and the findings of the lower Appellate Court if based on admissible and relevant evidence are conclusive.)
- (35) AIR 1935 P C 71 (72) (P C). (The question whether by custom women are excluded from inheritance is one of fact.)
- [See also (39) AIR 1938 All 141 (145).
- (35) AIR 1935 Bom 371 (375). (Question as to existence of custom — Lower Court applying law as to requirements of valid custom correctly — Its conclusion is one of fact and binding in second appeal.)
- (35) AIR 1935 All 720 (722).
- (35) AIR 1935 All 501 (501). (Finding on question of custom is finding of fact in so far as it records what happened and in so far as it gives weight to the opinion evidence.)
- (35) AIR 1935 All 754 (755). (Whether custom exists and its nature are questions of fact.)
6. (17) AIR 1917 P C 33 (39) : 40 Mad 709 : 41 Ind App 147 (P C).
- (37) AIR 1937 Cal 245 (250) : 1 L R (1937) 2 Cal 86. (Question as to reasonableness of custom is one of law.)
- (39) AIR 1939 Oudh 210 (213) : 181 Ind Cas 70 (73).
- (34) AIR 1934 All 890 (891).
7. (30) AIR 1930 P C 234 (235) : 53 Mad 597 : 57 Ind App 264 (P C). (Finding as to existence of custom is a question of fact — Their Lordships' observations must be taken to mean that the finding of fact from which the existence of custom is inferred must be accepted as binding.)
- no error of law exists.)
- High Court is bound by lower Court's finding if instances showing practice approved as facts — Actual
- (36) AIR 1936 All 119 (120). (Custom — Actual
- (37) AIR 1937 All 290 (291).
- (18) AIR 1918 Cal 979 (981, 982) : 45 Cal 285.
- (34) AIR 1934 All 690 (690).
- (18) AIR 1918 Mad 1 (14, 15) : 41 Mad 374 (375).
10. (36) AIR 1936 All 443 (449) : 58 All 869 (J See (36) AIR 1936 Oudh 459 (460) : 11 Luck 397.
- (35) AIR 1935 Oudh 330 (332).
- (30) AIR 1930 Oudh 143 (143).
- (26) AIR 1926 Oudh 460 (460, 461).
- (26) AIR 1926 Oudh 460 (460, 461).
- (To govern a case can be reopened.)
- as to which of two rival claims should be held
- (26) AIR 1926 All 153 (155). (But the question
- (21) AIR 1921 Oudh 116 (117).
- (13) 20 Ind Cas 810 (810) (Cal).
- (11) 9 Ind Cas 839 (839) (Cal).
- not been rebutted.)
- waib-hat — Question whether it has or has
- custom of prescription arising from entry in
- (21) AIR 1921 All 146 (147). (Presumption as to
- (18) AIR 1918 Mad 1166 (1167) : 40 Mad 1108.
- to an adequate proof of custom.)
- led to consider whether that evidence amounts
9. (14) AIR 1914 Oudh 336 (337). (But is entirely evidence — High Court will accept finding
- as one of fact.)
- Madame Justice after considering oral and documentary evidence
- Court coming to a finding that parties who are
- (36) AIR 1936 All 419 (445) : 58 All 859. (Lower
- (39) AIR 1939 All 600 (601).
- (35) AIR 1935 Bom 371 (375).
- (E B). (Overruling 29 Mad 21.)
- (15) AIR 1918 Mad 1 (11, 12, 16) : 41 Mad 371
8. (26) AIR 1926 All 43 (49) : 43 All 77.
- (10) 32 All 363 (373) : 37 Ind App 191 (P C).
- place is a question of fact.)
- particular combination of facts in a particular
- (91) is Cal 418 (427) : 18 Ind App 59 (P C). (The
- custom is one of fact.)
- evidence offered did not show the existence of the
- (Finding arrived on the ground that the evidence
- (31) AIR 1931 All 557 (570) : 36 Ind App 210 (P C).
- ence of commercial usage is a question of fact.)
- (32) AIR 1932 Rang 6 (8) : 9 Rang 585. (Facts
- (31) 131 Ind Cas 475 (476) (Oudh).
- (30) AIR 1930 Pat 562 (563). (Do).
- (70) 13 Suth W R 420 (192). (Do).
- (68) 10 Suth W R 133 (153). (Do).
- custom is a question of fact.)
- (28) AIR 1928 Oudh 121 (121). (Existence of

of a certain practice.¹¹ But the question whether the facts found establish the essential legal elements of custom can be gone into in second appeal.¹² Thus, the High Court can see whether the number of instances adduced show *invariability* and *ancient origin* of the practice and whether they are *reasonable* and *certain*.¹³

As will be seen in Note 52 *infra*, even the findings of fact of the lower Appellate Court can be attacked in second appeal where they are based on no evidence,¹⁴ irrelevant¹⁵ or illegal evidence¹⁶ or on the misinterpretation of a document,¹⁷ or on a misconception of well-established principles of law,¹⁸ or where the evidence does not warrant the finding arrived at.¹⁹

Where the lower Court has held that no question of custom is involved in the

11. ('33) AIR 1933 All 306 (307).
(36) AIR 1936 Nag 95 (97); I.L.R. (1936) Nag 13.
(Although legal inferences which flow from them may be questions of law.)
12. ('97) 21 Bom 110 (115, 116).
(38) AIR 1933 All 306 (307).
(18) AIR 1918 Mad 1 (16) : 41 Mad 374 (FB).
(84) 7 Mad 8 (10, 16) (FB).
(08) 12 Cal W N 539 (542).
(18) AIR 1918 Cal 979 (982); 45 Cal 285.
- (17) AIR 1917 Nag 147 (148).
(20) AIR 1920 Mad 277 (282).
(23) AIR 1923 Oudh 102 (108).
(85) 8 Mad 464 (465). (So assumed.)
(27) AIR 1927 All 201 (201, 202).
(31) AIR 1931 All 499 (508); 54 All 6 (SB).
(25) AIR 1925 Bom 380 (382).
(25) AIR 1925 Nag 179 (179).
(21) AIR 1921 Mad 694 (696).
(84) 10 Cal 138 (139).
(22) AIR 1922 Nag 52 (55); 18 Nag L.R. 163.
(23) AIR 1923 All 341 (341).
(26) AIR 1926 Bom 153 (154); 50 Bom 133.
(35) AIR 1935 Oudh 459 (460) : 11 Luck 397.
(Whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law.)
(36) 160 Ind Cas 990 (992) (Nag). (Question whether a customary right can be inferred from the evidence is one of law.)
(37) AIR 1937 Pat 458 (460).
(37) AIR 1937 All 290 (291).
(36) AIR 1936 All 119 (120). (Whether instances amount to custom is a question of law.)
(37) AIR 1937 Cal 245 (250) : I.L.R. (1937) 2 Cal 86. (Reasonableness of custom is a question of law and can be gone into in second appeal.)
(See '32) AIR 1932 Lab 274 (275) : 18 Lab 31 (34, 35). (Finding on remanded issue as to prevailing or mercantile usage open to attack in second appeal.)
(16) AIR 1916 Cal 67 (68).
(06) 29 Mad 24 (28).
(34) AIR 1934 All 890 (891).
(32) AIR 1932 Lab 61 (62).
15. ('18) AIR 1918 Mad 1 (16) : 41 Mad 374 (FB).
(13) 20 Ind Cas 810 (810) (Cal). (Inadmissible evidence.)
(18) AIR 1918 Cal 979 (981, 982); 45 Cal 285.
- [But see ('33) AIR 1933 All 603 (606).]]
[See ('36) AIR 1936 All 443 (449) : 58 All 889.]
derable evidence for existence of custom.)
(Finding that custom is not proved—High Court can interfere on the ground that there is consistent—Finding may be upset.)
(39) AIR 1939 All 500 (501) : 1939 R.D. 234 (234).
(Usage not pleaded—Evidence vague and inconsistent with precision—Evidence may be upset.)
(31) AIR 1931 All 583 (584). (Usage not pleaded—Evidence vague and inconsistent with precision—Evidence may be upset.)
(11) 9 Ind Cas 839 (839) (Cal).
(07) 11 Cal W N 83 (84).
(08) 30 All 311 (313) (FB).
(26) AIR 1926 All 215 (215).
(27) AIR 1927 All 471 (471).
(27) AIR 1927 All 471 (471).
(26) AIR 1926 All 215 (215).
(08) 30 All 311 (313) (FB).
(07) 11 Cal W N 83 (84).
(11) 9 Ind Cas 839 (839) (Cal).
(31) AIR 1931 All 583 (584). (Usage not pleaded—Evidence vague and inconsistent with precision—Evidence may be upset.)
(39) AIR 1939 All 500 (501) : 1939 R.D. 234 (234).
(Finding that custom is not proved—High Court can interfere on the ground that there is consistent—Finding may be upset.)
(36) AIR 1936 All 443 (449) : 58 All 889.]
[But see ('33) AIR 1933 All 603 (606).]]

case, it was held that the High Court can see whether such a question was involved or not.²⁰

In the Punjab, a question of custom cannot be taken up in second appeal without a certificate under Section 41 clause (3) of the Punjab Courts Act, 1918. See also the undermentioned cases.²¹

22. Failure to determine any issue of law or usage having the force of law.— Failure to determine an issue of law or usage having the force of law is a ground of second appeal.²²

23. Errors or defects in procedure—General—Clause (c).—Section 99 ante, which applies to appeals from original decrees, provides that no decree shall be reversed or varied on account of any error, defect or irregularity not affecting the merits of the case. In other words, where an error or defect could not or does not affect the merits of the case, the Appellate Court cannot upset the decision of the original Court. Section 100 clause (c) provides that an error or defect in procedure which is substantial enough to have possibly produced an error or defect in the decision of the case on the merits is a ground of second appeal.²³ The reason for the difference between the two Sections lies in the fact that a Court of second appeal cannot go into a question of fact as the first Appellate Court can, and that without doing so, it would not be possible to say in any given case whether the error or defect does or does not, in fact, affect the decision of the case on the merits.

The word 'procedure' as used in this clause must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code or any other law regulating the investigation of cases by the Civil Courts.²⁴ An erroneous finding of fact is a different thing from an error or defect in procedure, and the fact that the lower Appellate Court believed witnesses on the one side in preference to those on the other is not an error of procedure even if the reasons therefor are bad.²⁵ The following are examples of errors in procedure—

(1) Basing the decision against the admission of parties²⁶ or on a point not

20. (25) AIR 1925 Lab 82 (52).

21. (14) AIR 1914 Lab 422 (423). (A question

of custom cannot be taken up in second appeal

without the required certificate.)

(88) AIR 1938 Lab 115 (116).

(28) AIR 1923 Lab 63 (64). (Gift — Power of —

By custom—Certificate necessary.)

(22) AIR 1922 Lab 426 (427) : 3 Lab 314. (In

second appeal the question of custom must be

confined to that set out in the certificate granted

by the lower Appellate Court.)

(15) AIR 1916 Lab 351 (351) : 1915 Pun Ro No.

110. (The question of valid necessity may be one

of law or of customary law or one of fact accord-

ing to the peculiar circumstances of each case.)

(16) AIR 1915 Lab 408 (404) : 1916 Pun Ro No.

34. (Where the question raised is whether the

validity or existence of a custom was a question

properly before the lower Appellate Court—Cer-

tificate not necessary.)

(25) AIR 1925 Lab 82 (82). (When the lower

Appellate Court holds that no question of cus-

tom is involved in a case and rejects an applica-

tion for a certificate to enable the appellant to

file a second appeal, it is open to the second

Appellate Court to hold that a question of cus-

tom is involved and to remand the case to lower

No. 106.

7. (17) AIR 1917 Lab 297 (300) : 1917 Pun Ro

6. (72) 18 Suth W R 110 (110, 111).

5. (24) AIR 1924 Oudh 265 (266).

(91) 18 Cal 23 (30) : 17 Ind App 122 (PC).

25 Nag L R 121 (PC).

4. (29) AIR 1929 P C 190 (193) : 56 Ind App 280:

3. (85) 7 All 619 (657). (Per Mahmood, J.)

(17) AIR 1917 Cal 573 (573).

(02) 6 Cal W N 185 (188).

2. (85) 7 All 619 (659) (FIR). (Per Mahmood, J.)

1. See Section 99 and Notes thereto.

Note 23

(25) AIR 1925 Oudh 381 (385).

1. (68) 5 Bom II C R A C 57 (59).

Note 22

(38) AIR 1938 Lab 191 (192, 193).

(21) AIR 1921 Lab 77 (78) : 2 Lab 318.

(24) AIR 1921 Lab 263 (263).

(21) AIR 1924 Lab 455 (455, 456) : 5 Lab 268.

a certificate is necessary.)

a particular custom does or does not exist that

tion is that the custom alleged is invalid or that

19. (It is only in these cases where the conten-

(14) AIR 1914 Lab 217 (218) : 1915 Pun Ro No.

granted.)

Court to consider whether the certificate can be

(vi) Refusing to allow local investigation when both parties have gone into evidence.²⁰

(viii) Omission to employ a regular officer of Court for making local enquiry.²¹ Where the appointment of an *amin* as commissioner to effect partition was acquiesced in, in the first Court, no objection to such appointment should be allowed to be taken in appeal. The allowing of such an objection in first appeal was held to be a ground of second appeal.²²

(ix) Hearing an appeal before the date fixed in the presence of the pleaders of the parties.²³

(x) Committing an error as to valuation not affecting the jurisdiction.²⁴ The following have been held to be *no errors or defects* in procedure, much less substantial errors or defects —

- (i) Omission to make specific mention of a document in the judgment.²⁵
- (ii) Refusal by the lower Appellate Court to take notice of a question not raised in the memorandum of appeal.²⁶ On the other hand, if the lower Appellate Court takes up any such question, it will be a ground of second appeal.²⁷
- (iii) Dismissing a suit for misjoinder of parties.²⁸
- (iv) Making a mistake in the matter of accounts²⁹ or making a mistake in the calculation of the claim decreed.³⁰

25. Omission to frame or try issues of facts properly.—An omission to frame proper issues is an error or defect in procedure, and if it would have possibly affected the decision on the merits, it would be a ground of second appeal.¹ Where, however, the lower Court framed wrong issues but the findings were what they would have been if the correct issues had been framed, the High Court will not interfere inasmuch as the decision of the case on the merits has not been affected.²

Similarly, an objection that a matter was not raised in the pleadings and did not properly form the subject of an issue, will not be allowed to be taken in second appeal when the parties had let in evidence on the point and the matter had been argued in the lower Courts and no prejudice was established.³

The failure to try, determine and decide a *material issue* is a good ground of second appeal.⁴

20. ('08) 30 Cal 536 (537).
 21. ('67) 8 Suth W R 6 (7).
 22. ('81) 7 Cal 318 (321).
 23. (1864) 1 Suth W R 246 (246).
 24. ('68) 10 Suth W R 32 (33).
 25. ('01) 24 Mad 43 (45).
 26. ('12) 13 Ind Cas 495 (495) : 2 Rang 462.
 27. ('19) AIR 1919 Mad 130 (132).
 28. ('21) AIR 1921 Lah 228 (229).
 29. ('73) 20 Suth W R 147 (148).
 30. ('74) 22 Suth W R 310 (310, 311).
 31. ('76) 25 Suth W R 63 (64).
- Note 25
1. ('32) AIR 1932 P C 28 (30) : 59 Ind App 29 (P C). (A finding of fact based on failure to discharge onus by party on whom onus was wrongly cast is not a finding on positive evidence and is not binding in second appeal.)

2. ('97) 21 Bom 325 (327).
 3. ('26) AIR 1926 Mad 156 (156).
 4. ('67) 8 Suth W R 333 (333). (Question of possession.)
 5. ('67) 8 Suth W R 477 (478).
2. ('97) 21 Bom 325 (327).
- [See also ('71) 15 Suth W R 15 (16) : 13 Moo Ind App 573 (P C). (Omission to settle the issue—But no consequent failure of justice.)]
3. ('26) AIR 1926 Mad 156 (156).
4. ('67) 8 Suth W R 333 (333). (Question of possession.)
5. ('67) 8 Suth W R 477 (478).

26. Defective judgment. — Parties to a suit are entitled to the benefit of a proper discussion of the materials on record based upon a correct view of the law applicable to them.¹ In this view the Code has in O. 41 R. 31 prescribed that the judgment of the Appellate Court shall be in writing and shall state —

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is varied or reversed, the relief to which the appellant is entitled.

A judgment of the first Appellate Court which does not contain the said particulars is no judgment at all and will be set aside in second appeal.² Thus, where a suit was dismissed arbitrarily on the ground that the subject-matter involved was very small, the dismissal was set aside in second appeal.³ Similarly, where the lower Appellate Court reversed the decision of the first Court merely saying that the evidence was meagre, a second appeal was held to lie.⁴ But the mere fact that the judgment does not deal with *all* the evidence⁵ or *all* the circumstances⁶ relied upon by the first Court, or the fact that the discussion of the evidence is unsatisfactory,⁷ or that the judgment contains certain mis-statements,⁸ or that the judgment is written in a few lines,⁹ is not a

Court of first instance.)
(28) AIR 1928 Pat 275 (276).
(75) 23 Suth W R 266 (268). (Pronouncing first Court's reasons to be good without going into the merits of the case and recording its view of evidence.)
(07) 11 Cal W N 112 (116). (Judgment without reasons.)
(16) AIR 1916 Upp Bur 9 (11) : 2 Upp Bur Rul 92. (Judgment involving decisions of facts — Reasons have to be given.)
(38) AIR 1938 Pat 880 (882). (Appellate Courts judgment not dealing with merits of case in accordance with law — Judgment can be set aside in second appeal.)
(38) AIR 1938 Pat 609 (610). (Lower Appellate Court dismissing appeal, simply reiterating findings of trial Court without any discussion of evidence — Judgment is not proper.)
(37) AIR 1937 All 284 (285). (Application for adjournment by appellant's pleader — Court dismissing application and also appeal without pronouncing judgment on merits — Judgment is vitiated — Appeal cannot be dismissed for want of prosecution merely because appellant or his pleader is unable to argue the appeal.)
(97) AIR 1937 Mad 282 (283) : 1 L.R. (1937) Mad 299. (Finding by Appellate Court in reversal of trial Court's decision without giving reasons and without discussing evidence, only reason given being that evidence is not satisfactory.)
(17) AIR 1917 Lab 210 (210).
(25) AIR 1925 Cal 408 (410).
(23) AIR 1922 Lab 140 (141).
(25) AIR 1925 Cal 998 (994).
(25) AIR 1925 Oudh 313 (314).
(15) AIR 1915 Cal 99 (99). (Not disposing serially of all the reasons given by the first Court.)
(15) AIR 1915 Mad 468 (464).
(27) AIR 1927 Mad 1181 (1183).
(39) AIR 1939 Pat 267 (268).

(71) 16 Suth W R 49 (50).
(71) 16 Suth W R 150 (151). (But an omission to try any point from mistake, the non-decision on that point forms no good ground.)
(72) 17 Suth W R 279 (280).
(75) 23 Suth W R 166 (167).
(81) 7 Cal 148 (150).
(88) 1888 Upp Bur Print Jdg't, p. 47.
(88) 1888 Upp Bur Print Jdg't, p. 146.
(93) 16 Bom 545 (547).
(93) 1893 Upp Bur Print Jdg't, p. 15.
(93) 1893 Upp Bur Print Jdg't, p. 175.
(95) 17 All 117 (120).
(20) AIR 1920 Lab 322 (322).
(20) AIR 1920 Pat 359 (362).
(24) AIR 1924 Nag 91 (94) : 20 Nag L R 17.
(31) AIR 1931 Rang 812 (313, 314). (Issue of fact.)
Note 26
(08) 11 Oudh Cas 264 (266, 267).
(38) AIR 1935 Mad 803 (807) : 58 Mad 893 (FB).]

2. (11) 11 Ind Cas 915 (915) (Rang).
(12) 16 Ind Cas 382 (383) (Cal).
(10) 5 Ind Cas 829 (830) (Mad).
(08) 31 Mad 469 (470, 471) (P.B.).
(09) 2 Ind Cas 404 (404) (Cal).
(87) 9 All 26 (27, 28).
(23) AIR 1923 Cal 278 (278).
(84) 10 Cal 932 (935). (Omission of reasons for the finding.)
(17) AIR 1917 Pat 443 (445). (A finding that "on a consideration of all the circumstances of the case" the suit is barred by limitation is defective and unsatisfactory.)
(27) AIR 1927 Oudh 95 (96) : 29 Oudh Cas 330 : 1 Luck 458. (Mere general statement that on a perusal of all the evidence the Court is satisfied about a conclusion, is not sufficient judgment.)
(09) 1 Ind Cas 205 (206) (Cal). (Appellate Court not considering the evidence dealt with by the

ground of second appeal if it does not affect the decision on the merits. Similarly the fact that the reasons for differing from the lower Court's judgment are not specifically stated in the judgment, is not in itself a ground of second appeal where the reasons are evident and it is otherwise clear that the evidence has been considered in arriving at the finding.¹⁰

The following have also been held to be defects in judgment which will justify a second appeal —

- (1) Where the judgment is uncertain in its meaning.¹¹
- (2) Where from the judgment it is difficult to discover what the conclusions are which have been arrived at on evidence.¹²
- (iii) Where a finding is vague and indefinite¹³ or not legal.¹⁴
- (iv) Where the decision of a lower Appellate Court is based on an objection to court-fee taken for the first time before it.¹⁵
- (v) Where additional evidence is admitted in appeal without recording reasons as required by O. 41 R. 27.¹⁶

27. Admission or rejection of evidence. — The admission and rejection of documents is a matter of procedural law. In this sense the admissibility of evidence is question of law¹ and an error or defect therein is a ground of second appeal,² provided it is one which may possibly have affected the case on the merits.³ Thus, where the objection to the admission of evidence is based on a formal defect,⁴ or where the lower Court has arrived at the decision *independently of the evidence wrongly admitted*,⁵ the High Court will not interfere in second appeal. Nor will it interfere where the improper admission of evidence objected to was due to the conduct of the party complaining of it.⁶

10. (169) 12 Subh W R 272 (278).
- (175) 24 Subh W R 296 (297).
- (176) AIR 1916 P C 126 (128) : 48 Cal 1104 : 48 Ind App 172 (P C). (Case of the lower Appellate Court seeing no reason for differing from the conclusions of the trial Court.)
- (172) 18 Subh W R 473 (478). (Do.)
- (186) 12 Cal 199 (203).
- (174) 21 Subh W R 260 (261). (Reasons for believing witnesses not given.)
- (166) 5 Subh W R 178 (178).
- (174) AIR 1914 Cal 784 (784).
12. (124) AIR 1924 Mad 710 (711).
- (125) AIR 1925 Lab 357 (358).
14. (126) 92 Ind Cas 30 (30) (Mad).
15. (174) 22 Subh W R 433 (434).
16. (125) AIR 1925 Cal 98 (100).
- [See (138) AIR 1938 Sind 198 (200). (Additional evidence admitted by lower Appellate Court in total disregard of O. 41 R. 27—Second appeal—Maintainability of.)]
- Note 27
1. (115) AIR 1918 P C 92 (94) : 46 Cal 189 : 45 Ind App 153 (P C).
- (122) AIR 1922 Oudh 98 (98).
- (126) AIR 1926 Cal 727 (727).
- (137) AIR 1937 Rang 225 (225).
- (135) 39 Cal W N 311 (313). (When the finding is based really on other evidence, and the inadmissible evidence is only used for the purpose of further support, that does not vitiate the finding or necessitate a remand.)

- (135) 39 Cal W N 277 (280). (A finding based on evidence which is not legally admissible in evidence is not binding in second appeal.)
- [See (136) AIR 1936 P C 258 (259) (P C). (Finding of fact — Question as to use of document as secondary evidence is not one of fact but of procedure.)]
2. (183) 7 Bom 123 (124).
- (139) 16 Cal 753 (755) : 16 Ind App 125 (P C). (Admission of secondary evidence.)
- (116) AIR 1916 Cal 691 (692). (Receiving document assuming it to be public document.)
- [See also (168) 9 Subh W R 517 (517).]
3. (175) 24 Subh W R 392 (393).
- [See also (134) AIR 1934 Cal 269 (270). (Additional evidence by lower appellate Court not affecting right decision—High Court will not interfere.)]
4. (175) 7 N W P H C R 124 (126). (Document not sufficiently stamped.)
- (126) AIR 1926 Cal 938 (950).
- (136) AIR 1936 Lab 788 (789). (Document not properly tendered in evidence.)
- [See (139) AIR 1939 Nag 220 (221). (Document not duly stamped admitted — S. 36, Stamp Act, comes into play.)]
5. (181) 7 Cal 293 (296).
- (134) AIR 1934 Pat 55 (56). (Case under Sec. 167 of the Evidence Act.)
- (134) AIR 1934 Nag 124 (126).
- (130) AIR 1930 Lab 1067 (1068).
6. (131) AIR 1931 Cal 450 (450). (Inadmissibility stamped pro-note admitted without objection.)

An *inference of fact* must be distinguished from an *inference of law*. Where, from evidentiary facts and documents, an inference is drawn as to the existence or

- (122) 4 Lark L. Jour 157 (159). (Finding that a gift was an absolute one.)
- (129) AIR 1929 Oudh 83 (84) : 4 Luck 265. (Whether document is benami.)
- (131) 133 Ind Cas 440 (440) (Lah.). (Do.)
- (121) AIR 1924 Lah 39 (40). (Consideration.)
- (12) 16 Cal W N 227 (230). (Inadequacy of the price if the consequence of the irregularity.)
- (129) AIR 1929 Mad 259 (260). (Question whether grant was made to one not holding kudavaram.)
- (14) AIR 1914 AH 370 (370) : 36 AH 256. (Grant by Government whether inconsistent with the general wishes and well-being of the village community.)
- (31) AIR 1931 Pat 72 (75). (Question of intention or knowledge of intention of parties to pre-emption.)
- (31) AIR 1931 Lah 220 (221). (Whether sham that is included in a sale.)
- (31) AIR 1931 Oudh 124 (125). (That transaction is one of sale in a pre-emption suit.)
- (31) AIR 1931 Lah 618 (619). (Whether presumption arising from entry in riwajnam has been rebutted by evidence.)
- (30) AIR 1930 Mad 569 (569). (Whether an estate is a jagir.)
- (31) AIR 1931 AH 338 (340). (Question of notice under Section 40, L. P. Act.)
- (31) AIR 1931 AH 556 (557). (Question of actual or cause of action in a particular place.)
- (31) AIR 1931 AH 113 (119). (Whether two transactions are connected and inter-dependent.)
- (39) AIR 1939 Lah 88 (89). (Question whether place is town or village is one of fact.)
- (39) AIR 1939 Pat 269 (269). (Whether several holdings were amalgamated or not.)
- (39) AIR 1939 Pat 218 (218). (Finding as to delivery of possession.)
- (39) AIR 1939 Lah 284 (285). (Question whether a copy of certain order was affixed on the court-house is one of fact.)
- (36) AIR 1936 Cal 17 (18) : 62 Cal 979. (Question of prompiness in *shariat* ceremonies for pre-emption under Mohammedan law.)
- (35) AIR 1935 Rang 190 (190). (Jewish woman divorcing her husband — Question of alimony depends on personal law of Jews which is to be ascertained as a question of fact upon the evidence adduced in that behalf.)
- (36) AIR 1936 Cal 245 (246). (A finding on the question of title.)
- (35) AIR 1935 Pat 42 (44). (Apportionment of compensation money among persons interested in land compulsorily acquired is a finding of fact.)
- (37) 1937 Mad WN 1188 (1189). (No absolute rule of law that in no circumstances should waste lands belonging to a trust be given on permanent lease—The question is one of degree depending on a number of circumstances and accordingly is a question of fact.)
- (35) AIR 1935 Oudh 30 (38) : 10 Luck 250. (Question as to nature of gift.)
- (35) AIR 1935 Mad 70 (70). (Whether man registers is right or wrong is question of fact.)
- (122) AIR 1926 AH 549 (549) : 48 AH 588.
- (125) AIR 1925 AH 358 (354).
5. (25) AIR 1925 AH 39 (40).
- [See also (24) AIR 1924 Pat 305 (306).]
- (31) AIR 1931 Nag 67 (67) : 27 Nag L R 8.
- (28) AIR 1928 Nag 76 (78) : 23 Nag L R 156.
- of gift being incomplete for want of acceptance.)
- (24) AIR 1924 Oudh 164 (164, 165). (Inference see AIR 1928 Nag 87 *Contra*.)
- grant from long user is a question of fact—But of easement from evidence.)
- (20) AIR 1920 Cal 361 (362, 363). (Inference of grant)
- (25) AIR 1925 Pat 746 (750). (Inference of grant)
- (30) AIR 1930 AH 218 (219).
- transaction is a finding of fact.)
- inference that a document is not a fictitious
- (28) AIR 1928 Lah 608 (609) : 9 Lah 298. (The law and cannot be challenged in second appeal.)
- the decision is on a question of fact and not of a certain set of facts a Court infers a lost grant, when from
- (20) AIR 1920 Cal 361 (362, 363). (When from
- (69) 11 Suth W R 278 (280).
- (19) AIR 1919 Lah 221 (221).
- 45 Ind App 163 (P C).
4. (19) AIR 1918 P C 92 (93, 94) : 46 Cal 189 : the husband for adoption.)
- (Finding that there was no express authority of I L R (1938) Mad 551 : 32 Sind L R 328 (P C).
- (38) AIR 1938 P C 34 (35) : 65 Ind App 93 : and whether it is unregistered.)
- (Whether partnership numbers more than twenty
- (36) AIR 1936 Sind 99 (101) : 29 Sind L R 455.
- mandating payment is question of fact.)
- (36) AIR 1936 Mad 506 (508). (Hundi—Counter-gift or sale.)
- (34) 15 Pat L T 596 (599). (Alienation whether transferee is bona fide transferee for consideration.)
- (39) 181 Ind Cas 181 (182) (Oudh). (Whether of fact.)
- or by way of satisfaction of a debt is question
- ther a certain payment was made by way of gift
- (38) AIR 1938 Mad 25 (26). (The question whether is real or fictitious.)
- (36) AIR 1936 Pat 476 (477). (Whether partner-purchased belonged to a certain person.)
- funds with which the properties in dispute were
- (34) AIR 1934 AH 566 (568). (A finding that the interest of guardian *ad litem* is adverse to minor.)
- (38) AIR 1938 Rang 468 (470). (Question whether lands.)
- the lands in suit form part of a person's inam
- (36) 163 Ind Cas 93 (94) (Mad). (A question whether
- tion is one of fact.)
- (35) AIR 1935 AH 884 (885). (Question of intention of fact.)
- in which the assured committed suicide is a
- (36) AIR 1936 Lah 685 (687). (The circumstances because due is one of fact.)
- when the arrears of pay claimed by a person
- (36) AIR 1936 Cal 277 (279). (The question as to rate of interest is excessive.)
- (35) AIR 1935 Lah 440 (440). (Question whether irrevocable trust is question of fact.)
- (35) AIR 1935 Mad 60 (62). (Whether there is

non-existence of another fact, then the inference is one of *fact* and the question as to the inference, a *question of fact*.⁶ But when the question is whether certain facts give rise to a *legal right or liability*, the inference is one of *law*, and the question of such inference, a *question of law*.⁷ Even an inference of fact must be drawn in a *legal manner*, i. e., in a manner neither unreasonable nor illogical nor unwarranted by the

- (25) AIR 1925 Oudh 611 (612).
 (18) AIR 1918 P C 92 (94) : 46 Cal 189 : 45 Ind App 183 (P C).
 (24) AIR 1924 Cal 562 (563) : 51 Cal 110.
 (26) 99 Ind Cas 183 (184) (Oudh).
 (16) AIR 1916 Pat 59 (60).
 (30) AIR 1930 Pat 319 (320). (Inference from survey record of rights.)
 (28) AIR 1928 P C 243 (245, 247, 248) : 55 Ind App 380 (P C). (Inference as to whether payment was made in time, drawn from *Jama wasul baki*.)
 See also the cases in Note 29, Foot-note (1).
 6. (30) AIR 1930 Lah 1056 (1057).
 (38) AIR 1938 Lah 357 (359). (Question whether a fact has been proved when evidence for and against has been properly admitted is a question of fact.)
 (37) AIR 1937 Rang 225 (225). (The question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact.)
 (36) AIR 1936 Pat 96 (97).
 (35) AIR 1935 Mad 70 (71). (A question of fact is nonetheless a question of fact if part of the proof depends upon inferences.)
 (39) AIR 1939 Pat 218 (218).
 (36) AIR 1936 Nag 186 (188).
 (35) 39 Cal V N 888 (893).
 (38) AIR 1938 All 608 (606).
 [See (37) AIR 1937 Nag 230 (231, 232). (Inferences drawn from proved facts or admitted facts are not always questions of law.)]
 See also Note 29 below.
 7. See also Note 40 *infra*.
 (25) AIR 1925 All 796 (797).
 (18) AIR 1918 P C 92 (93) : 46 Cal 189 : 45 Ind App 183 (P C).
 (32) AIR 1932 Oudh 51 (52). (Inference from facts on application of legal principles.)
 (31) AIR 1931 Oudh 142 (143). (Proper legal effect of proved fact is a question of law.)
 (31) AIR 1931 Oudh 19 (20) : 6 Luck 408. (Do.)
 (31) AIR 1931 Lah 395 (396) : 12 Lah 741. (Do.)
 (28) AIR 1928 All 381 (385). (Do.)
 (31) AIR 1931 Pat 236 (238) : 10 Pat 264. (Whether from proved facts, abandonment under Section 87 of Bengal Tenancy Act follows is a question of law.)
 (31) AIR 1931 Bom 295 (296). (Concession by pleader—Binding nature—Question of law.)
 (27) AIR 1927 P C 102 (104) : 54 Ind App 178 (P C). (The question whether a tenancy is permanent or precarious is one of legal inference.)
 (96) 19 Mad 485 (493). (Inference of abandonment or loss of right.)
 (24) AIR 1924 Cal 92 (95). (Legal standard of care required—S. 151 of the Contract Act.)
 (407) 34 Cal 36 (40, 41). (Per Woodroffe, J.—Whether sale is binding on minor.)
 (23) AIR 1923 All 75 (76). (Inference of abandonment.)
 (29) AIR 1929 All 872 (872, 873). (Inference of adequacy of consideration.)
 (28) AIR 1928 Cal 815 (817) : 55 Cal 355. (Inference as to permanency of tenancy.)
 (32) AIR 1932 Cal 198 (199). (Do.)
 (32) AIR 1932 Cal 398 (400). (Do.)
 (28) AIR 1928 Cal 891 (891). (Inference of abandonment.)
 (17) AIR 1917 Lah 439 (440) : 1917 Pun Re No. 69. (Inference of acquiescence is a legal inference.)
 (11) 9 Ind Cas 41 (44) (Mad). (Inference if implied contract.)
 (11) 9 Ind Cas 394 (395) : 38 Cal 278. (Inference as to whether a person is a tenant.)
 (08) 27 Bom 452 (453). (Inference as to proper custody of document.)
 (25) AIR 1925 Nag 58 (58). (Conclusion that delay disentitles a person from claiming a particular relief.)
 (03) 25 All 1 (17) : 29 Ind App 203 (P C). (Inference of notice to principal from notice to the agent.)
 (28) AIR 1928 Lah 720 (720).
 (28) AIR 1928 Nag 87 (88) : 28 Nag L R 192. (Inference of grant from long user is one of law.)
 But see A I R 1920 Cal 361 *contra*.
 (26) AIR 1926 Oudh 128 (130). (Whether an admission is conclusive evidence.)
 (97) 21 Bom 91 (94).
 (26) AIR 1926 All 180 (184).
 (27) AIR 1927 All 601 (601).
 (29) AIR 1929 Nag 270 (271).
 (03) 5 Bom L R 225 (230).
 (24) AIR 1924 Pat 378 (374). (Inference as to the fixity of rent.)
 (25) AIR 1925 Rang 68 (68) : 2 Rang 459. (Sale, what amounts to.)
 (31) AIR 1931 Bom 871 (872, 876). (Inference from document and surrounding circumstances as to whether it amounts to a sale or a mortgage.)
 (90) 18 Mad 47 (51). (Question of what passes at a sale in execution of a decree.)
 (15) AIR 1915 Mad 208 (208) : 12 Ind Cas 389 (390) : 37 Mad 22. (Do.)
 (14) AIR 1914 Cal 305 (306). (Do.)
 (26) AIR 1926 Mad 851 (851, 852). (Do.)
 (30) AIR 1930 Lah 1060 (1060). (Reducing period of redemption—Question of law.)
 (32) AIR 1932 Lah 56 (57). (Raising a legal presumption as to extinguishment of mortgage when mortgagee purchases equity of redemption.)
 (37) 170 Ind Cas 881 (882) (Lah). (Interpretation to be placed on admitted facts is question of law.)
 (39) AIR 1939 Mad 783 (786) : 49 Mad L W 664 (668). (Inference from proved facts.)
 (36) AIR 1936 P C 77 (81, 82) : 63 Ind App 384 : 17 Lah 644 (P C). (Legal effect of proved facts is a question of law.)

facts from which it is drawn. If not so drawn, it is an error of law. The question, therefore, whether an inference of fact is reasonable or is warranted by facts, is also a question of law.

A mixed question of law and fact is one where in order to give a finding thereon it is necessary to answer a question of fact and also a question of law. Thus, as has already been seen in Note 21 *ante*, where the question is whether a valid custom exists, it is necessary to find, *first*, that there were a number of instances in which a course of conduct was followed, and *secondly*, that such instances are sufficient to establish the legal elements of a custom, namely, reasonableness, certainty and

- (73) AIR 1938 Bom 492 (491). (Proper legal inference from proved facts is a question of law.)
- (79) AIR 1939 Sind 97 (98) : ILR (1939) Kar 269. (Whether legal inferences arise from certain facts, whether conclusions in law arising from certain facts are or are not correct, are questions of law.)
- (75) 18 Nag L Jour 172 (177). (Whether custom can be inferred from evidence.)
- (78) AIR 1938 Lab 357 (359). (Proper legal effect of proved facts.)
- (78) AIR 1938 Lab 180 (181). (Interpretation of facts found by lower Court.)
- (87) AIR 1937 Rang 225 (225). (Legal effect of proved facts is legal inference to be drawn from proved facts and is matter of law.)
- (76) AIR 1936 Lab 104 (106).
- (86) AIR 1936 Nag 95 (97) : ILR (1936) Nag 13. (Whether a usual practice prevails or not, and the length of its existence are questions of fact, although the legal inferences which follow from them may be questions of law.)
- (89) AIR 1939 Pat 448 (449) : 18 Pat 571. (Inference to be drawn from proved facts is question of law.)
- (78) AIR 1938 Nag 522 (525). (Question of law arises only when ultimate inference from proved facts is itself a question of law.)
- (78) AIR 1928 P O 248 (245) : 55 Ind App 380 (P.C.). [See (77) AIR 1937 Oudh 301 (304). (Whether lower Courts draw correct inference from circumstantial evidence is a question of law.)]
8. (19) AIR 1919 P O 60 (61) : 42 All 152 : 46 Ind App 197 (P.O.). (Inference held not to be warranted by fact.)
- (93) 20 Cal 98 (99) : 19 Ind App 228 (P.O.). (Do.)
- (22) AIR 1922 Lab 892 (892) : 3 Lab 257. (No unwarranted inference—No error of law.)
- (30) AIR 1930 Mad 449 (456) : 53 Mad 510 (S.B.). (Raising presumption where facts did not leave any scope for it.)
- (03) 30 Cal 438 (438).
- (04) 31 Cal 174 (177). (Inference not following from facts.)
- (97) 24 Cal 825 (829, 880). (Inference not following from facts found.)
- (17) AIR 1917 Cal 674 (675). (Non-drawing of inference warranted by facts.)
- (21) AIR 1921 Bom 385 (388) : 45 Bom 1186. (Only possible inference not drawn.)
- (27) AIR 1927 Lab 811 (812). (Facts not justifying inference of marriage.)
- (23) AIR 1923 Lab 216 (218). (Inference not following from facts.)
- (28) AIR 1928 All 381 (385). (Do.)
- (28) AIR 1928 Lab 722 (723).
- (29) AIR 1929 All 561 (562). (Soundness of inferences.)
- (29) AIR 1929 All 575 (576). (Court misdirecting itself on a matter of law in arriving at the finding.)
- (29) AIR 1929 All 862 (863). (Applying a rule that no tenant can acquire easement.)
- (25) 6 L R All 62 (62) (Rev.).
- (30) AIR 1930 Lab 567 (568) : 11 Lab 581.
- (22) AIR 1922 Pat 507 (511) : 2 Pat 65. (Whether, as a matter of law, an inference is justified by facts found.)
- (70) 14 South W R 23 (24). (Erroneous manner of drawing inferences.)
- (31) AIR 1931 Lab 186 (188) : 12 Lab 270. (Inference of fraud and prejudice without proof of the same.)
- (15) AIR 1915 Mad 80 (81). (Inferences as to exercise of ordinary prudence.)
- (09) 2 Ind Gas 148 (149) (Cal). (Question of correct inference.)
- (25) AIR 1925 Cal 761 (765).
- (09) 36 Cal 1 (18) : 35 Ind App 195 (P.O.). (Conclusions of law at every point in the reasoning not regarded.)
- (73) 19 South W R 287 (288). (Inference not warranted by facts.)
- (29) AIR 1929 Lab 198 (199). (Question whether inference of fact was properly drawn according to law can be raised in second appeal.)
- (39) AIR 1939 Sind 97 (98) : ILR (1939) Kar 269. (Whether conclusions in law arising from facts are correct or not.)
- (35) AIR 1935 All 1005 (1010).
- (38) AIR 1938 Sind 206 (207) : 1 L R (1938) Kar 140. (Legal inference drawn from facts can be considered in second appeal.)
- (38) AIR 1938 Pat 147 (148). (Inference of conspiracy not warranted by facts.)
- [See (37) AIR 1937 Oudh 47 (51). (Presumption from proved facts.)]
- (97) AIR 1937 Pat 289 (292). (Misconduct—Inference from facts is question of law.)

29. Construction of documents. — The expression 'construction of a document' involves several questions —

(187) AIR 1987 Nag 280 (231, 232). (Inferences from questions of fact are not always questions of law.)

9. See Note 21 above.
See also (22) AIR 1922 71 ad 250 (298). (Custom.)
10. (11) 11 Ind Cas 185 (186) (Cal). (Adverse possession.)
(35) AIR 1935 All 553 (559). (Whether certain land is part of occupancy holding is mixed question.)

(185) AIR 1935 Oudh 387 (392) : 11 Luck 82.
(186) AIR 1936 Lab 741 (742).
is a question of law open to second appeal.)
tion as to when cause of action arises.)
(136) AIR 1936 Pat 672 (575) : 15 Pat 561. (Whe-
ther particular sale is void.)

(174) AIR 1914 All 517 (517) : 36 All 281. (Find-
ing that land held revenue free is no longer part
of mahal is mixed finding of fact and law.)
(35) AIR 1935 Cal 713 (715). (Question of notice
is not a pure question of law.)

believed by the defendant—Whether he showed reasonable care in believing and acting as he did later can be assailed in second appeal.)

...in the case of partnership, it is not a question of law. (AIR 1961 Andh 210 (213) : 181 Ind Cas 70)

High Court—Finding can be interfered with.)
[See also (36) AIR 1936 Rang 262 (265).]
I. (11) AIR 1914 Cal 896 (898, 899). (Meanings of words.)

(26) AIR 1926 Lah 21 (22). (Do.)
(25) AIR 1925 Lah 150 (151). (Do.)
(24) AIR 1931 Bom 570 (573, 574). (Do.)

(12) AIR 1931 Bom 430 (131). (Question of constructive notice.)
(134) AIR 1934 Pat 14 (15). (Question whether (26) AIR 1926 Bom 493 (194). (Do.)
(22) AIR 1922 Cal 186 (186). (Meaning and effect of admission in document.)

(11) 10 Ind Cas 325 (927) (Cal). (Mistake as to meaning of some portion of the evidence in (31) AIR 1981 Sind 170 (173) : 25 Sind L R 493.

as a ground of second appeal.*

The construction of a document as regards its legal effect will only arise where the document is an instrument of title or is a contract or is otherwise the direct foundation of legal rights.⁵

While the construction of a document *by itself* may be a question of law, it becomes a question of fact if it is one which is to be decided on the document *together*

[See ('30) AIR 1930 Cal 764 (766). (Question whether land is accretion involving construction of and inference from material documents.) ('37) AIR 1937 Nag 170 (171) : 19 Nag L Jour 308 (311) : I L R (1938) Nag 276. (Construction of an order of Court is a pure question of law.) ('37) AIR 1937 Sind 51 (52, 54) : 30 Sind L R 371. (Construction of documents such as letters and newspapers is question of law.)]

4. ('14) AIR 1914 Cal 836 (838, 839). ('12) 16 Ind Cas 67 (68, 69) : 34 All 579 : 39 Ind App 247 (P O).

('20) AIR 1920 Pat 646 (646) : 5 Pat L Jour 251. ('31) AIR 1931 Nag 25 (26).

('31) AIR 1931 Oudh 133 (134) : 6 Luck 382. ('31) AIR 1931 Oudh 686 (687).

('26) AIR 1926 Mad 652 (654). (Document of title.) ('29) AIR 1929 Lab 38 (39). (Do.)

('18) AIR 1918 Bom 158 (160) : 42 Bom 344. ('18) AIR 1918 Lab 362 (363, 364). (Whether two documents formed parts of a single transaction or were independent.)

('29) AIR 1929 Lab 833 (834). (Whether a document is a mortgage.)

('25) AIR 1925 Oudh 64 (64). (Whether entry in *wajib-ul-az* is of custom or contract.)

('25) AIR 1925 Mad 37 (38). (Whether a transaction amounts to a mortgage by conditional sale or to an absolute sale is not a pure question of fact.)

('13) 19 Ind Cas 301 (301) (Lab). (Question whether the transaction amounts to a sale or exchange.)

('28) AIR 1928 Nag 308 (310). (Will or gift.) ('14) AIR 1914 Mad 685 (686).

('93) 15 All 367 (371). ('26) AIR 1926 All 542 (543) : 48 All 588. ('28) AIR 1928 P O 44 (47) : 6 Rang 113. (Whether a power of attorney was effective up to a particular time.)

('18) AIR 1918 Mad 82 (84). (Interpretation of documents involving a determination of the intention of the parties—Question is one of mixed law and fact which can be dealt with in second appeal.)

('39) AIR 1939 Lab 264 (264). (Interpretation of document of title—Second appeal lies.)

('35) AIR 1935 Oudh 217 (225, 226) : 10 Luck 392 (P B). (Whether a document is a perpetual lease of under-proprietary rights or not.)

('36) AIR 1936 Pat 287 (288). (Document of title mixed question of law and fact.)

('37) 20 Nag L Jour 39 (41).

[See ('36) 162 Ind Cas 334 (335) (Oudh). (A finding based on *khatani* and *khasras* which are instruments of title can be challenged in second appeal even if it is a finding of fact.) ('32) AIR 1932 Bom 230 (231). (But it is a question of fact when it depends on appreciation of oral evidence and not merely on construction of documents.)]

[But see ('19) AIR 1919 Lab 246 (247). (Sale or exchange is a question of fact.)]

5. ('23) AIR 1923 P O 187 (187) (P O).

('38) AIR 1938 Mad 10 (13). (Misconstruction of important document in deciding question of fact.)

('34) AIR 1934 Lab 198 (193). ('30) AIR 1930 P O 83 (84) (P O). (Documents constituting the foundation of plaintiff's rights—Right construction is a question of law.)

('24) AIR 1924 Oudh 266 (268) : 27 Oudh Cas 77. ('26) AIR 1926 All 542 (543) : 48 All 588.

('20) AIR 1920 Pat 646 (646) : 5 Pat L Jour 251. ('05) 9 Cal W N 154 (160). (Document of title which is the foundation of the suit.)

('19) AIR 1919 Pat 334 (334). (Document of title.) ('23) AIR 1923 Cal 358 (359). (Do.)

('26) AIR 1926 Bom 493 (493) (Do.) ('29) AIR 1929 Lab 38 (39). (Interpretation of a document of title.)

('92) AIR 1932 Lab 65 (66). (Do.) ('30) AIR 1930 Pat 71 (73). (Do.)

('70) 14 Suth W R 485 (486). ('22) AIR 1922 Cal 185 (186).

('34) AIR 1934 Lab 35 (35). ('35) AIR 1935 Lab 857 (858). (Interpretation of sale deed which is foundation of title—Question of law.)

('39) AIR 1939 Lab 264 (264). (Document of title—Question as to which of two alternative meanings of a certain word in a document should in context be held applicable is one of interpretation of document.)

('39) AIR 1939 Pat 364 (367). (Construction of Rubkari.)

('37) AIR 1937 Pat 572 (574) : 16 Pat 527. (Construction of plaint.)

('37) AIR 1937 Nag 230 (233). (Partition deed.) ('35) AIR 1935 Oudh 217 (225) : 10 Luck 392 (P B). (Instrument of title—Whether a particular document is a perpetual lease of under-proprietary rights.)

('36) AIR 1936 Oudh 225 (226, 227) : 11 Luck 642. (Finding of fact based upon documents of title can be challenged in second appeal.)

with other *circumstances or extraneous evidence*.⁶ Where the nature and character of a document are clear and the only question in dispute is whether the real contract between the parties is something different from that contained in the document, no question of the construction of document is involved and no second appeal lies.⁷ Similarly, where the words are clear and the only question is whether property has been sufficiently specified,⁸ or whether a particular property is included in it,⁹ the question involves no construction of documents. Again, where two interpretations are possible, the fact that the lower Appellate Court has adopted one rather than the other is no error of law or procedure and is no ground of second appeal.¹⁰ Where the question is whether two documents executed on the same day are connected, so that one is a consideration for the other, the question is not one of interpretation of documents and if the lower Courts ascertain their connexion on evidence other than that of the documents themselves, the finding is one of fact which cannot be challenged in second appeal.¹¹

A finding that a document is so worded as to obscure its meaning and prevent parties from understanding its nature or effect has been held to be a question of fact having nothing to do with construction of the document.¹²

A conclusion based on a *misreading of a document* is like one based on a misreading of evidence and as such is an error of law which can be corrected in second appeal.¹³ See Note 13 above.

30. Legal effect of document or transaction.—The legal effect of documents,¹

[See (37) AIR 1937 Lah 656 (656). (The interpretation of documents which are not instruments of title but are evidence of title is a question of fact.)

(37) 39 Pun L R 376 (376). (Misconstruction of document which is not a document of title not good ground of second appeal.)

[See also (36) AIR 1936 Oudh 97 (99). (Status of person, or his right to land is mixed question of law and fact dependent on interpretation of documents of title.)]

6. (17) AIR 1917 Lah 156 (157).

(23) AIR 1923 All 586 (588) : 45 All 581.

(25) AIR 1925 Cal 656 (658, 659).

(26) 92 Ind Cas 42 (43) (Lah). (Mortgage or sale.)

(27) AIR 1927 All 689 (689). (Ambiguity.)

(28) AIR 1928 Lah 667 (667) (Mortgage or sale.)

(32) AIR 1932 Bom 230 (231). (Do.)

(28) AIR 1930 Lah 806 (807).

(30) AIR 1938 Lah 930 (931).

(19) AIR 1919 Lah 275 (275) : 1919 Pun Re No. 86.

(Where a sale deed is silent on the point, the question whether a *pro rata* share in the share-lab was intended to be conveyed to the vendee is one of fact.)

7. (24) AIR 1924 Lah 260 (261).

(08) 1908 Pun L R No. 104, p. 328 (329) : 1907 Pun Re No. 16.

(97) 1897 Unrep Print Jdg. 129.

8. (25) AIR 1925 Cal 1195 (1199).

9. (26) 91 Ind Cas 423 (424) (Cal).

10. (30) AIR 1930 Lah 139 (140).

1. (25) AIR 1925 Rang 255 (256).

(23) AIR 1923 All 337 (337).

(25) AIR 1925 Lah 150 (151).

(26) AIR 1926 All 75 (76).

(29) AIR 1929 All 519 (520).

(30) AIR 1930 Cal 113 (121) : 57 Cal 170.

(35) AIR 1935 Lah 132 (134). (Question whether notice of expulsion to one partner operates as dissolution of partnership.)

Note 30

(27) AIR 1927 Mad 167 (1179).

(20) AIR 1920 All 82 (85).

(12) 18 Ind Cas 629 (630) (Oudh).

(68) 9 Subh W R 366 (366).

(S B).

(68) 9 Subh W R 366 (366).

(12) 18 Ind Cas 629 (630) (Oudh).

(20) AIR 1920 All 82 (85).

(27) AIR 1927 Mad 167 (1179).

13. (31) AIR 1931 All 499 (503, 504) : 54 All 6

(S B).

(68) 9 Subh W R 366 (366).

(12) 18 Ind Cas 629 (630) (Oudh).

(20) AIR 1920 All 82 (85).

(27) AIR 1927 Mad 167 (1179).

(25) AIR 1925 Rang 255 (256).

(23) AIR 1923 All 337 (337).

(25) AIR 1925 Lah 150 (151).

(26) AIR 1926 All 75 (76).

(29) AIR 1929 All 519 (520).

(30) AIR 1930 Cal 113 (121) : 57 Cal 170.

(35) AIR 1935 Lah 132 (134). (Question whether notice of expulsion to one partner operates as dissolution of partnership.)

or of proved facts,² or of transactions,³ is a question of law. But the effect of a document, as merely *evidence* of a question of fact, is, as has been seen in Note 29 above, not a question of law.⁴ Questions relating to the fact of the *execution* of documents or the *existence* of facts or transactions⁵ and questions of the *genuineness* of documents,⁶ are all questions of fact.

31. Meaning of words.

31. Meaning of words.—The ordinary meaning of words is a question of fact¹ but the effect of the words is one of law.² Thus, the meaning of the word "assessments" in a resolution is a question of fact.³ So also is the question whether the words "insolent upstart" are defamatory of the plaintiff in a particular case.⁴ But in the case of words having a technical or scientific or special legal significance, the

2. ('18) AIR 1918 P C 92 (93) : 46 Cal 189 (P C). ('84) AIR 1984 All 108 (106). (Whether a statement made by tenant amounts to forfeiture.) ('27) AIR 1927 P C 102 (104) : 54 Ind App 178 : 8 Lah 573 (P C). ('13) 20 Ind Cas 951 (952) (All). ('18) AIR 1918 Cal 66 (69, 70). ('22) AIR 1922 Oudh 98 (98). ('32) AIR 1932 Oudh 51 (52). ('27) AIR 1925 Nag 58 (58). ('27) AIR 1927 Nag 166 (168). ('28) AIR 1928 Cal 815 (817) : 55 Cal 355. ('28) AIR 1928 Lah 774 (776) : 10 Lah 360. ('28) AIR 1928 Nag 153 (155). ('29) AIR 1929 Cal 37 (39) : 56 Cal 738. ('38) AIR 1938 Lah 357 (359). ('38) AIR 1938 Lah 180 (181). (Interpretation of facts found by lower Court). ('39) AIR 1939 Pat 448 (449) : 1939 Pat W N 394 (399) : 18 Pat 571. ('38) AIR 1938 Pat 413 (421) : 17 Pat 507. ('38) AIR 1938 Nag 552 (555). (Question of law arises only when ultimate inference from proved facts is itself a question of law). ('35) AIR 1935 Bom 47 (49, 50). ('38) AIR 1938 Oudh 238 (244). ('39) AIR 1939 Sind 97 (98) : I.L.R. (1939) Kar 269. (Whether legal inferences arise from certain facts, whether conclusions in law arising from certain facts are or are not correct are questions of law). ('37) AIR 1937 Oudh 47 (51). (Presumption from proved facts). ('37) AIR 1937 Oudh 254 (255, 256). (Whether certain bond is executed owing to undue influence). ('37) AIR 1937 Rang 225 (225). ('38) AIR 1938 Bom 492 (494). ('35) AIR 1935 Lah 206 (208). (Question as to whether certain proved facts amount to misconduct is not purely one of fact). ('36) AIR 1936 Rang 383 (385). (Whether proper effect of proved facts is to establish partnership). ('36) AIR 1936 Pat 384 (385). ('36) AIR 1936 Lah 104 (106). ('36) AIR 1936 P C 77 (81, 82) : 63 Ind App 140 (P C). ('39) AIR 1939 Mad 783 (786) : 49 Mad L W 664 (668). ('37) 170 Ind Cas 831 (832) (Lah). ('10) 6 Nag L R 78 (80). ('29) AIR 1929 All 519 (520).
2. ('18) AIR 1918 P C 92 (93) : 46 Cal 189 (P C). ('84) AIR 1984 All 108 (106). (Whether a statement made by tenant amounts to forfeiture.) ('27) AIR 1927 P C 102 (104) : 54 Ind App 178 : 8 Lah 573 (P C). ('13) 20 Ind Cas 951 (952) (All). ('18) AIR 1918 Cal 66 (69, 70). ('22) AIR 1922 Oudh 98 (98). ('32) AIR 1932 Oudh 51 (52). ('27) AIR 1925 Nag 58 (58). ('27) AIR 1927 Nag 166 (168). ('28) AIR 1928 Cal 815 (817) : 55 Cal 355. ('28) AIR 1928 Lah 774 (776) : 10 Lah 360. ('28) AIR 1928 Nag 153 (155). ('29) AIR 1929 Cal 37 (39) : 56 Cal 738. ('38) AIR 1938 Lah 357 (359). ('38) AIR 1938 Lah 180 (181). (Interpretation of facts found by lower Court). ('39) AIR 1939 Pat 448 (449) : 1939 Pat W N 394 (399) : 18 Pat 571. ('38) AIR 1938 Pat 413 (421) : 17 Pat 507. ('38) AIR 1938 Nag 552 (555). (Question of law arises only when ultimate inference from proved facts is itself a question of law). ('35) AIR 1935 Bom 47 (49, 50). ('38) AIR 1938 Oudh 238 (244). ('39) AIR 1939 Sind 97 (98) : I.L.R. (1939) Kar 269. (Whether legal inferences arise from certain facts, whether conclusions in law arising from certain facts are or are not correct are questions of law). ('37) AIR 1937 Oudh 47 (51). (Presumption from proved facts). ('37) AIR 1937 Oudh 254 (255, 256). (Whether certain bond is executed owing to undue influence). ('37) AIR 1937 Rang 225 (225). ('38) AIR 1938 Bom 492 (494). ('35) AIR 1935 Lah 206 (208). (Question as to whether certain proved facts amount to misconduct is not purely one of fact). ('36) AIR 1936 Rang 383 (385). (Whether proper effect of proved facts is to establish partnership). ('36) AIR 1936 Pat 384 (385). ('36) AIR 1936 Lah 104 (106). ('36) AIR 1936 P C 77 (81, 82) : 63 Ind App 140 (P C). ('39) AIR 1939 Mad 783 (786) : 49 Mad L W 664 (668). ('37) 170 Ind Cas 831 (832) (Lah). ('10) 6 Nag L R 78 (80). ('29) AIR 1929 All 519 (520).
3. ('10) 6 Nag L R 78 (80). ('29) AIR 1929 All 519 (520).
4. ('12) 9 All L Jour 253 (256).
5. ('09) 5 Nag L R 85 (86). ('09) 5 Nag L R 85 (86). ('22) AIR 1922 Nag 46 (47). ('26) AIR 1926 Oudh 546 (546). ('28) AIR 1928 Oudh 500 (501). ('29) AIR 1929 All 419 (420). ('36) AIR 1936 Sind 7 (8). (Finding that a document has not been proved that it was never executed by the alleged executor). ('37) 167 Ind Cas 724 (724) (Oudh). (Finding that mortgage deed alleged in plaint not proved). ('39) AIR 1939 Rang 59 (61). (The question whether a person executed a deed of gift jointly with others). ('67) 8 Suth W R 356 (357). ('22) 8 L R All 248 (248) (Rev.). ('38) AIR 1938 Lah 357 (359, 360). (Question whether execution of document is genuine). ('37) 1937 Mad W N 188 (188). ('35) AIR 1935 Pat 349 (350). ('36) AIR 1936 Sind 7 (8). (Finding that document is collusive). [See also ('37) 166 Ind Cas 531 (532) (Pat). (Genuineness of signature is a question of fact). ('39) AIR 1939 Pat 276 (277). (The question of the correctness of an entry in the record of rights cannot be opened in second appeal). ('39) AIR 1939 Pat 229 (230). (Question whether entry in record of rights is correct is one of fact).]]
- Note 31
1. ('28) AIR 1928 P C 243 (245) : 55 Ind App 380 (P C). ('09) 1 Ind Cas 530 (534) (Cal). ('09) 4 Ind Cas 732 (733) (Cal). ('16) AIR 1916 Cal 77 (79). ('18) 46 Ind Cas 794 (795) (Nag). ('22) AIR 1922 Lah 423 (423). ('23) AIR 1923 All 337 (337). ('25) AIR 1925 Cal 1209 (1209). ('37) AIR 1937 Oudh 295 (297). ('35) AIR 1935 All 586 (588). (Finding as to what was meant by witness by use of particular word is one of fact).
2. ('23) AIR 1923 All 337 (337). ('26) AIR 1926 Oudh 360 (361) : 2 Luck 216. ('37) AIR 1937 Oudh 295 (297). ('26) AIR 1926 Cal 607 (608) : 53 Cal 453. ('12) 9 All L Jour 253 (256).

interpretation will be a question of law.⁵ Similarly, the question whether a word has been used in a *restricted sense* is a question of law.⁶

32. Inference from proved facts — Presumptions and onus of proof. — It has been observed in Note 28 above that an *inference of fact* from proved facts is a question of fact, but that a *legal inference* from proved facts is one of law.¹ A Court is bound, in law, to draw the necessary inferences, whether of fact or of law, in coming to a conclusion on the question to be decided. A failure to draw *any inference at all one way or the other is an error of law.*² Thus, where only one inference is possible from proved facts, the failure to draw it is an error of law.³ Where, however, one out of *two possible inferences* are drawn there is no error of law.⁴ Similarly, drawing of an inference which is not improper,⁵ or the omission to draw an inference which does not necessarily follow,⁶ are not errors of law and are not grounds of second appeal.

A *presumption of fact* is really an inference of fact depending on the facts and circumstances of each case and where a Court draws such a presumption or refuses to draw it on a consideration of the facts of the case, it will not be interfered with in second appeal.⁷ But where the Court fails to direct its mind to the question *whether it should draw the presumption or not*, it commits an error of law inasmuch as it is its legal duty to make up its mind to draw the presumption or not to draw it for reasons to be given by it.⁸ A Court will also commit an error of law if it deals improperly with the presumptions which the law raises.⁹ For instances of presumptions of law, see Sections 79 to 90 of the Evidence Act. Even in the case of a presumption of law, where a Court "may presume" a particular thing, *e. g.*, the genuineness of an ancient document under Section 90 of the Evidence Act, the matter is in the *discretion* of the

5. ('26) AIR 1926 Nag 435 (439).
6. ('22) AIR 1922 Bom 416 (417, 419) : 47 Bom 18.

Note 32

1. ('36) AIR 1936 Rang 383 (385).
2. ('38) AIR 1938 Nag 470 (472) : 1 L R (1938) Nag 535.
[See ('30) AIR 1930 Lah 443 (444).]
('12) 14 Ind Cas 1007 (1008) (Mad).]

3. ('11) 9 Ind Cas 169 (171) (Mad).
('96) 21 Bom 91 (95).
4. ('11) 9 Ind Cas 169 (171) (Mad).
('26) AIR 1926 Lah 672 (672).
('18) 46 Ind Cas 794 (795) (Nag).
('23) AIR 1923 Lah 239 (239).
('24) AIR 1924 Nag 160 (161).
('30) AIR 1930 Nag 200 (203).
('30) AIR 1930 Lah 936 (936).
5. ('72) 17 South W R 418 (418).
('72) 17 South W R 349 (350).
('72) 17 South W R 472 (474).
('20) AIR 1920 Sind 25 (26) : 14 Sind L R 128.
('21) AIR 1921 Sind 20 (22) : 15 Sind L R 84.
6. ('76) 25 South W R 503 (504).
7. ('34) AIR 1934 Cal 215 (216).
('30) AIR 1930 Lah 557 (557). (Presumption based on probabilities deduced from evidence.)
('25) AIR 1925 Nag 168 (169). (Presumption of user as of right from long and open user.)
('15) AIR 1915 Mad 113 (119) : 39 Mad 304.
('13) 19 Ind Cas 66 (67) (Cal).
('32) AIR 1932 Mad 343 (346, 350).
('39) AIR 1939 Nag 78 (80) : 1 L R (1939) Nag

8. ('30) AIR 1930 Lah 443 (444).
('20) AIR 1920 Lah 354 (355) : 1 Lah 206.
[See ('35) AIR 1935 Lah 912 (913). (Land entered as grave-yard in revenue records — Court disregarded in disregard of presumption under S. 44, regarding entries, and holding land not as grave-yard in binding not binding in second appeal.)]
9. ('68) 9 South W R 338 (342).
('32) AIR 1932 Lah 56 (57). (Where the Court raises a legal presumption that when the equity of redemption is purchased by the mortgagee, the mortgage is extinguished, there is a question of law for purposes of second appeal.)
[See also ('32) AIR 1932 Mad 415 (415).]

Court and, unless exercised in a non-judicial manner, cannot be interfered with in second appeal.¹⁰ The question whether a statutory presumption is *rebutted* is a question of fact.¹¹ The question of *burden of proof* is one of law and if it has been placed on the wrong party it is a ground of second appeal.¹² Where, however, the parties have adduced evidence in support of their cases, the question of onus disappears and therefore does not arise in second appeal.¹³

33. Admission or rejection of evidence and documents. — See Note 27 above.

34. Relevancy and sufficiency of evidence. — The relevancy of evidence is a question of law.¹ So also the question whether there is *any* evidence to support a finding.² But where there is evidence from which a conclusion of fact can be drawn, the *weight* of the evidence³ or the *sufficiency* of

[See (97) AIR 1937 Nag 230 (233, 234). (Prima-
rily onus of proof means duty of establishing case
—It never shifts and is question of law—Secun-
dary sense is duty of adducing evidence—It
shifts constantly throughout trial and is ques-
tion of fact.)
(99) AIR 1939 Nag 78 (80) : 1 L R (1939) Nag
160. (The question of burden of proof is a ques-
tion of law only when it is used as a final decid-
ing factor in the case.)]
[See also (96) AIR 1936 Rang 262 (265).
(92) AIR 1932 F C 28 (80) : 59 Ind App 29 (PC).]
13. (09) 3 Ind Gas 431 (431) (Cal).
(92) AIR 1932 F C 228 (230) : 13 Lab 687 : 59
Ind App 386 (PC).

(17) AIR 1917 Pat 708 (704).
(14) AIR 1914 Oudh 341 (342).
(24) AIR 1924 Lab 335 (335).
(34) AIR 1934 Nag 253 (254, 255).
Note 34
1. (97) 19 All 76 (92) : 28 Ind App 106 (PC).
2. (86) 12 Cal 93 (93).
(22) AIR 1922 Oudh 98 (98).
(35) AIR 1935 All 720 (722).
(35) AIR 1935 Mad 26 (26).
[See (36) AIR 1936 Pat 96 (97). (Court's conclu-
sion that no evidence exists or evidence is not
evidence supporting point — Question of law
arises.)]
3. (72) 17 Suth W R 314 (315).
(32) AIR 1932 Oudh 225 (227). (Value of account
books.)
(07) 29 All 267 (270).
(09) 4 Ind Gas 329 (329, 330) (Cal).
(15) AIR 1915 All 239 (240) : 37 All 524.
(15) AIR 1915 Oudh 194 (195).
(15) AIR 1915 Oudh 132 (133).
(17) AIR 1917 Cal 407 (408).
(18) AIR 1918 Cal 685 (685).
(32) AIR 1932 Mad 415 (415, 416). (Finding of
fact — Not coloured by wrong view of onus —
Binding.)
(31) AIR 1931 Nag 97 (97). (Finding that burden
not discharged is one of fact.)
(19) AIR 1919 Cal 721 (721) : 46 Cal 152.
(20) AIR 1920 Pat 726 (726).

10. (12) 15 Cal L Jour 7 (10).
(16) AIR 1915 Mad 839 (840).
(32) AIR 1932 Lab 43 (44).
(95) AIR 1935 Oudh 96 (101). (Question arising
in first appeal.)
11. (30) AIR 1930 F C 91 (93) : 11 Lab 199 (PC).
(32) AIR 1932 Mad 343 (350).
(92) AIR 1932 Mad 178 (174).
(18) AIR 1918 Cal 597 (597).
(22) 65 Ind Gas 527 (529) (Cal).
(24) AIR 1924 Lab 444 (447) : 5 Lab 84.
(31) AIR 1931 Lab 606 (605).
(25) AIR 1925 Cal 1138 (1134). (Rebuttal of pre-
sumption raised under S. 50, Bengal Tenancy
Act.)
(38) AIR 1938 Lab 445 (446, 447).
(98) AIR 1938 Lab 857 (859).
[See also (85) AIR 1935 Pat 415 (416). (Rebuttal
of presumption attached to entry in record of
rights.)
(37) AIR 1937 Lab 468 (470). (Question whether
presumption attaching to particular document
is rebutted is a question of fact.)
(39) AIR 1939 Cal 866 (868). (Finding that pre-
sumption as to entry of record of rights is
rebutted, if justified by evidence, should not be
disturbed.)
(36) 105 Ind Gas 763 (764) (Pat). (Question whe-
ther the presumption arising out of an entry in
the record of rights is rebutted by the evidence
adduced by a party is entirely a question of
fact.)
12. (21) AIR 1921 Lab 128 (128) : 2 Lab 219.

(32) AIR 1932 Cal 351 (353).
(21) AIR 1921 Lab 199 (200).
(22) 65 Ind Gas 715 (746) (Lab).
(21) AIR 1921 Lab 195 (197).
(18) AIR 1918 Oudh 103 (105).
(20) AIR 1920 Lab 295 (296) : 1 Lab 429.
(32) AIR 1932 Cal 351 (352, 353).
(30) AIR 1930 Cal 591 (593).
(38) AIR 1938 Lab 700 (702).
(31) AIR 1931 Nag 253 (254).
(38) AIR 1938 Nag 322 (322). (Evidence equally
admitted — Conclusion being impossible, Court
must come as determining factor—Question of
onus is one of law.)
(35) AIR 1935 Rang 256 (256) : 14 Rang 242 (PB).

unless such inference or the refusal to draw the inference, as the case may be, can be shown to be demonstrably wrong.³

The incidents of a "joint" tenancy are in the nature of a contract and consequently a decision on the question whether a certain "joint" is a tenure or a *rentcharge* is a finding of fact.⁴ Similarly, a finding as to joint tenancy,⁵ or as to the date of commencement of a tenancy,⁶ or as to whether the tenant has held at a uniform rate for 20 years or more,⁷ or as to whether a tenancy has been forfeited by denial of the title of the landlord,⁸ or as to whether certain charges are parts of rent or not,⁹ is a finding of fact.

The question whether the legal right of a tenant has determined is a question of law.¹⁰

See also the cases cited below.¹¹

36. Nature of possession. — A question as to the factum of possession is a

36. Nature of possession.—A question as to the factum of possession is a question of fact.¹ But the question whether possession is adverse or not though often one of fact, may also be a question of law or a mixed question of law and fact.² Where both the facts and the legal inference to be drawn therefrom are in dispute, the question will be one of mixed law and fact.³ Where the question of adverse possession is a matter of evidence merely, it is one of fact.⁴ But where the facts are not in

- (38) AIR 1938 Pat 333 (334). (Inference of permanent tenancy from facts found.)
- [See (39) AIR 1939 Pat 350 (351) : 179 I C 940 (941). (Whether tenancy is permanent or not is a mixed question of law and fact.)
3. (26) AIR 1926 Cal 592 (593).
4. (18) AIR 1918 Cal 517 (518).
5. (24) AIR 1924 All 281 (282).
- [See (36) 162 Ind Gas 334 (335) (Oudh). (Finding that the plot in suit belongs jointly to the parties is a finding of fact.)
6. (23) AIR 1923 P C 187 (187, 189) (PC). (26) AIR 1926 All 542 (543) : 48 All 588.
7. (26) AIR 1926 Cal 359 (360).
- (25) AIR 1925 Cal 632 (633).
- (36) AIR 1936 Cal 582 (584).
8. (33) AIR 1933 Lab 377 (378).
- [See also (36) AIR 1936 Pat 275 (280).]
9. (16) AIR 1915 Cal 17 (18).
10. (12) 15 Ind Gas 857 (859) (Oudh).

11. (39) AIR 1939 Cal 598 (594). (Whether joint lands purchased by proprietor become his khas lands under S. 22, Bengal Tenancy Act, is question of fact.)

(36) AIR 1936 Pat 411 (412). (Whether a new tenancy has been created can never be said to be a pure question of law; it is a question of mixed fact and law and a question which certainly depends upon a number of facts.)

(32) AIR 1932 All 393 (396) : 54 All 628. (Do.)

(31) AIR 1931 All 323 (324).

(31) AIR 1931 Oudh 381 (382).

(11) 10 Ind Cas 63 (64) (Mad). (Question of a widow's acquisition of a prescriptive title and the extent of the title acquired is one of fact.)

(21) AIR 1921 Lah 264 (264). (*Helid* to be one of fact.)

(193) 195 Ind Cas 590 (591) (195). (Do.)

Note 36

1. ('76) 25 Subh W R 13 (14).
('92) 15 Mad 101 (108) : 18 Ind App 149 (PO).
('14) AIR 1914 Cal 50 (51) : 21 Ind Cas 431 (431) :
41 Cal 52.
('16) AIR 1916 All 181 (182, 183).
('22) 67 Ind Cas 152 (153) (Lab).
('24) AIR 1924 All 924 (925).
('97) 1897 Unrep Fint Judge, p. 15.
('25) AIR 1925 Oudh 170 (170). (Finding of con-
tinuance of possession is one of fact.)
(39) AIR 1939 Mad 564 (568).
4. ('34) AIR 1934 All 692 (693).
3. ('11) 11 Ind Cas 185 (186) (Cal).
[See ('38) AIR 1938 Cal 117 (118, 119).]
fact and law.)
('86) AIR 1986 Lab 741 (742). (Mixed question of
fact and law.)
('88) AIR 1988 Sind 132 (138) : I.L.R. (1989) Kar 18.
('35) AIR 1935 Cal 760 (760).
('39) AIR 1939 Mad 564 (568).
('21) 60 Ind Cas 298 (301) (Cal).
(39) AIR 1939 Mad 564 (568).
(39) AIR 1939 Mad 564 (568).

dispute, the legal inference to be drawn from them is a question of law, which is open to examination in second appeal.⁵ Even where the question is one of legal inference from the facts found, the High Court will not interfere unless such inference is obviously wrong or unless the finding could not be legally arrived at upon the evidence.⁶ A finding on the question whether a person in possession is an ostensible owner or as to who is the true owner, is a finding of fact.⁷

37. Nature of property. — The question as to the nature of a particular property is one of fact unless it involves a consideration of legal principles, in which case it will be a question of mixed law and fact. Thus, the question whether a particular property is ancestral property¹ or a grove² or a "parjau" land³ or forms part of an estate⁴ or is a separate sub-division⁵ or was thrown into partnership assets⁶ or is joint family property⁷ or is moveable property,⁸ is a pure question of fact. But the question whether a property is a "*talukdari* property"⁹ or a "*sulka stridhana*"¹⁰ or has ceased to be part of a mahal¹¹ or is saleable¹² or transferable,¹³ has been held to involve questions of law. It has been held by the Allahabad,¹⁴ Calcutta¹⁵ and Lahore¹⁶ High Courts that the question whether a property has been dedicated to a religious or

(38) AIR 1938 Oudh 228 (245). (Question as to the date from which adverse possession commenced.)

5. (17) AIR 1917 All 42 (42).

(32) AIR 1932 Lah 72 (72).

(34) AIR 1934 All 288 (290).

(19) AIR 1919 P C 60 (61) : 42 All 152 : 46 Ind App 197 (PC).

(22) AIR 1922 Cal 54 (55).

(28) AIR 1938 Nag 65 (66).

(26) AIR 1926 Lah 482 (482). (So admitted.)

(31) AIR 1931 Lah 489 (490).

(26) AIR 1926 Cal 881 (881).

(35) AIR 1935 Cal 760 (760).

(37) AIR 1937 All 429 (431).

(38) AIR 1938 Sind 215 (216) : I.L.R. (1938) Kar 136.

(38) AIR 1938 Sind 206 (207) : I.L.R. (1938) Kar 140.

(38) AIR 1938 Sind 132 (138) : I.L.R. (1938) Kar 18.

[See also (39) AIR 1939 Nag 260 (261) : 1939 Nag 140 (392). (Effect of adverse possession against a Hindu widow on the reversionary right.)]

6. (95) 21 Bom 91 (96).

(11) 11 Ind Cas 52 (54) : 33 All 757.

7. (14) AIR 1914 All 232 (234) : 36 All 308.

(21) AIR 1921 Lah 138 (138).

(34) AIR 1934 Lah 517 (518).

(34) AIR 1934 Lah 406 (407). (Finding that land is not ancestral.)

(34) AIR 1934 Lah 351 (352) : 15 Lah 791. (Do.)

(33) AIR 1933 Lah 765 (765).

(33) AIR 1933 Lah 350 (350).

(23) AIR 1923 Lah 532 (533).

(24) AIR 1924 Lah 263 (263).

Note 37

1. (21) AIR 1921 Lah 138 (138).

(34) AIR 1934 Lah 517 (518).

(34) AIR 1934 Lah 406 (407). (Finding that land is not ancestral.)

(34) AIR 1934 Lah 274 (275) : 15 Lah 645.

(33) AIR 1933 Lah 765 (765).

(33) AIR 1933 Lah 350 (350).

(23) AIR 1923 Lah 532 (533).

(24) AIR 1924 Lah 263 (263).

(30) AIR 1930 Lah 1056 (1057).

(30) AIR 1930 Lah 744 (745).

(19) AIR 1919 Lah 130 (131) : 1919 Pun Re No. 1.

Pun Re No. 38.

(13) 1913 Pun L R No. 264, p. 890 (891) : 1913

(23) 5 Lah L Jour 11 (12).

was made waft.)

(33) AIR 1933 Lah 342 (342). (Whether property

(32) 33 Pun L R 288 (289).

(21) AIR 1921 Lah 343 (343).

16. (11) 9 Ind Cas 650 (650) (Cal).

15. (11) 9 Ind Cas 650 (650) (Cal).

14. (27) AIR 1927 All 377 (377).

(Transferability of right to offerings.)

13. (28) AIR 1928 All 721 (724) : 50 All 394.

(Pension whether saleable.)

12. (25) AIR 1925 All 652 (652) : 47 All 900.

11. (14) AIR 1914 All 517 (517) : 36 All 231.

10. (29) AIR 1929 All 25 (27).

law and fact.)

mutual character of land — Mixed question of

[See also (31) AIR 1931 Mad 213 (215). (Com-

9. (14) AIR 1914 Oudh 206 (207).

8. (22) AIR 1922 All 45 (45).

certain properties were joint properties.)

(34) AIR 1934 Oudh 177 (177). (Finding that

7. (32) AIR 1932 Oudh 144 (145).

6. (28) AIR 1928 P C 135 (137) (PC).

5. (34) AIR 1934 Lah 424 (425).

(27) AIR 1927 Cal 457 (458).

4. (24) AIR 1924 Mad 117 (118).

3. (26) AIR 1926 All 83 (84).

2. (24) AIR 1924 Oudh 306 (306) : 27 Oudh Cas 26.

the judgment-debtor is a question of fact.)

sonal properties of the legal representative of

execution of a decree are or are not the per-

whether certain properties proceeded against in

[See (38) AIR 1938 Pat 372 (374). (Question

(34) AIR 1934 Lah 517 (518).

stock.)

separate properties were thrown into common

(31) AIR 1931 Cal 666 (667). (Finding that

(31) AIR 1931 Lah 704 (704).

charitable purpose is a question of fact. The Oudh Chief Court has however held that such a question is one of law or at any rate a mixed question of law and fact.¹⁷ A finding as to ownership is a finding of fact¹⁸ though where it depends upon legal presumptions, it will be a mixed question of law and fact.¹⁹ Whether a wall erected by a co-owner on top of a joint wall is a joint wall or not is a question of law.²⁰

See also the undermentioned cases.²¹

38. Nature of contract or transaction.—Whether a contract can be implied from certain facts may be a question of fact or of law according to circumstances. If it is based on offer and acceptance, for instance, it is a question of fact. If it is a matter of inference of law to be drawn from proved facts or documents, it will be a question of law.¹ Thus, the question whether certain representations made amount to a warranty, is a question of law.² Even in the latter case if the presumption to be drawn for or against such contract is one depending upon the circumstances of the case, the lower Court's decision drawing or refusing to draw the presumption will be no error of law.³ The following findings with reference to contracts generally are findings of fact—

(1) A finding as to whether a contract has been superseded or not.⁴

(2) A finding as to the legal origin of a presumed contract.⁵

(3) A finding as to whether time was of the essence of a contract.⁶

(4) A finding as to whether a contract is hard and unconscionable or not binding.⁷

(5) A finding as to who committed breach of a contract.⁸

(6) A finding as to the damaged condition of goods in a contract for sale of goods.⁹

(7) A finding as to whether a tender was or was not within time.¹⁰

(30) 12 Lab L Jour 320 (320, 321). (Dedication

(31) AIR 1981 Lab 170 (172). (Dedication while

(31) AIR 1981 Lab 607 (608) : 12 Lab 540.

(Whether property is wakf.)

17. (12) 17 Ind Cas 303 (304) : 16 Oudh Gas 76.

(38) AIR 1938 Oudh 238 (240). (Question whether a building is a private or public mosque.)

[See also (37) AIR 1987 Sind 230 (231) : 81 Sind L R 510. (But when all facts are on record question whether such facts show a trust to be within provisions of S. 92, C. P. Code, is a question of law.)]

18. (23) AIR 1923 Lab 611 (612).

(28) 113 Ind Cas 886 (887) (Nag). (Whether a site belongs to public or an individual.)

(38) AIR 1938 Oudh 214 (215).

(38) AIR 1938 Oudh 186 (187) : 14 Luck 138.

19. (14) AIR 1914 Cal 811 (811).

20. (39) AIR 1939 Lab 28 (29).

21. (35) AIR 1935 Bom 47 (49, 50). (Question whether samadi inam lands are karami or jaidi is one of law.)

(39) AIR 1939 Lab 12 (13, 14). (Finding as to dedication of a well for public use is one of fact.)

(35) AIR 1935 Cal 413 (418). (Whether khaj is dedicated to public user is question of fact.)

(35) AIR 1935 Rang 129 (130). (Whether property is payin or letetpwa is not purely question of fact.)

(36) AIR 1936 Oudh 154 (155). (Question whether a road is a public road or a private road is rather a question of law than a question of fact and in any case it is partly a question of law.)

(39) AIR 1939 Oudh 48 (48) : 14 Luck 269. (Question whether character of grove land has changed is question of law.)

Note 38

1. (11) 9 Ind Gas 41 (44) (Mad). (Whether facts proved establish partnership is question of law.)

2. (12) 14 Ind Gas 135 (135) (All).

3. (94) 17 Mad 43 (47).

4. (86) 1886 All W N 18 (19).

5. (30) AIR 1930 Mad 339 (340).

6. (15) AIR 1915 Mad 546 (547).

(22) 1922 Pun W R No. 37.

(31) AIR 1931 Lab 696 (701).

7. (18) AIR 1918 Lab 264 (265).

(29) AIR 1929 Mad 673 (673).

8. (21) AIR 1921 Lab 316 (317).

(35) AIR 1935 Nag 111 (112) : 31 Nag L R 250.

9. (24) AIR 1924 Pat 240 (241).

10. (25) AIR 1925 Lab 353 (354).

39. State of mind, acquiescence, good faith, consent, intention, negligence, wilful neglect, misconduct, reasonable care, reasonable and probable cause and waiver.—The state of a mind of a person is a fact and a question relating thereto is a question of fact.¹ A finding therefore as to the intention,² or state of mind

- (8) A finding as to whether certain money was received as a deposit or by way of loan.¹¹
- (9) A finding as to the consideration for the contract being the love and affection between the parties.¹²
- The following question is a question of law—
- (1) Whether an agreement is in restraint of trade within the meaning of Section 27 of the Contract Act.¹³
- See also the undermentioned cases.¹⁴

Mortgage or sale—Finding as to, is finding of

(29) AIR 1929 Lah 530 (531). (Do.)

(28) 110 Ind Cas 408 (409) (Mad). (The question as to whether a particular document is executed on account of natural love and affection or not, is a question of fact.)

(16) AIR 1916 Lah 60 (61) : 1916 Pun Re No. 102. (The question as to whether a person made a transfer of his property with intent to defeat or delay his creditors within S. 4 (b) of the Insolvency Act is merely one of fact.)

(25) AIR 1925 Oudh 541 (541). (The question whether the legatees signing the will as witnesses did not intend to attest the will is a question of fact.)

(26) AIR 1926 Mad 33 (35). (Question of intention of fact.)

(26) AIR 1926 Mad 963 (964). (The question whether a member of a joint Hindu family who had made certain self-acquisitions has thrown such acquisitions into the common stock is essentially a question of fact.)

(26) AIR 1926 Oudh 614 (615). (Whether there was intention to partition.)

(27) AIR 1927 Cal 538 (542). (Creditor, instead of being actually paid taking renewed pro-note is a question of fact.)

(31) AIR 1931 Mad 804 (806) : 55 Mad 408. (Whether ratification is of whole or part of the transaction.)

(25) AIR 1925 Mad 1217 (1217, 1218). (Intention to keep alive mortgage.)

(37) AIR 1937 Sind 263 (266, 269). (Per Hawel-wala, A. J. C.; Rupchand Bilaram, A. J. C., contra.)

(37) AIR 1937 Nag 230 (232, 233). (Question whether there was an intention amongst the members of a joint Hindu family to separate is pure question of fact.)

(38) AIR 1938 P O 34 (35) : 1 T R (1938) Mad 551 : 65 Ind App 93 : 32 Sind L R 328 (P O). (Inference of intention from circumstances.)

11. (34) AIR 1934 Nag 219 (220).

12. (94) AIR 1934 Pat 44 (45).

13. (34) AIR 1934 Lah 110 (111).

14. (36) 38 Pun L R 590 (592). (A conclusion of the lower Appellate Court that a certain contract was not acted upon by the parties is a finding of fact.)

(37) AIR 1937 All 363 (366). (Finding by the lower Appellate Court as to when an agency terminated is binding in second appeal.)

(37) 1937 All L Jour 1885 (1885). (Finding that no actual damage or loss has been caused to the plaintiff by a breach of contract is one of fact.)

(35) AIR 1935 Lah 877 (878). (Finding whether a certain entry contains a distinct promise to pay within the meaning of S. 25 (3) of the Contract Act is one of fact.)

(37) AIR 1937 Pat 572 (577) : 16 Pat 527. (Whether a hand-note is the sole consideration for an advance and not merely a conditional payment or a collateral security, must be a question of fact.)

(35) AIR 1935 Pesh 121 (122). (Whether an agreement is void as opposed to public policy within the meaning of Ss. 23 and 25 of the Contract Act is a question of law.)

(39) AIR 1939 Lah 284 (285). (Finding as to genuineness of mortgage is one of fact.)

Note 39

1. See Note 28, ante.

(35) AIR 1935 Cal 168 (174) : 61 Cal 1005.

2. (16) AIR 1916 Lah 85 (86) : 1916 Pun Re No. 68.

(33) AIR 1933 Lah 588 (589).

(18) AIR 1918 Pat 593 (593).

(28) AIR 1928 All 61 (62) : 50 All 208.

(30) AIR 1930 Mad 590 (592).

(29) AIR 1929 Lah 90 (90). (Intention of execution of document—Finding as to, is finding of fact.)

(21) AIR 1921 Lah 263 (264). (Intention—To pass title to particular property—Finding as to, is one of fact.)

(31) 133 Ind Cas 440 (440) (Lah). (Benami—Question of fact.)

(31) 133 Ind Cas 551 (552) (Lah).

(26) 92 Ind Cas 42 (43) (Lah). (Intention—

(36) AIR 1936 Bom 160 (161) : 60 Bom 226. (Benami—Question of fact.) (36) AIR 1936 Cal 178 (179) : 63 Cal 846. (Do.) (36) AIR 1936 Lab 685 (687). (Whether the assured committed suicide deliberately and intentionally is a question of fact.) (36) 38 Pun L R 577 (578). (Finding that certain transaction was intended to defeat and delay creditors and was collusive is one of fact.) (38) AIR 1938 Pat 278 (280) : 17 Pat 430. (Finding whether the institution of a partition suit is evidence of clear intention to separate from the joint family is one of fact.) (36) AIR 1936 Rang 256 (260) : 14 Rang 242 (FB). (Whether transfer is benami.) (36) AIR 1936 Nag 186 (188). (Whether two persons agree on a certain matter and whether they have requisite mental intention necessary to give validity to their outward forms or acts of agreement are questions of fact.) [See (36) 19 Nag L Jour 801 (804). (Whether there was agreement to forgo balance of consideration is question of fact.)] [But see (36) AIR 1936 All 553 (554). (Question whether in given circumstances the occupier of a house should be deemed to have abandoned it depends upon the inference of the occupier's intention from the proved facts and is not necessarily one of fact.)] 3. (11) 12 Ind Cas 730 (732) (All). (36) AIR 1936 Lab 685 (687). (Whether the assured was of sound mind.) (38) AIR 1938 P C 91 (97) (P C). (The state of mind of a person is as much a fact as the state of his digestion.) (35) AIR 1935 Cal 168 (174) : 61 Cal 1005. 4. (16) AIR 1916 Lab 232 (233) : 1916 Pun Re No. 75. (34) AIR 1934 Pat 121 (122). (32) AIR 1932 Lab 531 (532) : 14 Lab 106. (16) AIR 1916 Lab 57 (57) : 1916 Pun Re No. 63. (25) AIR 1925 Lab 505 (506). (32) AIR 1932 Lab 322 (323). (Question whether conduct was bona fide.) (97) 24 Cal 825 (829). (70) 5 Beng L R App 59 (60). (Whether proceedings which had been taken to execute a decree had been taken bona fide.) (74) 13 Beng L R App 1 (2). (26) 92 Ind Cas 670 (672) (Oudh). (37) AIR 1937 Cal 314 (318). [But see (38) AIR 1938 Lab 704 (706). (Question whether party acted in good faith within the meaning of S. 14, Limitation Act, on facts found by lower Appellate Court is mixed question of law and fact.)] 5. (21) AIR 1921 Mad 198 (199). (23) AIR 1923 Cal 165 (166).

Questions of *waiver*, *acquiescence* and *estoppel* are not questions of fact but inferences of law from facts proved and are therefore open to examination in second appeal.¹²

The question of *negligence* is a question of fact.¹³ But whether the inference as to the negligence is warranted by the facts is a question of law.¹⁴ Again, where there is a special legal significance attached by statute to the word "negligence," the question whether there has been *such* negligence is a question of law.¹⁵ Similarly the legal standard of *reasonable care* required by Section 151 of the Contract Act,¹⁶ or by Section 41 of the Transfer of Property Act, is a question of law.¹⁷

Whether misconduct *can* be inferred from a set of facts is a question of law.¹⁸ The question of the existence or otherwise of reasonable and probable cause for the doing of a thing is a question of fact,¹⁹ though the question whether the proved facts

- (39) AIR 1939 Pat 13 (14). (The finding of the lower appellate Court as to the absence of reasonable and probable cause and to the existence of malice in a suit for damages for malicious arrest is one of law.)
 (34) AIR 1934 Lah 907 (908).
 12. (29) AIR 1929 Cal 437 (439) : 56 Cal 201. (99) 21 All 496 (501) : 26 Ind App 58 (P C). (Acquiescence.)
 (01) 28 Cal 738 (741). (Do.)
 (21) AIR 1921 Nag 167 (168). (Do.)
 (25) AIR 1925 Cal 288 (289). (Do.)
 (26) AIR 1926 Nag 416 (422). (Do.)
 (16) AIR 1916 Lab 370 (371) : 1916 Pun Ro No. 107. (Do.)
 (27) AIR 1927 Cal 220 (224). (Representation and acquiescence giving rise to estoppel — Question of the conduct is one of fact.)
 (10) 6 Ind Cas 138 (141). (Cal). (Waiver—Mixed question of law and fact.)
 (17) AIR 1917 Mad 47 (49). (Do.)
 (13) 19 Ind Cas 894 (895) : 37 Bom 480. (Waiver is primarily, and in most cases very largely, an inference to be drawn from facts, though in certain classes of cases this inference has come to be looked on as an inference of law.)
 (03) 27 Bom 1 (13). (P B). (Whether there has been waiver of the creditor's right to claim the whole on default of an instalment is a mixed question of fact and law.)
 (16) AIR 1916 Mad 901 (902). (Reversionsers consent inferred from proved facts is matter of law.) [But see (36) AIR 1936 Lab 159 (161). (The question whether a substance from suing coupled with other circumstances would amount to waiver is largely, if not wholly, a question of fact.)
 (19) AIR 1919 Oudh 384 (385).
 (15) AIR 1915 All 255 (256) : 37 All 350.]
 (33) AIR 1920 P C 88 (90). (P C).
 (33) AIR 1933 All 214 (215). (Contributory negligence.)
 (33) AIR 1933 Lab 337 (338).
 (27) AIR 1927 Mad 443 (444).
 (22) AIR 1922 Cal 817 (819).
 (27) AIR 1927 Oudh 478 (478).
 (30) AIR 1930 Pat 283 (286) : 9 Pat 733.
 (28) AIR 1928 All 166 (168). (Finding of no negligence.)
 (18) AIR 1918 Pat 413 (415). (Willful negligence.)

- (24) AIR 1924 Lab 594 (594). (Do.)
 (26) 94 Ind Cas 348 (348) (Lab). (Do.)
 (36) AIR 1936 Pat 84 (85). (Finding of no neglect or misconduct is not one of law.)
 [See (36) AIR 1936 All 771 (775) : 58 All 771. (Negligence is at least a mixed question of law and fact—Lower Court approaching it neither from wrong standpoint nor evidence pointing only to converse conclusion — No legal defect in finding — Such finding cannot be upset in second appeal.)]
 [See also (33) AIR 1933 All 158 (159). (Reasonable diligence is question of fact.)]
 14. (29) AIR 1929 Rang 17 (18) : 6 Rang 643. (25) AIR 1925 Mad 258 (258). (What is gross negligence is a mixed question of law and fact.) (26) AIR 1926 Mad 905 (905).
 (32) AIR 1932 All 139 (139). (Finding not approached from proper legal standpoint — Question not one of fact.)
 (37) AIR 1937 Mad 472 (474). (Certain facts whether amount to negligence or not can be considered in second appeal.)
 [See (35) AIR 1935 Mad 81 (86). (Minor decree against—Setting aside decree for negligence of guardian—Negligence must be such as leads to loss of a right, which must have been successfully asserted if the suit had been conducted with due care — Question of mixed law and fact.)]
 15. (21) AIR 1921 All 314 (316) : 43 All 29. (Whether acts and omissions constituted negligence within S. 167 (2) of the Agra Tenancy Act, 1901.)
 (22) AIR 1922 All 421 (421). (Do.)
 (24) AIR 1924 All 613 (613). (U. P. Land Revenue Act.)
 (28) AIR 1928 Lab 837 (838) : 10 Lab 329 (Do.)
 (16. (24) AIR 1924 Cal 92 (95).
 (27) AIR 1927 All 158 (159). (Mixed question of law and fact.)
 [But see (27) AIR 1927 Nag 41 (42).]
 18. (37) AIR 1937 Pat 289 (292).
 19. (01) 25 Bom 332 (336). (P C).
 (25) AIR 1925 Oudh 359 (359) : 28 Oudh Cas 387. (26) 91 Ind Cas 112 (113) (Oudh).

warrant the inference of a reasonable and probable cause is one of law.²⁰ The High Court of Patna²¹ has, however, held that it is a question of law. The High Court of Lahore has expressed conflicting views.²² It is submitted that the view of the Patna High Court is not correct. The attempt made in the Patna case to distinguish the Privy Council decision in *Pestonji Modi v. Queen Insurance Co., Ltd.*,²³ Bombay 332 (336) is not satisfactory and the decisions which are purported to be followed only lay down the rule that the *inferences* from facts is a question of law.

40. Existence of liability.—Questions relating to the existence of liability depend upon principles which are generally principles of law. Consequently, such questions involve questions of law.¹ See also Note 28 *ante*.

41. Existence of custom.—See Note 21 *ante*.

42. Status.—Where the question of status depends upon certain legal conditions being made out, it is a question of law.¹ Otherwise, it is a question of fact.²

(13) 21 Ind Cas 232 (232) : 7 Low Bur Rul 39. (The question if a trustee could divest himself of his office is a question of law.)
(28) AIR 1928 Cal 123 (124). (Question as to personal liability on a pro-note is one of law.)
(30) AIR 1930 Cal 815 (816) : 58 Cal 585. (Whether a person is a legally constituted agent or not upon certain admitted facts is a question of law.)

Note 42

1. (16) AIR 1916 Pat 417 (417) : 1 Pat L Jour 157. (25) AIR 1925 Cal 1238 (1239). (Tenancy.)
(27) AIR 1927 Pat 209 (212) : 6 Pat 698 (FB). (Whether questions determining status of tenure-holders are themselves questions of law : *Quere*.)
(27) AIR 1927 Nag 200 (201).
(11) 9 Ind Cas 394 (395) : 38 Cal 278. (Tenancy.)
(25) AIR 1925 Cal 761 (765). (Do.)
(25) AIR 1925 Mad 768 (768, 769). (Partnership.)
(24) AIR 1924 Nag 410 (411) : 21 Nag L R 12. (Inference of unequivocal declaration of intention to separate is one of law.)
(36) AIR 1936 Nag 29 (30). (Question whether ancestors of party were 'inferior holders' or 'tenants' or occupied some other position is purely one of law.)
(37) AIR 1937 Nag 230 (238). (Actual severance of status is a question of law.)
(35) AIR 1935 Mad 268 (272, 273). (Question as to whether relationship of landlord and tenant exists.)
[See also (86) AIR 1936 Mad 180 (181, 182). (Whether person takes limited or absolute estate is not question of fact.)
(36) AIR 1936 Oudh 97 (99). (Status of person or his right or title to land is a mixed question of law and fact dependent on interpretation of documents of title.)]

2. (25) AIR 1925 P C 49 (50, 51) : 52 Ind App 83 : 48 Mad 254 (PC). (Whether a Hindu family is joint or divided.)
(33) AIR 1933 Lah 451 (452). (Finding that lady is not pardanashin is one of fact.)
(34) AIR 1934 Nag 44 (45). (Minority is question of fact.)
(34) AIR 1934 Pat 48 (49). (Finding as to jointness or separateness is one of fact.)

(29) AIR 1929 All 429 (430).
(39) AIR 1939 Mad 783 (786) : 49 Mad L V 664 (668).
(35) AIR 1935 Bom 355 (356). (Suit for malicious prosecution.)
(36) AIR 1936 All 441 (441, 442).
(39) AIR 1939 All 554 (557) : 1939 All L Jour 367 (371) : 1 L R (1939) All 424.
20. (01) 24 Mad 549 (552, 553). (But if the inference is not warranted by facts there will be an error of law.)
(01) 28 Cal 591 (593). (Propriety of inference is a question of law.)
(10) 6 Ind Cas 675 (680) (Cal). (Whether facts warrant inference is a question of law.)
(11) 11 Ind Cas 729 (734) (Cal). (Whether the inference drawn therefrom is legitimate is a question of law.)
(30) AIR 1930 Cal 392 (396) : 57 Cal 25. (Inference open to second appeal.)
(33) AIR 1933 Nag 28 (26) : 28 Nag L R 312. (32) AIR 1932 All 386 (389). (Reasonable and probable cause is a question of law and fact.)
(39) AIR 1939 Mad 783 (786) : 49 Mad L V 664 (668).
[See also (32) AIR 1932 Mad 601 (603) : 35 Mad L V 495 (496). (Reasonable and probable cause is a question of law and fact.)]
21. (16) AIR 1916 Pat 174 (175) : 1 Pat L Jour 149. (32) AIR 1932 Pat 91 (92) : 10 Pat 842.
(39) AIR 1939 Pat 13 (14).
22. (32) AIR 1932 Lah 183 (185). (It is a question of law.)
(33) AIR 1933 Lah 263 (264) : 14 Lah 46. (It is a question of fact.)
(35) AIR 1935 Lah 765 (767) : 17 Lah 190. (Question whether facts found amount to absence of reasonable and probable cause is one of law—Distinguishing 25 Bom 332 (PC).)
Note 40
1. (06) 33 Cal 1047 (1061) : 33 Ind App 165 : 2 Nag L R 130 (PC). (Though a person may not have been duly appointed executor, he may render himself responsible as executor if he intermeddles with the estate of the deceased—Misapplication of law on this point is a good ground for a second appeal.)

Where the principles of law applicable to the question have been misconceived,³ or where there has been a misapprehension of the evidence,⁴ or an entire misconception of the real question that has to be tried,⁵ there will be an error of law. See also Note 28 ante.

The question whether a certain woman is a 'public prostitute' within the meaning of a particular enactment (e.g., Section 152 (2) of the Punjab Municipal Act), is a question of law.⁶

43. Mortgage. — 'The question as to whether there has been a merger of interest or not, is a mixed question of law and fact.'⁷

44. Limitation. — 'Questions of limitation are ordinarily mixed questions of law and fact.' Similarly, the question whether the facts proved come within any provision of the Limitation Act is a mixed question of law and fact.⁸

But the following questions are questions of fact —

(1) Whether a plaintiff filed a petition in a wrong Court in good faith and conducted it diligently, so as to secure exclusion of time under Section 14 of the Limitation Act?⁹

- (33) AIR 1933 Oudh 27 (25). (Finding of non-separation is one of fact.)
 (21) AIR 1921 Lah 257 (257). (Whether a Hindu family is joint or divided.)
 (26) AIR 1926 Lah 113 (113, 114). (114.)
 (23) AIR 1923 Lah 626 (627, 628).
 (28) 100 Ind Cas 154 (159) (Lah). (Discretionary.)
 (19) AIR 1915 Lah 273 (273). (That a man has taken to life of celibacy.)
 (16) AIR 1916 Lah 97 (97). (Whether parties follow Mahomedan law.)
 (20) AIR 1920 Lah 150 (150). (Legitimacy.)
 (27) AIR 1927 AH 110 (111). (111.)
 (22) AIR 1925 Pat 307 (308). (Minors.)
 (21) AIR 1921 Lah 350 (351). (Plaintiff's relation-ship.)
 (22) AIR 1927 Mad 185 (187). (Whether certain persons acted as heirs or administrators in conducting a certain debt.)
 (28) AIR 1928 Nag 150 (151). (Whether a person is a hereditary death.)
 (37) AIR 1937 Nag 287 (289) : 1 L R (1938) Nag 221. (Findings that a Hindu family is joint and that certain person is its manager — questions of fact.)
 (37) AIR 1937 Sind 312 (315). (Whether person is manager of property, nature of management and extent of his powers as manager are questions of fact.)
 (36) AIR 1936 Cal 269 (273). (Separation of one member of the joint family — Whether others are separate is a question of fact.)
 (36) AIR 1936 Pat 129 (129). (Whether a person is legal heir and agnate.)
 (35) AIR 1935 Bom 333 (336). (Question of relationship is one of fact.)
 (38) AIR 1938 Cal 721 (728). (Finding that tenants have occupancy rights and are ryots.)
 (36) AIR 1935 Pat 256 (260). (Whether plaintiff is son of a certain person.)
 (35) AIR 1935 Oudh 80 (81) : 11 Luck 199. (Question whether plaintiff is legitimate son and heir of a certain person.)

- (35) AIR 1935 Pat 256 (256). (Facts admitted—Question of limitation thereon is one of law.)
 2. (27) AIR 1927 Pat 256 (256).
 3. (27) AIR 1927 Lah 909 (910).
 1. (27) AIR 1927 Cal 30 (31).
 (39) AIR 1939 Rang 42 (44).
 [See (35) AIR 1935 AH 716 (717). (Facts admitted—Question of limitation thereon is one of law.)]
 Note 44
 challenged in second appeal.)
 merged, is properly one of fact and cannot be separate and that consequently there is no inferior interest intends to keep the two interests the holder of a superior interest acquiring an [See (35) 39 Cal W N 691 (696). (Finding that (18) AIR 1918 Pat 651 (652).
 1. (27) AIR 1927 Cal 186 (189).
 Note 43
 (30) AIR 1930 Lah 821 (825).
 6. (26) AIR 1926 Lah 461 (462).
 5. (25) AIR 1925 Nag 231 (237).
 exclusion of evidence.)
 (31) AIR 1931 Pat 15 (19). (Finding based on 4. (31) AIR 1931 Nag 11 (15).
 3. (26) AIR 1926 Nag 389 (390) : 21 Nag L R 63. It is inference of legal effect of facts found.)
 of Hindu family—Finding is not one of fact—[But see (31) AIR 1931 Nag 13 (14). (Disruption of joint family.)
 (33) AIR 1931 Lah 968 (969). (Adoption.)
 (32) AIR 1931 AH 351 (353). (Finding that it is an Hindu family.)
 (35) AIR 1935 Pat 312 (314) : 11 Pat 755 (S B). (Question whether person is member of a joint family.)
 (34) AIR 1934 Nag 260 (261) : 1939 Nag L Jour 391 (392). (Whether woman is mistress or is married.)
 (33) AIR 1933 Lah 260 (261) : 1939 Nag L Jour 391 (392). (Whether person is mistress or is married.)
 (32) AIR 1932 Lah 303 (303). (Whether a person is a member of another.)
 (31) 157 Ind Cas 205 (205). (A finding that the plaintiff is the adopted son of the defendant is a question of fact.)
 (30) AIR 1930 Lah 109 (109). (Finding that the facts are established as stated in the pedigree is a question of fact.)

- (2) Whether a person had attained majority at any particular time.⁴
- (3) The time requisite for obtaining copies which has to be deducted in calculating the time for preferring an appeal.⁵
- (4) Whether there is sufficient cause for extending time under Section 5 of the Limitation Act.⁶

45. Existence of legal necessity for, and binding nature of, transaction.—The question of legal necessity for an alienation is ordinarily a question of fact,¹ unless the application of any *principle of law* is also in question, in which case it will be a question of law.² As in the case of other findings of fact, the *propriety of the inference* drawn from facts is always a question of law and can be examined in second appeal.³

The question whether a guardian was justified in entering into a compromise on behalf of a minor,⁴ and the question of the sufficiency of notice in connexion with an objection that an award is not binding,⁵ are questions of fact. Similarly, the question whether a family arrangement,⁶ or an alienation by the guardian is binding on a minor, is a question of fact.⁷ The existence of an antecedent debt is also a question of fact.⁸ It has been held in the undermentioned case⁹ that the question whether the guardian of a minor is justified in alienating the property of the minor for necessity is a mixed question of law and fact.

46. Existence of nuisance.—A finding that no nuisance has been proved,¹ a finding that a public lane has not been narrowed so as to cause damages to the residents

4. (08) 81 Mad 540 (543).
- (07) 29 All 29 (32) : 34 Ind App 1 (PC).
5. (94) 1894 Pun Re No. 6, p. 8.
- (18) AIR 1918 Lah 29 (29, 30) : 1918 Pun Re No. 100.
- (22) AIR 1922 Lah 428 (423).
6. (16) AIR 1916 Lah 146 (148) : 1916 Pun Re No. 88.
- (31) AIR 1931 All 28 (28).
- (30) 128 Ind Cas 83 (83) (Lah).
- [See (30) AIR 1930 Lah 1068 (1070), *Judicial discretion wrongly exercised in refusing extension—Refusal on ground that appeal bad on merits—High Court interfered.*]
- (30) AIR 1930 Oudh 184 (184). (Grounds for refusal of extension invalid—Court interfered in second appeal.)

Note 45

1. (21) AIR 1921 Lah 304 (307).
- (32) AIR 1932 Lah 473 (474) : 13 Lah 826. (Absence of legal necessity.)
- (33) AIR 1933 Lah 343 (343) : 14 Lah 584.
- (33) AIR 1933 Oudh 31 (32) : 8 Luck 182.
- (32) 33 Pun L R 607 (608).
- (14) AIR 1914 Lah 120 (120).
- (14) AIR 1914 Lah 314 (314).
- (15) AIR 1915 Lah 374 (375).
- (22) AIR 1922 Lah 398 (398).
- (23) AIR 1923 All 20 (21).
- (23) AIR 1923 All 28 (28).
- (23) AIR 1923 Lah 669 (670).
- 1 Hay 257.
- (24) AIR 1924 Lah 685 (685).
- (27) AIR 1927 Lah 606 (607) : 8 Lah 340.

- (34) AIR 1934 Lah 517 (519).
- (35) AIR 1935 Mad 481 (482). (Alienation by Hindu father—Question whether debts are incurred for necessary purposes binding on the family is one of fact.)
- (37) AIR 1937 Nag 380 (382) : ILR (1937) Nag 111.
- (36) AIR 1936 Pat 275 (278).
- (35) AIR 1935 Pat 175 (176). (Alienation by Hindu widow whether for legal necessity or not, is a question of fact.)
- [See (36) AIR 1936 Pat 426 (428). (Legal necessity is a mixed question of law and fact.)]
2. (25) AIR 1925 Oudh 557 (557) : 27 Oudh Cas 329. (Alienation by Hindu widow—Enquiry by alienee as to legal necessity—Sufficiency of enquiry is question of law.)
- (12) 13 Ind Cas 945 (946) (All).
- (27) AIR 1927 Lah 896 (897).
- (36) AIR 1936 Pat 275 (279, 280). (Question whether the lower Appellate Court misdirected itself in presuming that there was legal necessity is a question of law.)
- (35) AIR 1935 Lah 440 (440). (Hindu widow—Question whether provision for marriage of daughter's daughter is a legal necessity.)
3. (26) AIR 1926 Nag 332 (333).
- (26) AIR 1926 Nag 486 (487).
4. (25) AIR 1925 Mad 1285 (1287).
- (27) AIR 1927 Cal 619 (621).
- (21) AIR 1921 Lah 291 (291).
- (06) 4 Cal L Jour 485 (487) : 34 Cal 36.
- (26) AIR 1926 Oudh 33 (33, 34).
- (34) AIR 1934 Lah 329 (330).
- Note 46
- (25) AIR 1925 Lah 424 (424).

in the lane,² and a finding that a latrine is not likely to cause pollution to the water of a well,³ are all questions of fact.

47. Interpretation and applicability of the law.—Questions relating to the interpretation and applicability of law are obviously questions of law. Thus, the question whether correct tests have been applied in determining the infringement of legal rights,¹ or whether on the facts proved a relief prayed for should be granted,² or, whether in the circumstances of a case an appeal lies,³ or as to what constitutes exclusion from a joint estate,⁴ or whether an estoppel arises on the facts found,⁵ or whether the requisites for *res judicata* are proved,⁶ or whether on the facts proved a person can be called a "trespasser,"⁷ or whether the occasion on which a libellous statement is alleged to have been made was a privileged one,⁸ is a question of law. Similarly, the question whether a particular Section of an Act applies or not, to the facts proved in a case, is a question of law.⁹ Thus, the question whether a stipulation in a deed is by way of penalty under Section 74 of the Indian Contract Act,¹⁰ is a question of law.

The following questions have been held to be mixed questions of law and fact :

(1) Whether an alteration in a document is 'material' or not.¹¹

(2) What is the reasonable time for presentation for payment of a bill of exchange.¹²

(3) What are "necessaries" within the meaning of the term, under Section 68 of the Indian Contract Act.¹³

(4) Whether there has been a proper investigation of a claim preferred under O. 21 R. 58 of the Code so as to make an order therein binding on the claimant.¹⁴

(5) Whether a deposit of decretal amount by an unregistered purchaser of a transferable under-tenure is sufficient under the Sale of Under Tenures Act (VIII of 1865).¹⁵

(6) Whether there was a partnership as defined in the Contract Act.¹⁶

(7) AIR 1929 All 504 (505).
3. ('26) AIR 1926 Nag 50 (50).

Note 47

1. ('14) AIR 1914 P C 45 (47) : 42 Cal 46 : 41 Ind App 180 (P C).

2. ('18) 35 All 487 (498) : 40 Ind App 182 (P C).

3. ('14) AIR 1914 Cal 592 (594).

4. ('17) AIR 1917 P C 77 (77) (P C).

5. ('18) AIR 1918 Lab 261 (282) : 1918 Pun Ro No. 46.

6. ('33) AIR 1933 Lab 606 (609).

7. ('16) AIR 1916 Pat 381 (382) : 1 Pat L Jour 47.

8. ('39) AIR 1939 Pat 190 (193).

9. ('28) AIR 1928 All 583 (584) : 45 All 520.

(26) AIR 1926 Pat 495 (497). (Whether facts amount to "notice" under the Bengal Tenancy Act.)

(29) AIR 1929 Cal 366 (367). (Division of tenancy under S. 88 of the Bengal Tenancy Act.)

(15) AIR 1915 Lab 143 (143) : 1915 Pun Ro No. 69. (Whether building is a "shop" within S. 13, Punjab Pre-emption Act.)

(30) AIR 1930 Lab 141 (142). (Whether transfer is a "sale" under the Punjab Pre-emption Act.)

15. ('13) 20 Ind Cas 337, 339 (Cal).

16. ('22) AIR 1922 Nag 96 (97).

11. ('25) AIR 1925 Nag 243 (244).

12. ('29) AIR 1929 Lab 577 (577) : 11 Lab 34.

13. ('24) AIR 1924 Nag 360 (361).

14. ('17) AIR 1917 Oudh 99 (100) : 19 Oudh Cas 357.

15. ('13) 20 Ind Cas 337, 339 (Cal).

16. ('22) AIR 1922 Nag 96 (97).

However, where the law and its application are clear and the only question relates to facts and their proof, the finding will be a finding of fact.¹⁷

48. Abandonment.—Abandonment is a question depending on the nature of evidence adduced in each case.¹ It is largely a question of fact in the sense that the lower Court's inference for or against abandonment will not, ordinarily, be interfered with in second appeal.² But the High Court can always consider the propriety of the lower Court's inference from the facts established by evidence.³ And such a question, viz., whether the facts found warrant the inference of abandonment, will be a question of law.⁴

49. Foreign law.—What a foreign law is on any particular point is a question of fact.¹

50. Acquisition of easement and customary rights of privacy.—A finding as to the acquisition of a right of easement¹ or as to the infringement

17. ('69) 11 Suth W R 263 (264). (Whether notice of execution was properly served.)
 - (21) AIR 1921 Nag 94 (95). (Payment of interest.)
 - (26) AIR 1926 Nag 245 (246). (Whether payment is to be regarded as interest.)
 - (26) AIR 1926 All 329 (330). (Whether a payment of interest can be said to be made 'as such'.)
 - (29) AIR 1929 Lab 154 (155). (Finding that a partnership is dissolved.)
 - (27) AIR 1927 All 215 (215). (Whether notice under Railways Act, S. 140 was duly served.)
 - (16) AIR 1916 Cal 554 (557) : 42 Cal 888. (Whether "silk" is manufactured or not within the meaning of Sec. II of the Railways Act.)
 - (07) 11 Cal W N 794 (800) : 34 Ind App 133 : 34 Cal 718 (P.C.). (Whether the erection of an indigo factory will render land unfit for agriculture.)
 - (20) AIR 1920 All 246 (247) : 42 All 819 (326). (Whether a suit was contentious within the meaning of S. 52, Transfer of Property Act.)
 - (21) 63 Ind Gas 169 (170) (Cal). (Fraudulent nature of transfer.)
 - (29) AIR 1929 All 330 (331). (Question whether the particular trees could or could not be removed.)
 - (23) AIR 1923 Lab 443 (444). (Whether a place is a town.)
 - (26) AIR 1926 Lab 542 (542). (Town or village.)
 - (21) AIR 1921 Lab 201 (202). (Factum of marriage between the parties.)
 - (24) AIR 1924 Lab 188 (189). (Do.)
 - (14) AIR 1914 Lab 377 (378). (Do.)
 - (90) 1890 Pun Re No. 135. (Marriage whether had taken place by Chadar Andazi.)
 - (07) 9 Bom L R 382 (387). (Sufficiency of accommodation for residence of Hindu widow.)
 - (22) AIR 1922 Cal 429 (434) : 49 Cal 477. (Whether or not a particular illness constitutes Marz-ul-munt.)
 - (24) AIR 1924 Lab 382 (382). (Existence of wake.)
 - (17) AIR 1917 Mad 671 (671). (Misjoinder.)
 - (30) AIR 1930 Cal 315 (318). (Notice to quit.)
 - (26) AIR 1926 Lab 21 (23). (Question whether an Alia maliik had rights in Shamiyat.)
 - (27) AIR 1927 Lab 879 (880). (Whether the plaintiff had sufficient cause for not producing his evidence under O. 17 R. 1, O. P. Code.)
1. ('69) 11 Suth W R 285 (286). (Right of user.)
 1. ('30) 1930 Lab 177 (177).
 - Note 50
 1. ('26) AIR 1926 Mad 218 (219).
 - Note 49
 - (35) AIR 1935 Cal 80 (82) : 61 Cal 937.
 - (36) AIR 1936 All 553 (554). (Abandonment of house.)
 - (28) AIR 1928 Cal 891 (891).
 - (21) AIR 1921 Lab 229 (231).
 - (30) AIR 1930 Lab 215 (215).
 3. See Note 28 ante.
 - Note 48
 - (32) AIR 1932 Cal 405 (408). (Mixed question of law and fact.)
 - (28) AIR 1928 Lab 924 (925) : 9 Lab 487.
 - (29) AIR 1929 Cal 120 (121).
 - (26) AIR 1926 Cal 751 (752).
 - (25) AIR 1925 Pat 741 (743) : 4 Pat 838.
 - (24) AIR 1924 Cal 366 (367).
 - (21) AIR 1921 Lab 162 (162).
 - (19) AIR 1919 Lab 299 (299) : 1919 Pun Re No. 41.
 - (16) AIR 1916 Cal 155 (156).
 - (34) AIR 1934 Lab 163 (163).
 - (13) 20 Ind Gas 198 (199) (Cal).
 2. ('35) AIR 1935 Cal 80 (82) : 61 Cal 937.
 1. ('10) 1910 Pun W R No. 13, page 34.
 - Note 48
 - ing that a gift is invalid under S. 53, T. P. Act.)]
 - [See also ('31) AIR 1931 Oudh 344 (344). (Finding the form of marriage is a question of law.)]
 - [See ('26) AIR 1926 All 1 (3) : 48 All 126. (But of business.)]
 - (39) AIR 1939 Pat 264 (265). (Finding that a book of account is one kept in the regular course of business.)
 - Act of 1922 comes into force is one of fact.)
 - i. e., before or after the Oudh Rent Amendment, had been sub-let before or after a particular date, sub-let at the time of the institution of the suit a particular land which is alleged to have been one of fact.)
 - (36) 1936 R D 268 (269). (The question whether that land has been rendered unfit for tenancy is using land for building huts—Finding of Court breach of S. 22, Chota Nagpur Tenancy Act, by AIR 1939 Pat 161 (161). (Tenant committing

thereof is a question of fact. Similarly, a question as to whether an easement is one of necessity,³ or as to whether a customary right of privacy exists in a particular place,⁴ or as to whether such right has been infringed,⁵ is a question of fact.

51. Miscellaneous.—*Representation*.—It has been held by the High Court of Madras that, where the facts are known, the question whether a Hindu son was effectively represented in a former suit, is an inference of law from facts, and is therefore a question of law.¹ The High Court of Calcutta has, however, held that the question whether one heir of a tenant represents another or the tenancy, is a question of fact.²

Quantum of damages.—The measure of damages awardable in a particular case is a question of fact.³

Question of market-value of property.—The question of the market-value of a property is a question of fact.⁴

The following have also been held to be questions of fact:—

(1) Whether a caste was split up or not.⁵

(2) Whether two houses have a common entrance.⁶

(3) Whether a person is the owner of a particular property.⁷

(4) Whether a particular standard of measurement prevails in a particular place.⁸

(5) Whether certain lands appertain to one village or another.⁹

(6) Whether parties agreed to a certain decree being passed.¹⁰

(74) AIR 1924 Lah 488 (489). (Finding that no

right of way was granted.)

[See also (85) AIR 1935 Lah 346 (346).]

2. (28) AIR 1928 Lah 980 (981, 982). (Finding

as to deprivation of light not inconveniencing

user so as to entitle him to injunction is a find-

ing of fact.)

(81) AIR 1931 Mad 128 (131). (Whether a parti-

cular user of passage right imposes additional

burden on servient herbage.)

(85) AIR 1935 Lah 558 (559). (Suit for infringe-

ment of right to easement of light and air—

Finding that if defendant builds in particular

way, plaintiff will get sufficient light is one of

fact.)

3. (27) AIR 1927 Mad 963 (963). (Easement of

necessity.)

4. (21) AIR 1921 Sind 155 (156) : 16 Sind L.R. 17.

(Customary right of privacy.)

5. (10) 6 Ind Cas 398 (399) (All). (Right of

privacy.)

(29) AIR 1929 Oudh 535 (536). (That there had

been no fresh or substantial interference with

the plaintiff's former right of privacy was held

to be a finding of fact.)

Note 51

1. (27) AIR 1927 Mad 406 (408).

2. (11) 10 Ind Cas 116 (116) (Cal).

(26) AIR 1926 Cal 517 (518).

(27) AIR 1927 Cal 81 (82).

(29) AIR 1929 Cal 28 (30).

3. (1865) 2 South W R 235 (236).

(34) AIR 1934 All 392 (393). (The High Court how-

ever dealt with the question in second appeal.)

(38) AIR 1938 Nag 29 (30) : 28 Nag L R 320.

(34) AIR 1934 Pat 16 (18).

(33) AIR 1933 Nag 29 (30) : 28 Nag L R 320.

(34) AIR 1934 Pat 16 (18).

(38) AIR 1938 Nag 29 (30) : 28 Nag L R 320.

(34) AIR 1934 Pat 16 (18).

(38) AIR 1938 Nag 29 (30) : 28 Nag L R 320.

(34) AIR 1934 Pat 16 (18).

(38) AIR 1938 Nag 29 (30) : 28 Nag L R 320.

(34) AIR 1934 Pat 16 (18).

(38) AIR 1938 Nag 29 (30) : 28 Nag L R 320.

(34) AIR 1934 Pat 16 (18).

(38) AIR 1938 Nag 29 (30) : 28 Nag L R 320.

(But the finding may be vitiated in special cir-
cumstances by matters which raise a question
of law.)
(68) 10 South W R 164 (165).
(06) 3 Cal L Jour 140 (141).
(09) 31 All 338 (334, 335).
(11) 9 Ind Cas 984 (985) (All).
(21) AIR 1921 Pat 341 (341).
(12) 17 Ind Cas 517 (517) (All). (Reasonable
compensation.)
(32) AIR 1932 Nag 118 (119) : 28 Nag L R 142.
(36) AIR 1936 Nag 70 (70). (Adequacy of damages,
ordinarily a question of fact.)
[See (34) AIR 1934 All 392 (393). (Where the
damages have been assessed on wrong principle,
the finding as to quantum of damages can be
reviewed in second appeal.)]
But see (14) AIR 1914 Lah 531 (534) : 1915
Fun Re No. 1.]
4. (26) AIR 1926 Oudh 68 (69).
(29) AIR 1929 Lah 137 (138).
(29) AIR 1929 Oudh 244 (246) : 4 Luck 643.
(30) AIR 1930 All 363 (365) : 52 All 532.
5. (26) AIR 1926 Bom 69 (70) : 50 Bom 124.
6. (25) AIR 1925 Lah 257 (258).
7. (26) AIR 1926 Mad 1052 (1053).
(33) AIR 1933 All 603 (604).
8. (18) AIR 1918 P C 92 (93, 94) : 46 Cal 189 :
45 Ind App 183 (PC).
(21) AIR 1921 Cal 220 (222). (As to the length of
the unit of measurement on the basis of which
rent has to be paid.)
9. (29) AIR 1929 Oudh 524 (524).
(34) AIR 1934 Oudh 449 (450).
10. (29) AIR 1929 Bom 68 (69).

- (7) Question as to what portion of a property is mortgaged.¹¹
- (8) Whether a *kotha* was built within 12 years.¹²
- (9) Whether a partnership was dissolved.¹³
- (10) Question of non-access.¹⁴
- (11) Whether a certain unpublished manuscript was handed over to a party and whether it was improperly used by him in breach of confidence.¹⁵

See also the case cited below.¹⁶

52. Finding of fact binding in second appeal. — See also Section 107, Notes 12 to 15.

An error of fact is not one of the grounds of second appeal mentioned in Section 100. The reason, as has already been pointed out in Note 2, is that public interest requires that there should be an end to litigation even at the risk of occasional error, and Sections 100 and 101 taken together distinctly prohibit second appeals on questions of fact,¹ unless in the process of arriving at a finding of fact the Court has committed an *error of law* or a substantial error of procedure.² Thus, the High Court can neither investigate the grounds on which the finding has been arrived at³ nor interfere with it.⁴ It may be that the evidence is unsatisfactory or

- 11. ('34) AIR 1934 All 152 (155): 56 All 496.
- 12. ('34) AIR 1934 Lah 529 (530).
- 13. ('33) AIR 1933 Pat 78 (79): 12 Pat 139.
- 14. ('34) AIR 1934 Nag 124 (125).
- 15. ('35) AIR 1935 All 1008 (1010). (Question of dissolution of partnership is mixed question of law and fact.)
- 16. ('37) AIR 1937 Nag 139 (140): 1 L R (1937) Nag 214.

Note 52

- 1. ('14) AIR 1914 P C 87 (89): 37 Mad 443: 41 Ind App 258 (PC).
- 2. ('37) AIR 1937 All 262 (263). (Finding of fact based on elaborate consideration of evidence—Finding is conclusive though first Appellate Court's view as to admissibility of a document is technically erroneous.)
- 3. ('38) AIR 1938 Pat 278 (280): 17 Pat 430.
- 4. ('36) AIR 1936 Pat 129 (129).
- 5. ('36) AIR 1936 Pat 237 (238).
- 6. ('35) AIR 1935 All 501 (501) (SB).
- 7. ('36) AIR 1936 Pat 243 (244). (Omission to consider piece of evidence does not alter character of finding.)
- 8. ('36) AIR 1936 Pat 270 (272): 15 Pat 422.
- 9. ('36) AIR 1936 All 124 (127).
- 10. ('37) AIR 1937 Oudh 47 (51).
- 11. ('39) AIR 1939 Pat 267 (268). (Appellate Court recording findings of fact in dismissing appeal under O. 41 R. 11—Findings are binding in second appeal.)
- 12. ('38) AIR 1938 Lah 191 (193). (Finding of fact based upon consideration of evidence on record—Finding cannot be interfered in second appeal.)
- 13. ('37) AIR 1937 Rang 249 (250).
- 14. ('92) 19 Cal 249 (252): 19 Ind App 1 (PC).
- 15. ('93) 20 Cal 93 (99): 19 Ind App 228 (PC).

- 2. See Note 11 *supra*.
- 3. ('29) AIR 1929 Pat 28 (31): 7 Pat 832.
- 4. ('37) AIR 1937 Oudh 165 (166): 12 Luck 516.
- 5. ('38) AIR 1938 All 144 (145).
- 6. ('38) AIR 1938 Lah 182 (183).
- 7. ('37) AIR 1937 Sind 263 (267).
- 8. ('34) AIR 1934 Cal 633 (634): 61 Cal 365. (Misconception of or mistake in consideration of evidence.)
- 9. ('34) AIR 1934 Oudh 449 (450).
- 10. ('35) AIR 1935 Bom 371 (375).
- 11. ('35) AIR 1935 All 588 (588).
- 12. ('35) AIR 1935 Pat 152 (154).
- 13. ('35) AIR 1935 Pat 42 (44). (Land acquisition—Finding as to apportionment of compensation—money.)
- 14. ('35) AIR 1935 Oudh 394 (399): 11 Luck 209.
- 15. ('36) AIR 1936 All 443 (448): 58 All 889.
- 16. ('27) AIR 1927 P C 117 (119): 54 Ind App 196: 54 Cal 586 (PC).
- 17. ('34) AIR 1934 All 990 (992).
- 18. ('19) AIR 1919 Cal 672 (673).
- 19. ('70) 13 Suth WR 50 (51). (Weight to be attached to evidence.)
- 20. ('30) AIR 1930 Mad 590 (592).
- 21. ('89) 16 Cal 753 (755): 16 Ind App 125 (PC).
- 22. ('90) 17 Cal 291 (298): 16 Ind App 233 (PC).
- 23. ('18) AIR 1918 P C 92 (94): 46 Cal 189: 45 Ind App 163 (PC).
- 24. ('27) AIR 1927 P C 117 (119): 54 Ind App 196: 54 Cal 586 (PC).
- 25. ('28) AIR 1928 P C 219 (221) (PC).
- 26. ('35) AIR 1935 All 636 (637).
- 27. ('35) AIR 1935 All 586 (588). (Meaning of word used by witnesses—Question is one of fact.)
- 28. ('36) 38 Pun L R 577 (578). (A finding of fact is not liable to interference in second appeal merely because the lower Appellate Court's remark about the shifting of the onus is not happily worded, if it has not really affected the decision on merits.)

insufficient⁶ or that it has not been properly appreciated;⁶ it may be that the High Court is inclined to take a different view⁷ or that the decision is open to doubt;⁸ it may even be that the finding may seem to be grossly and inexcusably erroneous⁹; still if there is some (legal) evidence for the finding,¹⁰ and there is no such error or defect as

(736) 35 Pun L R 590 (592).
(735) AIR 1938 Pat 181 (182).
(735) AIR 1938 Pat 35 (35, 39). (Finding cannot be re-opened merely because some evidence is not considered.)
(737) AIR 1937 Nag 9 (10). (Unless of course it is a perverse finding for which there is no evidence whatever or is arrived at by casting the burden on the wrong party and thereby shutting out oral evidence.)
(736) AIR 1936 Rang 256 (260) : 11 Rang 212 (171).

(736) AIR 1936 Pat 136 (138).
(736) AIR 1936 Pat 7 (9) : 15 Pat 96.
(737) AIR 1937 Sind 51 (52) : 30 Sind L R 371.
(737) AIR 1937 Sind 312 (315).
(737) AIR 1937 Pat 479 (481). (Inference drawn from exhibits.)

(736) 1936 R D 119 (120).
(739) AIR 1939 Pat 356 (356).
(735) 40 Pun L R 705 (706).
(736) AIR 1936 Pat 96 (96).
(735) AIR 1935 Ali 329 (333) : 57 Ali 55. (But if lower Court has not discussed evidence of witnesses, it may differ from finding of the lower Court.)
(737) 1937 Mad W N 393 (395).

(735) AIR 1935 Mad 58 (59).
(735) AIR 1935 Pat 482 (482).
(735) AIR 1935 Oudh 214 (215, 216).
(735) AIR 1935 Oudh 80 (81) : 10 Luck 199. (Finding as to legitimacy.)
(739) AIR 1939 Pat 281 (285).

(735) AIR 1938 Pat 110 (111).
(734) AIR 1934 Cal 633 (631, 635) : 61 Cal 365. (Genuineness of signature is a question of fact.)
(734) AIR 1934 Cal 703 (705) : 61 Cal 579.

(735) AIR 1935 Ali 351 (353).
(734) AIR 1934 Lab 406 (407).
(735) AIR 1935 Ali 278 (278). (Finding that the debt was tainted with immorality.)
(734) AIR 1934 Nag 226 (227) : 18 Nag L R 27. (The finding that there is full accord and satisfaction is a finding of fact.)
(734) AIR 1934 Lab 968 (969). (Finding that there was no adoption.)
[See (734) AIR 1934 Cal 824 (826).]

5. (792) 19 Cal 249 (252) : 19 Ind App 1 (PC).

(734) AIR 1934 Lab 163 (163).

(732) 9 Oudh W N 1015 (1015).

(733) AIR 1933 Pat 708 (712).

(715) AIR 1915 Mad 680 (681).

(715) AIR 1915 Lab 163 (163).

(718) AIR 1918 Cal 279 (279).

(725) AIR 1925 Nag 271 (271, 272).

(726) AIR 1926 Cal 941 (943).

(728) 111 Ind Cas 376 (376) (Oudh).

(725) AIR 1925 Oudh 353 (351).
(729) AIR 1929 Pat 93 (93).
(739) AIR 1939 Nag 197 (200). (Evidence meagre.)
6. (721) AIR 1921 Lab 281 (286).
(729) AIR 1929 Nag 270 (271).
(730) AIR 1930 Nag 11 (12).
(737) AIR 1937 Cal 371 (372). (Due weight not given to evidence.)
(735) AIR 1936 Pat 270 (272) : 15 Pat 422. (Lower Court erring in its reasoning and arguing in a circle.)
(735) AIR 1935 Bom 371 (376).

7. (729) AIR 1929 Ali 555 (556).

(733) AIR 1933 Nag 185 (186).

(711) 15 Sach W R 303 (303).

(711) 16 Sach W R 311 (312).

(726) 98 Ind Cas 576 (576) (Lab).

(726) AIR 1926 Nag 192 (193).

(731) AIR 1931 Nag 95 (96).

(737) AIR 1937 Nag 139 (140) : I.L.R. (1937) Nag 214.

(735) AIR 1935 Pat 278 (280) : 17 Pat 430.

(736) AIR 1936 Sind 7 (9).

(737) AIR 1937 Sind 36 (36).

(735) AIR 1935 Lab 357 (359).

(739) AIR 1939 Pat 229 (230).

8. (717) AIR 1917 Lab 363 (361) : 1917 Pun Ra

No. 89.

(739) AIR 1939 Pat 856 (856).

9. (729) AIR 1929 P C 190 (193) : 56 Ind App 250 :

25 Nag L R 121 (PC).

(729) AIR 1929 P C 152 (155) : 56 Ind App 223 :

52 Mad 533 (PC).

(791) 18 Cal 23 (30) : 17 Ind App 122 (PC).

(793) 20 Cal 93 (99) : 19 Ind App 228 (PC).

(738) AIR 1938 Pat 413 (415) : 17 Pat 507.

(738) AIR 1938 Pat 275 (280) : 17 Pat 430.

(735) AIR 1935 Oudh 186 (187) : 14 Luck 138.

(736) AIR 1936 Oudh 201 (201). (Unless vitiated by some error of law.)

(736) 163 Ind Cas 93 (94) (Mad).

(737) AIR 1937 Oudh 226 (229). (This rule applies to findings based on inferences drawn from document in evidence.)

(736) AIR 1936 Pat 129 (130).

(736) AIR 1936 Pat 140 (141).

(738) AIR 1938 Lab 357 (359).

(737) AIR 1937 Sind 263 (266, 267).

(738) AIR 1938 Sind 215 (216) : I.L.R. (1938) Kar 136.

(737) AIR 1937 Sind 51 (52) : 30 Sind L R 371.

(735) AIR 1935 Pat 351 (352).

(735) AIR 1935 Lab 172 (173).

10. (729) AIR 1929 P C 286 (287) : 56 Ind App.

888 (PC).

(729) AIR 1929 P C 190 (193) : 56 Ind App 280 (PC).

(737) 14 Cal 740 (745) : 14 Ind App 101 (PC).

(737) AIR 1937 Ali 363 (365). (Finding of fact as to termination of agency based on statement of plaintiff.)

mentioned above, then the High Court cannot entertain a second appeal on the finding. The findings need not be concurrent.¹¹ The fact that the trial Court and the lower appellate Court have differed on the point is immaterial,¹² nor would the fact that the finding has been based by the lower Appellate Court on *additional evidence* recorded by it,¹³ or on evidence treated as inadmissible by the trial Court,¹⁴ give the High Court a right to interfere with it. Further, though the lower Appellate Court should not (ordinarily) reject witnesses accepted by the trial Court in respect of credibility, still the fact that it has rejected witnesses accepted by the trial Court will be no ground for interference on a question of fact, when the lower Appellate Court has given satisfactory reasons for doing so.¹⁵

It has also been held that if a finding of fact given by the trial Court has not been challenged in the first appeal, it cannot be challenged in second appeal on any ground.¹⁶

53. Finding of facts, when not binding in second appeal. — As observed in Notes 2 and 52 above, Sections 100 and 101 prohibit the entertainment of a second appeal on the ground of an error on a question of *fact*. But where in the process of arriving at the finding of fact the lower Appellate Court has committed an *error of law* such as has been referred to in Notes 13 to 20 or has adopted an erroneous or defective procedure such as has been referred to in Notes 23 to 27 above, the finding of fact will be open to attack on the ground of such error or defect.¹ Thus, a finding of fact can be

(‘37) AIR 1937 Lab 26 (27). (The finding is binding in second appeal even if the lower Court has admitted inadmissible evidence.)

(‘37) AIR 1937 Lab 387 (388).

(‘35) 157 Ind Cas 865 (865) (Lab).

(‘36) 163 Ind Cas 93 (94) (Mad).

(‘39) AIR 1939 Lab 284 (285).

(‘35) AIR 1935 Cal 210 (211). (Finding of fact based on evidence is final.)

(‘35) AIR 1935 Lab 389 (390) : 16 Lab 1060.

(‘35) AIR 1935 Lab 641 (641) : 17 Lab 280.

(‘35) AIR 1935 Lab 765 (769) : 17 Lab 190.

(‘35) AIR 1935 Mad 26 (26).

(‘35) AIR 1935 Oudh 30 (38) : 10 Luck 250.

(‘35) AIR 1935 Oudh 362 (363).

(‘35) AIR 1935 Oudh 385 (387).

(‘36) AIR 1936 Cal 22 (23). (Conclusions of the lower Courts on evidence partly documentary are as binding in second appeal as conclusions of oral evidence.)

(‘37) AIR 1937 Pat 289 (290).

(‘37) AIR 1937 Rang 225 (226). (Even of doubtful weight.)

(‘36) AIR 1936 Rang 488 (490).

(‘36) AIR 1936 Lab 978 (981).

(‘36) AIR 1936 Lab 678 (678).

(‘37) AIR 1937 All 197 (197). (A finding based on inferences derived from documentary evidence.)

(‘39) AIR 1939 Nag 210 (211).

(‘38) AIR 1938 All 100 (102). (However weak the evidence may be.)

(‘39) AIR 1939 Nag 221 (223); I.L.R. (1939) Nag 510.

(‘35) AIR 1935 All 754 (755).

(‘35) AIR 1935 All 884 (886).

(‘35) AIR 1935 All 422 (423).

(‘35) AIR 1935 All 662 (663).

(‘35) AIR 1935 All 174 (175).

(‘37) 1937 All 1 Jour 1385 (1385).

11. (‘23) AIR 1923 Rang 303 (303) : 6 Rang 556. (‘37) AIR 1937 Oudh 165 (166) : 12 Luck 516.

12. (‘15) AIR 1915 Oudh 132-132).

(‘32) 33 Pun L.R. 628 (629).

(‘16) AIR 1916 All 181 (182).

(‘20) AIR 1920 Mad 789 (790).

(‘27) AIR 1927 Nag 158 (159).

[See also (‘37) AIR 1937 Sind 36 (36). (Lower Appellate Court considering a case from a different aspect from that of the trial Court.)]

13. (‘52) 12 Cal 37 (38).

(‘15) AIR 1915 Cal 568 (569).

(‘32) AIR 1932 Lab 93 (94). (So also refusal to admit additional evidence in appeal is no ground for interference in second appeal unless lower Court exercised discretion perversely or contrary to law.)

(‘35) AIR 1935 Pat 105 (107).

14. (‘33) AIR 1933 Rang 35 (36, 37).

15. (‘25) AIR 1925 Rang 117 (117).

(‘23) AIR 1923 P.C. 156 (158) : 1 Rang 451 (P.C).

16. (‘29) AIR 1929 Rang 213 (214).

(‘31) AIR 1931 Nag 147 (148). (Want of enquiry into circumstances evidencing legal necessity for alienation by Hindu widow not challenged in the lower Appellate Court — Matter cannot be re-opened in second appeal.)

[See also (‘33) AIR 1933 Pat 270 (271).]

Note 53

1. (‘24) AIR 1924 Oudh 154 (155).

(‘33) AIR 1933 Mad 565 (568).

(‘02) 6 Cal W.N. 185 (188).

set aside in second appeal in the following cases:—

- (15) AIR 1915 Lah 156 (157). (Ignoring patent facts and principles established by Courts for dealing with cases of old allegations.)
- (18) AIR 1918 Lah 101 (105). (Wrong principles of law.)
- (26) AIR 1926 Mad 57 (58). (Do.)
- (29) AIR 1929 Lah 314 (314, 315).
- (11) 12 Ind Cas 580 (581) (All). (Judge in arriving at a certain finding wrongly influenced by his view of the burden of proof.)
- (97) 21 Cal 823 (829, 830). (Arriving at a conclusion on a wrong view of the law is an error of law.)
- (25) AIR 1925 Mad 973 (973). (Vital mistake as regards very simple proposition of law on a question of inheritance.)
- (23) AIR 1923 Lah 41 (42). (Mistake of rules and maxims relating to legal necessity for an alienation under Hindu law.)
- (23) AIR 1923 Lah 660 (661). (Do.)
- (25) AIR 1925 Oudh 710 (711). (Do.)
- (183) 10 Mco Ind App 151 (161) (PC). (Finding that if property had not been sold it must have been mortgaged.)
- (29) AIR 1929 All 557 (558). (Mistake as to the nature and quantum of evidence required to prove that what was once grove land has ceased to retain that character.)
- (29) AIR 1929 Lah 772 (773). (Relying on erroneous presumption of law.)
- (13) 17 Cal W N 491 (195). (Disregarding a legitimate presumption.)
- (28) AIR 1928 Cal 751 (752). (Do.)
- (24) AIR 1924 Lah 689 (690). (Do.)
- (25) AIR 1925 Nag 270 (271). (Failure to invoke a legitimate presumption.)
- (8) AIR 1928 All 16 (18); 50 All 145. (Do.)
- (15) AIR 1915 Mad 1113 (1119); 39 Mad 304. (But raise is fixed by no rule of law the privilege of raising it entirely rests with the Court of fact and the High Court cannot in second appeal interfere with it.)
- (9) 4 Ind Cas 455 (457) (Lah). (Misapplication of the burden of proof.)
- (24) AIR 1924 Pat 310 (310); 2 Pat 919. (Do.)
- (30) AIR 1930 Lah 97 (98). (Finding of fact based entirely on presumption arising out of a rule of Mahomedan law.)
- (30) AIR 1930 Oudh 17 (18, 19). (Finding of fact based entirely on presumption—Validity of presumption can be gone into.)
- (94) 21 Cal 504 (512); 21 Ind App 39 (PC).
- (25) AIR 1925 Mad 1226 (1228). (But misconception of documents not affecting finding will not vitiate the finding of fact, and the High Court should see if such misconception has vitiated the finding of fact.)
- (11) 9 Ind Cas 4 (4) (Cal). (And a solitary statement securing to throw onus on the wrong party while the whole evidence was considered does not vitiate the finding of fact.)
- (9) 4 Ind Cas 329 (330) (Cal). (And it is not (109) & Ind Cas 329 (330) (Cal). (And it is not set aside in second appeal in the following cases:—
- sufficient ground for second appeal that the lower Appellate Court has misunderstood the result of the first Court's local investigation or that it has erred in the importance attached to certain documents which were admissible in evidence.)
- (95) 32 Cal 719 (723, 724). (And no second appeal lies because some portion of the evidence may be in writing and the Judge makes a mistake as to its meaning.)
- (21) AIR 1921 Lah 719 (719). (Reliability of entries apart from construction is purely a question of fact.)
- (35) AIR 1935 All 771 (776). (A finding of fact which has been arrived at in complete disregard of the legal propositions involved.)
- (31) AIR 1931 Lah 662 (662). (Finding not binding it based on incorrect interpretation of document and on plea which did not arise in the case.)
- (31) AIR 1931 Nag 253 (254, 255). (Finding based on wrong view of burden of proof or on one-sided examination of evidence.)
- (35) AIR 1935 Lah 152 (153). (Appellate Court erring in law in arriving at conclusion upon facts.)
- (38) AIR 1938 Cal 763 (765). (Failure to attach presumption under S. 90, Evidence Act.)
- (38) AIR 1938 Cal 511 (512). (Failure to appreciate legal effect of recitals of necessity in ancient documents and omission to consider other documents.)
- (38) AIR 1938 Lah 760 (762). (Misapplication of rule as to burden of proof.)
- (36) 19 Nag L Jour 301 (301). (Finding of fact not properly arrived at—Onus wrongly laid.)
- (36) AIR 1936 Nag 130 (132); 1 I L R (1936) Nag 142. (Finding of fact of first Court on wrong basis regarding onus of proof.)
- (36) AIR 1936 Lah 1005 (1006). (Finding based on wrong assumptions.)
- (36) AIR 1936 Pat 185 (187). (Ignoring presumption of correctness attaching to the record-officials.)
- (36) AIR 1936 Lah 733 (739). (Finding of fact based on presumption which cannot be made under S. 90, Evidence Act.)
- (38) AIR 1938 Lah 303 (304). (Finding as to relationship vitiated by misapprehension of pedigree table.)
- (38) AIR 1938 Nag 385 (388); 1 I L R (1938) Nag 324. (Misapplication of law of evidence.)
- (36) AIR 1936 Mad 253 (254). (Wrong statement of law by Appellate Court as to presumption—Evidence approached from a wrong standpoint.)
- (38) AIR 1938 Nag 470 (473); 1 I L R (1938) Nag 555. (Presumption under S. 44, Punjab Land Revenue Act ignored—Finding of fact vitiated.)
- (35) AIR 1935 All 774 (776). (Finding of fact arrived at in complete disregard of legal questions involved can be interfered with in second appeal.)

(1) Where it is not based on any evidence or on legal evidence,² or on a judicial consideration of the evidence adduced.³

- [See also (35) AIR 1935 Pat 415 (416). (Court has only to see whether decision on facts by lower Court is vitiated by error of law.)]
2. (90) 17 Cal 875 (882) : 17 Ind App 65 (P C). (32) 142 Ind Cas 673 (673) (Lah). (Overlooking material evidence and basing decision on wrong assumptions.)
- (19) AIR 1919 P C 29 (30, 31) : 47 Cal 107 : 46 Ind App 140 : 15 Nag L R 97 (P C).
- (25) AIR 1925 Pat 552 (552). (But where the allegation in plaint was not specifically denied in the written statement—*Held* that a finding in support of such allegation cannot be said to be based on no evidence.)
- (27) AIR 1927 Pat 209 (212) : 6 Pat 698 (P B). (No evidence.)
- (31) AIR 1981 Oudh 186 (137). (Do.)
- (32) AIR 1982 Lab 298 (294) : 18 Lab 399. (Do.)
- (32) AIR 1982 Lab 322 (323, 324).
- (04) 1 All L Jour 637 (640) : 29 Bom 1 : 31 Ind App 154 (P C). (No evidence and point not raised in pleadings.)
- (26) AIR 1926 Bom 33 (39). (Lower Courts went outside the foundation for determination of fraud—High Court interfered.)
- (21) AIR 1921 Lab 256 (257). (A finding on a question of fact not put in issue can be challenged in second appeal.)
- (69) 3 Beng L R A C 258 (260). (Inadmissible evidence.)
- (11) 11 Ind Cas 536 (537) (Oudh). (Do.)
- (12) 15 Ind Cas 459 (459, 460) (Cal). (Do.)
- (12) 16 Ind Cas 887 (888, 889) (Oudh). (Insufficient evidence.)
- (16) AIR 1916 Lab 333 (334). (Inadmissible evidence.)
- (36) AIR 1936 Lab 978 (981). (Findings based on mere conjecture.)
- (36) AIR 1936 Oudh 192 (192). (Inadmissible evidence.)
- (36) AIR 1936 Oudh 211 (212) : 12 Luck 94.
- (37) AIR 1937 Pat 289 (290).
- (37) AIR 1937 Rang 225 (226).
- (35) 18 Nag L Jour 833 (334). (Decision based on inadmissible and unproved document.)
- (35) 18 Nag L Jour 104 (105).
- (38) 1938 Oudh W N 171 (173).
- (39) AIR 1939 Cal 366 (367).
- (36) AIR 1936 Rang 488 (490).
- (36) AIR 1936 Lab 788 (789). (Inadmissible evidence.)
- (36) AIR 1936 Sind 7 (8).
- (38) AIR 1938 Pat 622 (624).
- (37) 39 Pun L R 361 (363). (Finding based purely upon unwarranted assumptions and unjustified conjectures.)
- (37) 1937 All L Jour 1385 (1386).
- (35) AIR 1935 Cal 648 (649).
- (35) AIR 1935 Lab 108 (109).
- (35) AIR 1935 Mad 26 (26).
- (35) AIR 1935 Mad 190 (191). (Finding based on surmises.)
3. (12) 15 Ind Cas 190 (191) (Mad).
- (23) 4 L R All (Rev) 376 (377).
- (23) 4 L R All (Rev) 401 (402).
- (10) 5 Ind Cas 160 (162) (Cal).
- (17) AIR 1917 Mad 689 (690).
- (16) AIR 1916 Pat 262 (263) : 2 Pat L Jour 8.
- (17) AIR 1917 Pat 288 (289).
- (17) AIR 1917 Lab 267 (267).
- (18) AIR 1918 Oudh 105 (107).
- (18) AIR 1918 Oudh 221 (222).
- (20) AIR 1920 Cal 255 (258) : 47 Cal 1079.
- (25) AIR 1925 Oudh 747 (747). (Evidence not properly weighed.)
- (27) AIR 1927 Nag 392 (394). (Failure to realise the evidentiary value of certain documents.)
- (29) AIR 1929 Lab 145 (145, 146). (Finding based only on part of evidence legally on record.)
- (23) 4 L R All (Rev) 358 (359).
- (25) 6 L R All (Rev) 69 (70).
- (25) 6 L R Oudh 70.
- 11 Oudh and Agra L R 65.
- (19) AIR 1919 Oudh 44 (46) : 22 Oudh Cas 312. (But the mere failure of a Court to mention a document in the judgment is no sufficient proof that the Court failed to consider it.)
- (22) AIR 1922 Lab 140 (141) (Do.)
- (24) AIR 1924 All 270 (271). (Mistake or error of fact.)
- (94) 18 Bom 250 (255). (Do.)
- (17) AIR 1917 Lab 60 (63) (Do.)
- (23) AIR 1923 Lab 585 (587). (Misreading of evidence.)
- (01) 25 Bom 574 (581). (Do.)
- (12) 16 Ind Cas 618 (619, 620) (Cal) (Do.)
- (21) AIR 1921 All 212 (213) (Do.)
- (24) AIR 1924 Mad 770 (771) (Do.)
- (96) 20 Bom 753 (754). (Misconception of what the evidence is.)
- (17) AIR 1917 Lab 225 (226) (Do.)
- (24) AIR 1924 All 848 (849) : 46 All 773 (Do.)
- (25) AIR 1925 Cal 408 (410) (Do.)
- (12) 15 Ind Cas 515 (517) (Cal). (Misconception as to the existence of evidence.)
- (21) AIR 1921 Cal 71 (72) (Do.)
- (85) 11 Cal 499 (501). (Disregard of material evidence.)
- (83) 9 Cal 309 (311) (Do.)
- (06) 33 Cal 200 (202) (Do.)
- (14) AIR 1914 Lab 404 (405). (Do.)
- (17) AIR 1917 Lab 196 (197). (Do.)
- (20) AIR 1920 All 344 (345). (Do.)
- (21) AIR 1921 Pat 18 (20) : 6 Pat L Jour 72. (Do.)
- (22) AIR 1922 Lab 149 (153). (Do.)
- (22) AIR 1922 Nag 226 (227). (Do.)
- (22) AIR 1922 Pat 503 (504). (Do.)
- (23) AIR 1923 All 401 (401). (Do.)
- (25) AIR 1925 Mad 447 (448). (Do.)
- (28) AIR 1928 Mad 826 (827). (Do.)

- (2) Where it is based on a misconception of the real point in controversy in the case,¹
- (3) Where the conclusion of fact is not warranted by the facts on which it is based,² or is inconsistent with the other findings in the

(27) s. L. R. All (Rev.) 313 (313).
 (31) AIR 1931 Sind 125 (131) : 25 Sind L. R. 511.
 (32) AIR 1932 Loh 51 (55). (Important document not considered.)
 (75) 21 Sakh W. R. 101 (101, 102). (Rejection of material evidence.)
 (60) 11 Sakh W. R. 152 (151). (Do.)
 (59) 20 All 12 (13). (Do.)
 (07) 11 Cal W. N. 550 (550). (Do.)
 (07) 11 Cal W. N. 1024 (1030). (Do.)
 (11) AIR 1921 Oudh 121 (121) : 20 Ind. Cal. 591 (530) : 17 Oudh Cal. 1 (Do.)
 (21) AIR 1921 Oudh 107 (107) : 5 Lucknow (Do.)
 (23) AIR 1923 Loh 405 (405). (Do.)
 (25) AIR 1925 Cal 703 (703). (Do.)
 (28) 105 Ind. Cal. 191 (191) (Loh). (Do.)
 (38) AIR 1935 Cal 763 (763). (Lower Court misdirecting in all with regard to history of documents.)
 (35) AIR 1935 Cal 31 (32) : 1 L. R. (1935) 1 Cal 110. (Where case not taken into consideration for awarding compensation for acquisition of land.)
 (38) 40 Pan L. R. 707 (706). (Lower Court omitted to consider a document erroneously held- ing them to be invalid title.)
 (56) 19 Nag L. R. 301 (301). (Held also to con- sider all facts and circumstances.)
 (56) AIR 1956 Pat 213 (211). (But more emphasis to consider a piece of evidence will not alter the character of a finding of fact.)
 (36) AIR 1956 Loh 551 (555). (Effect of mutation proceedings not considered.)
 (36) AIR 1956 All 121 (127). (Evidence not weighed fairly and properly.)
 (35) AIR 1955 Sind 195 (200) : 1 L. R. (1939) Kar 111.
 (35) AIR 1955 Oudh 391 (399) : 11 Luck 209. (Finding based solely on legal presumption with- out considering oral evidence.)
 (35) AIR 1955 Oudh 55 (59). (Misdirection in the appreciation of evidence.)
 (35) AIR 1935 Pat 10 (11). (No categorical refer- ence by Appellate Court to statements of wit- nesses whom it disbelieved—High Court can go into evidence to see whether finding is correct.)
 (35) AIR 1935 Mad 565 (569, 570). (Appellate Court, while reversing considered judgment of trial Judge, failing to refer to material piece of evidence militating against its own view.)
 (36) AIR 1936 Nag 177 (178). (Misconception of pleadings, burden of proof and relevancy of evi- dence in arriving at conclusion.)
 (31) AIR 1931 Cal 633 (631) : 61 Cal 365. (Mis- conception of or error in consideration of evi- dence.)
 4. (13) AIR 1915 Loh 177 (175).
 (20) AIR 1920 Mad 232 (232).
 (19) AIR 1919 P. C. 29 (31) : 47 Cal 107 : 46 Ind. App. 110 (P. C.).
 (27) AIR 1923 Loh 205 (207).
 (20) AIR 1925 Nag. 116 (120). (Misconception of findings.)
 (26) AIR 1925 Oudh 353 (351). (Do.)
 (23) AIR 1925 Loh 125 (125). (Misconception that witness was not interested.)
 (20) AIR 1920 Pat 405 (405). (Misdirection.)
 (31) AIR 1931 All 517 (515). (Do.)
 (23) AIR 1923 Loh 516 (515). (Misapprehension of law.)
 (39) AIR 1933 Loh 301 (302).
 (35) AIR 1935 Nag. 170 (172) : 1 L. R. (1935) Nag. 315.
 (35) AIR 1935 Sind 195 (200) : 1 L. R. (1939) Kar 111. (Important aspect of the case not con- sidered.)
 (35) AIR 1935 Mad 133 (131). (Finding of fact based on erroneous approach to a case.)
 5. See also Note 25 ante.
 (27) AIR 1927 P. C. 257 (260) (P. C.).
 (63) 1 Mad H. C. R. 63 (65).
 (75) 3 Cal 155 (201) : 4 Ind. App. 217 (P. C.).
 (16) AIR 1916 Cal 517 (519).
 (22) AIR 1922 All 312 (313) : 41 All 169.
 (21) AIR 1921 Pat 391 (392).
 (25) AIR 1925 Cal 469 (470).
 (30) AIR 1930 Oudh 101 (101) : 4 Luck 396.
 (23) AIR 1923 Loh 635 (656). (Comparison of signatures is one of the modes of proving hand- writing and although, where there is no other evidence such proof would be regarded as hazar- dous and inconclusive, it cannot be regarded as an error in law.)
 (25) AIR 1925 Loh 57 (53).
 (25) AIR 1925 All 39 (41) : 50 All 150.
 (29) AIR 1929 All 767 (768). (Legal conclusions erroneously deduced from ascertained facts.)
 (31) AIR 1931 All 219 (220). (Conclusion based on nobody's pleadings.)
 (56) 12 Cal 93 (95).
 (02) 6 Cal W. N. 155 (155).
 (25) AIR 1925 Nag. 179 (179).
 (03) 5 Bom L. R. 174 (176). (Incorrect inferences of law as to the legal consequences regarded as following from facts found.)
 (99) 3 Cal W. N. 255 (260).
 (23) AIR 1923 Loh 197 (198). (Wrong conclusions from proved facts.)
 (21) AIR 1921 Oudh 104 (105) : 24 Oudh Cas. L. (17) AIR 1917 Loh 350 (351).
 (05) 9 Cal W. N. 663 (665).
 (04) 6 Bom L. R. 312 (313).
 (23) AIR 1923 Nag. 124 (125).

case,⁶ or is opposed to the case set up by the party in whose favour it is drawn.⁷

(4) Where it is contrary to the facts found, or is inconsistent with the statement of reasons therefor in the judgment, or is based on gaining reasoning,¹⁰ or is vague¹¹ or indefinite.¹²

(5) Where the finding has been given in reversal of the decision of the trial Court either without properly appreciating or discussing the reasons given by the latter Court,¹³ or on unsatisfactory grounds.¹⁴

(6) Where it is arbitrary,¹⁵ or vitiated by prejudice,¹⁶ or is based on a distorted view of the evidence,¹⁷ or where no reasons have been given for the finding.¹⁸

(7) Where material facts have been ignored in arriving at the conclusion of fact.¹⁹

It has been held by the Allahabad High Court that a finding based on the opinions of experts is not necessarily a finding based on facts proved or directly demonstrated, and that the sufficiency of the facts observed or of the inferences or opinions formed, can be examined in second appeal.²⁰

- (35) AIR 1935 Pat 342 (344) : 14 Pat 753 (S.D.).
- (38) AIR 1938 Pat 413 (416) : 17 Pat 207.
- (38) AIR 1938 Pat 147 (148). (High Court can see whether inference is justified by the facts found.)
- (36) AIR 1935 Bom 47 (50). (Finding based on wrong inference from proved facts.)
6. (25) AIR 1925 Nag 211 (214). (Inconsistent findings.)
- (20) AIR 1920 Pat 285 (286).
- (28) AIR 1928 Lah 690 (691).
- [See (35) AIR 1935 Bom 326 (330) : 59 Bom 502.]
7. (26) AIR 1926 Lah 655 (656).
- (37) 39 Pun L R 861 (863).
- [See (38) AIR 1938 Pat 181 (182). (Lower Appellate Court on slender evidence making out case which is not in pleadings — Its finding is not binding in second appeal.)]
8. (13) 18 Ind Cas 814 (816) (Cal.).
9. (90) 1890 Unrep Print Jdg. 353.
10. (25) AIR 1925 Oudh 386 (387).
- (34) AIR 1934 AH 902 (903). (Manifestly wrong reasoning.)
11. (17) AIR 1917 Oudh 194 (195).
- (34) AIR 1934 AH 529 (529).
- (17) AIR 1917 Lah 284 (285).
12. (29) AIR 1917 Lah 654 (656).
- (25) AIR 1925 Cal 993 (994). (Where it is not clear whether the finding was one of fact or of law, the High Court cannot be confined to the one or to the other and will interfere.)
13. (02) 4 Bom L R 822 (822).
- (23) AIR 1923 Lah 502 (503).
- (92) 16 Bom 540 (545).
- (36) 40 Cal W N 769 (772).
- (36) AIR 1936 Cal 178 (180) : 63 Cal 816.
- (39) AIR 1939 Lah 188 (189). (Appellate Court failing to consider a document pointedly relied on by trial Court for its finding.)
14. (88) 1888 Unrep Print Jdg. 59.
- (28) AIR 1928 P C 62 (64) (P.C.).
- (90) 17 Cal 256 (257).
- (25) AIR 1925 Rang 71 (78) : 2 Rang 495.
15. (23) AIR 1923 AH 199 (201). (Amount of [But see (35) AIR 1935 AH 501 (501).]
- (25) AIR 1925 AH 24 (25) : 47 AH 213.
20. (24) AIR 1924 AH 116 (118).
355. (Material part of admissible evidence which vitally bears on the point at issue disregarded.)
- (38) AIR 1938 Nag 470 (472) : 1 L R (1938) Nag
- (37) AIR 1937 Pat 78 (79). (Omission to consider materials having obvious bearing on case.)
19. (32) AIR 1932 AH 603 (606).
- (37) AIR 1937 Mhd 282 (283). (Appellate Court upsetting reasoned and elaborate judgment of trial Court without giving reasons except on General Ground that evidence was not satisfactory — No discussion of evidence whatsoever — Finding can be set aside.)
- (37) AIR 1937 Mhd 282 (283). (Appellate Court giving a lead on for believing the witnesses (72) 18 South W R 110 (110, 111). (That not for death with and withheld.)
- (26) AIR 1926 Lah 158 (159).
- (21) AIR 1921 Pat 18 (20) : 6 Pat L J 207.
- (20) AIR 1920 Pat 829 (830).
- (20) 56 Ind Cas 529 (530) (AH).
- (92) 19 Bom 323 (325).
- (93) 1933 Unrep Print Jdg. 227.
- (50) 14 Bom 422 (424).
- (83) 9 Bom 527 (529).
- (81) 8 Bom 368 (371).
- (23) 9 Bom 452 (454).
18. (1861) 1 South W R 211 (211).
- (03) 50 Cal 207 (210).
- (30) AIR 1930 AH 510 (511). (Lower Court trying to fit facts with law — Finding of fact of lower Court can be set aside in second appeal.)
17. (22) AIR 1922 Rang 226 (229).
- (35) AIR 1935 Mhd 195 (200) : 1 L R (1935) Mhd 111. (Finding of fact set aside and remanded by aspect of case which the finding was not entitled to consider.)
- (35) AIR 1935 Mhd 195 (200) : 1 L R (1935) Mhd 111. (Finding of fact set aside and remanded by aspect of case which the finding was not entitled to consider.)

Lords of the Privy Council observed as follows : "A litigant who seeks before a second appellate tribunal to reverse findings of fact which have been arrived at by the trial judge and have, after consideration, been confirmed on appeal, comes always with a very heavy burden upon his shoulders."

The circumstance that the lower Appellate Court and the trial Court, in arriving at the same conclusion, have not been influenced by the same considerations, will not detract from the binding nature of the concurrent finding.⁸ But if the lower Appellate Court does not deal with the question and fails to give independent opinion thereon, then the finding is not "concurrent."

55. New case — General. — Parties are bound by the case which arises on their pleadings and which has been enquired into by the trial Court.¹ They should not be allowed to depart from the facts and grounds of relief originally pleaded by them,² or to change their case and present it in an entirely new shape.³ If there is any defect in their case it is not the function of the High Court to remedy it.⁴ Consequently, a new plea not being one of pure law, which is inconsistent with⁵ or different from⁶ the one set up in the Courts below, will not be allowed in second appeal.

8. (198) 20 Cal 847 (852) : 20 Ind App 95 (P C). (Plea of eviction by title paramount contrary to the pleas already taken.)
- (16) AIR 1916 Cal 236 (237).
- (17) AIR 1917 Cal 467 (469).
- (29) AIR 1929 Mad 349 (350).
- (36) AIR 1936 Rang 260 (262) : 14 Rang 738.
- (Plea that property descended to the stridhana heirs of the deceased inconsistent with the plea already taken.)
6. (1864) 1 Suth W R 136 (136). (Discharge of interest into non-liability for interest.)
- (33) AIR 1938 Lah 845 (847).
- (33) AIR 1938 Oudh 462 (464). (Adverse possession pleaded in lower Court — New plea of easement in second appeal.)
- (1864) 1 Suth W R 282 (283). (Heirship to last full owner, into heirship to one of his widows not allowed.)
- (68) 10 Suth W R 424 (424, 425). (Genuineness of patthar set up in suit for enhancement of rent into misconstruction of the terms of a lease.)
- (69) 11 Suth W R 133 (133). (Claim for dower into claim of heirship.)
- (69) 11 Suth W R 10 (11). (The plea originally being that the debts for which the properties were sold had been incurred for purposes not sanctioned by Hindu law, its attempted change in second appeal into the following, viz., that the father being in Hindu law only a sharer with his sons the rights and interests sold did not comprise the son's shares was not allowed.)
- (69) 11 Suth W R P C 27 (28) : 12 Moo Ind App 470 (P C). (A plea as to whether suit land was comprised in resumption proceedings into one of improper resumption.)
- (69) 11 Suth W R 133 (133, 134). (Change of dower right into right of inheritance under Mahomedan law.)
- (69) 11 Suth W R 164 (164, 165). (Defence on ground of non-liability for enhanced rent into asking for the dismissal of suit on the strength of a Full Bench decision.)

9. (10) 5 Ind Cas 592 (593) (Lah). (See (16) AIR 1916 PC 126 (128) : 43 Ind App 172 (PC).)
- Note 55
1. (15) AIR 1915 Lah 399 (400).
- (66) 6 Suth W R 57 (58) (P C).
- (33) 10 Oudh W N 1186 (1187). (New line of defence.)
- (23) AIR 1923 Lah 56 (57).
- (32) AIR 1932 Cal 77 (79).
- (27) AIR 1927 Mad 1197 (1198, 1199).
- (See also (36) AIR 1936 Pat 49 (50) : 15 Pat 219. (New facts cannot be investigated in second appeal.)
3. (69) 11 Suth W R (Or) 10 (11).
- (34) AIR 1934 Mad 639 (640).
- (66) 5 Suth W R 197 (197).
- (80) 5 Cal 246 (250).
- (81) 6 Cal 55 (58).
- (84) 6 All 428 (430).
- (88) 10 All 495 (497).
- (04) 26 All 381 (384).
- (13) 19 Ind Cas 661 (662) (All). (Suit for sale on mortgage cannot be changed as one for money charged on immovable property.)
- (15) AIR 1915 Cal 438 (440) : 19 Cal W N 768 (772).
- (16) AIR 1916 Cal 236 (237).
- (16) AIR 1916 Oudh 313 (314) : 19 Oudh Cas 166.
- (21) AIR 1921 All 154 (155).
- (27) AIR 1927 Lah 426 (427).
- (36) AIR 1936 Pat 275 (282). (Plea of forfeiture of tenancy not raised in plaint not allowed to be raised.)
4. (22) AIR 1922 Bom 150 (152) : 46 Bom 213.
5. (67) 7 Suth W R 413 (414).
- (74) 22 Suth W R 552 (553).
- (14) AIR 1914 Lah 11 (13) : 1914 Pun Ra No. 77.
- (23) AIR 1928 All 358 (360) : 45 All 53.
- (23) AIR 1923 Cal 177 (178).
- (23) AIR 1923 Cal 345 (350).
- (09) 1 Ind Cas 112 (114) (Cal). (Permanent tenancy contrary to the plea in written statement.)

Even in the case of new pleas which are in the nature of *additional pleas*, the rule is that the parties are not entitled to relief on facts or grounds not stated in their pleadings, and unless upon very strong grounds, or under very circumstances, a party will not be allowed to urge them in second appeal. The same principle will apply even if the new plea is in the nature of an *alternative* arising out of the lower Appellate Court's decision. However, it has been held that it will be doing an injustice to the party to deny him a right to which he is entitled on that basis. A new prayer may, however, be allowed if it naturally follows from the findings of the lower Appellate Court, but not if it would change the nature of the suit. A prayer for consequential relief may also be allowed if

- 2 South W R 50 (81). (Right under mitras into occupancy right.)
 3 South W R 230 (231). (Gift into nuncup-
 al legatee.)
 Cal 418 (123, 121). (Lawful title into title
 over possession.)
 Cal 560 (563). (Do.)
 Mad 163 (161). (Tenancy by patta into
 one year to year.)
 2 Mad 292 (293). (Right by purchase from
 titled member into right to partition.)
 5 Bom 407 (112).
 9 Cal 507 (512). 19 Ind App 90 (P C).
 9 Cal 507 (512). 19 Ind App 90 (P C).
 Personal liability of defendant into liability of
 estate inherited by defendant.
 5 Mad 50 (52). (Fraud — Misrepresentation
 or concealment by vendor into implied
 warranty for title.)
 5 Mad 503 (511). 19 Ind App 179 (P C).
 Right of inheritance by sapinda into right of
 one illegitimate brother to another.
 Ind Cas 423 (423). (Mad). (Partition into
 action.)
 AIR 1914 Lah 425 (426). (New plea about
 governed by Mohammedan law.)
 AIR 1914 Lah 393 (393). (Tracing title from
 person different from the person alleged origi-
 nally.)
 AIR 1915 Lah 115 (116). 1915 Pun Ho
 57. (Custom into Mohammedan law.)
 AIR 1917 Cal 661 (661). (Where the plain-
 case in the Court was not that a new ten-
 has been created or that the parties had
 ded to create a new tenancy by the amal-
 tion of the old tenancy, he cannot be
 ded to contend in second appeal that a new
 tenancy was created by the amalgamation.)
 AIR 1920 Cal 177 (178). (Permanent ten-
 into pecuniary compensation.)
 AIR 1920 Lah 489 (491). (Suit for arrears of
 tenance into one for contribution.)
 AIR 1923 Lah 53 (54). (Ordinary law into
 law.)
 AIR 1923 Pat 309 (313). (Existence of cus-
 into its validity.)
 AIR 1925 Cal 1184 (1184, 1185). (From the
 of tenancy being colourable and without
 deration to non-transferability of tenancy.)
 AIR 1925 Mad 384 (384). (Absolute sale into
 of life interest.)
 AIR 1927 Nag 378 (378). (Where claim to
1. (11) AIR 1914 Oudh 218 (250).
 (12) AIR 1932 Lah 256 (256). (Management into
 en tenancy right or implied dedication.)
 (13) AIR 1933 AH 73 (73). (Suit on basis of habi-
 lity for actual collection — Liability on basis of
 failure to collect cannot be raised.)
 (14) AIR 1939 Nag 210 (210, 211).
 (15) AIR 1939 Nag 210 (210, 211).
 (16) AIR 1939 Nag 210 (210, 211).
 (17) AIR 1939 Nag 210 (210, 211).
 (18) AIR 1939 Nag 210 (210, 211).
 (19) AIR 1939 Nag 210 (210, 211).
 (20) AIR 1939 Nag 210 (210, 211).
 (21) AIR 1939 Nag 210 (210, 211).
 (22) AIR 1939 Pat 393 (393). 1 Pat 23.
 (23) AIR 1939 Pat 393 (393). 1 Pat 23.
 (24) AIR 1939 Pat 393 (393). 1 Pat 23.
 (25) AIR 1939 Pat 393 (393). 1 Pat 23.
 (26) AIR 1939 Pat 393 (393). 1 Pat 23.
 (27) AIR 1939 Pat 393 (393). 1 Pat 23.
 (28) AIR 1939 Pat 393 (393). 1 Pat 23.
 (29) AIR 1939 Pat 393 (393). 1 Pat 23.
 (30) AIR 1939 Pat 393 (393). 1 Pat 23.
 (31) AIR 1939 Pat 393 (393). 1 Pat 23.
 (32) AIR 1939 Pat 393 (393). 1 Pat 23.
 (33) AIR 1939 Pat 393 (393). 1 Pat 23.
 (34) AIR 1939 Pat 393 (393). 1 Pat 23.
 (35) AIR 1939 Pat 393 (393). 1 Pat 23.
 (36) AIR 1939 Pat 393 (393). 1 Pat 23.
 (37) AIR 1939 Pat 393 (393). 1 Pat 23.
 (38) AIR 1939 Pat 393 (393). 1 Pat 23.
 (39) AIR 1939 Pat 393 (393). 1 Pat 23.
 (40) AIR 1939 Pat 393 (393). 1 Pat 23.
 (41) AIR 1939 Pat 393 (393). 1 Pat 23.
 (42) AIR 1939 Pat 393 (393). 1 Pat 23.
 (43) AIR 1939 Pat 393 (393). 1 Pat 23.
 (44) AIR 1939 Pat 393 (393). 1 Pat 23.
 (45) AIR 1939 Pat 393 (393). 1 Pat 23.
 (46) AIR 1939 Pat 393 (393). 1 Pat 23.
 (47) AIR 1939 Pat 393 (393). 1 Pat 23.
 (48) AIR 1939 Pat 393 (393). 1 Pat 23.
 (49) AIR 1939 Pat 393 (393). 1 Pat 23.
 (50) AIR 1939 Pat 393 (393). 1 Pat 23.
 (51) AIR 1939 Pat 393 (393). 1 Pat 23.
 (52) AIR 1939 Pat 393 (393). 1 Pat 23.
 (53) AIR 1939 Pat 393 (393). 1 Pat 23.
 (54) AIR 1939 Pat 393 (393). 1 Pat 23.
 (55) AIR 1939 Pat 393 (393). 1 Pat 23.
 (56) AIR 1939 Pat 393 (393). 1 Pat 23.
 (57) AIR 1939 Pat 393 (393). 1 Pat 23.
 (58) AIR 1939 Pat 393 (393). 1 Pat 23.
 (59) AIR 1939 Pat 393 (393). 1 Pat 23.
 (60) AIR 1939 Pat 393 (393). 1 Pat 23.
 (61) AIR 1939 Pat 393 (393). 1 Pat 23.
 (62) AIR 1939 Pat 393 (393). 1 Pat 23.
 (63) AIR 1939 Pat 393 (393). 1 Pat 23.
 (64) AIR 1939 Pat 393 (393). 1 Pat 23.
 (65) AIR 1939 Pat 393 (393). 1 Pat 23.
 (66) AIR 1939 Pat 393 (393). 1 Pat 23.
 (67) AIR 1939 Pat 393 (393). 1 Pat 23.
 (68) AIR 1939 Pat 393 (393). 1 Pat 23.
 (69) AIR 1939 Pat 393 (393). 1 Pat 23.
 (70) AIR 1939 Pat 393 (393). 1 Pat 23.
 (71) AIR 1939 Pat 393 (393). 1 Pat 23.
 (72) AIR 1939 Pat 393 (393). 1 Pat 23.
 (73) AIR 1939 Pat 393 (393). 1 Pat 23.
 (74) AIR 1939 Pat 393 (393). 1 Pat 23.
 (75) AIR 1939 Pat 393 (393). 1 Pat 23.
 (76) AIR 1939 Pat 393 (393). 1 Pat 23.
 (77) AIR 1939 Pat 393 (393). 1 Pat 23.
 (78) AIR 1939 Pat 393 (393). 1 Pat 23.
 (79) AIR 1939 Pat 393 (393). 1 Pat 23.
 (80) AIR 1939 Pat 393 (393). 1 Pat 23.
 (81) AIR 1939 Pat 393 (393). 1 Pat 23.
 (82) AIR 1939 Pat 393 (393). 1 Pat 23.
 (83) AIR 1939 Pat 393 (393). 1 Pat 23.
 (84) AIR 1939 Pat 393 (393). 1 Pat 23.
 (85) AIR 1939 Pat 393 (393). 1 Pat 23.
 (86) AIR 1939 Pat 393 (393). 1 Pat 23.
 (87) AIR 1939 Pat 393 (393). 1 Pat 23.
 (88) AIR 1939 Pat 393 (393). 1 Pat 23.
 (89) AIR 1939 Pat 393 (393). 1 Pat 23.
 (90) AIR 1939 Pat 393 (393). 1 Pat 23.
 (91) AIR 1939 Pat 393 (393). 1 Pat 23.
 (92) AIR 1939 Pat 393 (393). 1 Pat 23.
 (93) AIR 1939 Pat 393 (393). 1 Pat 23.
 (94) AIR 1939 Pat 393 (393). 1 Pat 23.
 (95) AIR 1939 Pat 393 (393). 1 Pat 23.
 (96) AIR 1939 Pat 393 (393). 1 Pat 23.
 (97) AIR 1939 Pat 393 (393). 1 Pat 23.
 (98) AIR 1939 Pat 393 (393). 1 Pat 23.
 (99) AIR 1939 Pat 393 (393). 1 Pat 23.
 (100) AIR 1939 Pat 393 (393). 1 Pat 23.

- registration has been held to be allowable.²⁸ On the other hand, objections on the ground of invalidity of registration²⁹ or on the ground of want of sufficient stamps³⁰ will not be allowed. An instrument not duly stamped will not be admitted in second appeal on payment of stamp duty and penalty, when there is no evidence that such stamp duty and penalty were tendered in the lower Courts.³¹
- (3) Objections as to the sufficiency of evidence,³² or as to the construction of evidentiary documents,³³ or an objection that a document has been materially altered.³⁴
- (4) Objections relating to the burden of proof.³⁵
- (5) An objection that a witness who ought to have been examined by the trial Court has not been examined.³⁶
- (6) An objection that the decision has been given by the District Court on evidence recorded by the Munsif before the transfer of the suit to the District Court.³⁷
- (7) An objection that the plaintiff should have, but has not, asked for another or consequential relief.³⁸
- (8) Objections on the ground of misjoinder³⁹ or non-joinder⁴⁰ of parties. But the question whether a particular defendant is necessary party and could contest the suit can be allowed if no further evidence is thereby rendered necessary.⁴¹
- (9) Objections on the ground of misdescription of parties.⁴²
- (10) Objections on the ground of the misjoinder of causes of action.⁴³
- (11) Objections to the frame of issues.⁴⁴

28. ('73) 19 South W R 22 (23).
 ('77) 2 Bom 489 (490).
 ('25) AIR 1925 Cal 870 (872).
 [But see ('69) 3 Beng L R App 125 (127).
 ('32) AIR 1932 P C 118 (120, 121) : 10 Rang 242 : 59 Ind App 161 (PC). (Point raised first time before the Privy Council—Disallowed as the unregistered document had been admitted by parties and the proceedings did not affect any immovable property in the suit.)
 ('69) 11 South W R 881 (881). (The learned Judges held that they were not able to say if there was any error in the judgment of the lower Court.)
 29. ('27) AIR 1927 Mad 92 (93).
 30. ('09) 2 Ind Cas 414 (415) : 37 Cal 68. ('35) AIR 1935 Lab 172 (178).
 ('35) AIR 1935 Rang 160 (160) : 13 Rang 322. 31. ('96) 20 Bom 791 (792, 794).
 32. ('22) AIR 1922 Pat 167 (169) : 1 Pat 350. ('69) 12 South W R 244 (245).
 ('72) 18 South W R 105 (105). (Objection to evidence as being not the best evidence.)
 ('29) AIR 1929 Rang 213 (214).
 33. ('24) AIR 1924 Cal 353 (354).
 ('27) AIR 1927 Mad 791 (791).
 34. ('29) AIR 1929 Mad 622 (624).
 35. ('75) 23 South W R 324 (325).
 36. ('32) 6 Bom 524 (527).
 ('71) 15 South W R 87 (88). (Refusal by trying Court to examine witnesses.)
 37. ('74) 6 N W P H C R 80 (83).
 44. ('17) AIR 1917 Lab 68 (69).
 ('18) AIR 1918 Nag 233 (233).
 ('15) AIR 1915 Cal 441 (441).
 ('12) 13 Ind Cas 788 (789) (Mad).
 43. ('81) 5 Bom 554 (551).
 [See ('69) 12 South W R 117 (118).]
 42. ('93) 16 Mad 317 (319).
 41. ('25) AIR 1925 Lab 65 (65).
 only, not allowed to be raised in second appeal.]]
 [See ('36) AIR 1936 Lab 612 (616). (Pre-emption suit—Objection that only one of the vendees appealed to the lower Appellate Court and hence the lower Court should have decreed the appeal to the extent of the share of the appellant only, not allowed to be raised in second appeal.)]
 ('87) 10 Mad 322 (329, 331, 333).
 ('21) AIR 1921 Mad 243 (245) : 44 Mad 344. ('19) AIR 1919 Cal 814 (815).
 ('09) 3 Ind Cas 693 (693) (Cal).
 ('91) 14 Mad 498 (501).
 40. ('72) 18 South W R 376 (376).
 in first appeal.)
 ('35) AIR 1935 Rang 23 (23). (Question arising
 ('28) AIR 1928 Mad 635 (636).
 ('94) 18 Bom 110 (113).
 ('93) 16 All 180 (131).
 ('92) 16 Bom 119 (122).
 ('77) 3 Cal 26 (29).
 ('69) 12 South W R 504 (504).
 39. ('1843) 3 Mco Ind App 229 (242) (PC).
 ('78) 2 All 184 (185).
 38. ('90) 14 Mad 46 (48).

- (12) An objection that the suit is not maintainable⁴⁵ or that it is premature⁴⁶ if it depends on facts.
- (13) Objections based on the ground of illegality and insufficiency of notice to quit.⁴⁷
- (14) Objections to court-fee and to the valuation of the suit for purposes of court-fees.⁴⁸

For other cases of objections, see the undermentioned cases.⁴⁹ As to new points of pure law, *vide* Note 56 *infra*.

A point which, though mentioned in the pleadings, was not put forward or agitated in the Courts below, will not be allowed to be raised in second appeal.⁵⁰ Similarly, a point put forward in the trial Court but not urged in first appeal will not be allowed in second appeal.⁵¹ Conversely, where one party sets up a new case in first

45. ('17) AIR 1917 Mad 177 (177).

('34) AIR 1934 Oudh 55 (56) : 9 Luck 365.

('22) AIR 1922 Lah 363 (363) : 5 Lah 239.

('30) AIR 1930 Cal 267 (269).

('69) 11 Suth W R 134 (135). (Suit not properly framed.)

('78) 2 All 134 (135).

('75) 24 Suth W R 413 (413, 414). (Objection as to right of suit owing to want of damage to plaintiff.)

('32) AIR 1932 All 661 (662).

('35) AIR 1935 Bom 254 (255).

46. ('24) AIR 1924 Lah 328 (328, 329).

47. ('18) AIR 1918 Mad 980 (982).

('17) AIR 1917 Pat 469 (470) : 2 Pat L Jour 595.

('20) AIR 1920 Mad 990 (991) : 62 Ind Cas 390 (391, 392).

('29) AIR 1929 Mad 617 (620).

('20) AIR 1920 Mad 965 (967) : 60 Ind Cas 766 (769). (Notice to quit — Not denied in written statement—Want of notices cannot be raised in second appeal.)

[See also ('78) 1 Cal L Rep 421 (423, 424). (Non-service of notice to quit.)]

[But see ('80) 2 Mad 346 (351). (Where notice to quit was part of plaintiff's title to eject, defendant was allowed to raise the point in second appeal.)

('94) 18 Bom 110 (113). (Objection to non-service of notice allowed and decree modified accordingly.)]

48. (1862) 1 Bom H C R 62 (63).

('91) 13 All 580 (581).

('25) AIR 1925 Lah 241 (241).

('27) AIR 1927 Nag 321 (322).

49. ('35) AIR 1935 Lah 10 (11). (Question of fraud, misrepresentation or gross negligence.)

('35) AIR 1935 Cal 726 (728). (Plea as to legality of certain tax by Municipality.)

('35) AIR 1935 Cal 89 (90). (Question whether Sec. 173, Bengal Tenancy Act was applicable to a particular application.)

('35) 18 Nag L Jour 110 (115). (A plea that a suit is barred by reason of S. 47, C. P. C.)

('36) AIR 1936 Pat 62 (63). (Objection that decree was satisfied as against the objector-judgment-debtor.)

('38) 40 Pun L R 630 (631). (Plea that suit should be treated as representative one.)

('36) AIR 1936 Oudh 235 (235, 236) : 12 Luck 59. (Finding as to existence of custom—Plea that it is qualified cannot be raised for the first time in second appeal.)

('32) AIR 1932 Bom 255 (255). (Plea of purchase in good faith and for consideration from ostensible owner.)

('34) AIR 1934 Nag 226 (227) : 18 Nag L R 27. (Plea of fraud not set up in pleadings—Appellate Court has no jurisdiction to entertain the plea.)

('37) AIR 1937 Cal 8 (9). (Whether rate of rent mentioned in lease contravenes Sec. 29, Bengal Tenancy Act, and so not enforceable.)

('38) AIR 1938 Nag 163 (164) : I L R (1938) Nag 469. (Allegation as to caste or community cannot be challenged for first time in second appeal at the stage of argument.)

('36) AIR 1936 Pat 275 (282). (New point as to forfeiture of tenancy by denial of title.)

('39) AIR 1939 All 163 (164) : I L R (1939) All 167. (Plea that lower Appellate Court should not entertain plea of want of jurisdiction in view of Sec. 21, Civil P. C., not raised in lower Court nor in grounds of second appeal.)

('36) AIR 1936 Rang 260 (262) : 14 Rang 738. (New plea that property descended to stridhana heir of the deceased.)

('37) AIR 1937 Nag 237 (239) : I L R (1938) Nag 221. (Plea of invalidity of deed of assignment of decree for want of registration.)

50. ('25) AIR 1925 Cal 1184 (1184).

('17) AIR 1917 PC 23 (25). (Such point disallowed before Privy Council.)

('37) AIR 1937 Oudh 243 (244) : 13 Luck 167. (Plea of res judicata withdrawn in trial Court.)

[But see ('13) 18 Ind Cas 367 (368) (Oudh). (Raised in written statement but no issue framed—Allowed in second appeal and remanded.)]

51. ('21) AIR 1921 All 232 (233) : 43 All 555.

('27) AIR 1927 All 791 (793).

('16) AIR 1916 P C 166 (168). (Point not pressed before Appellate Court — Disallowed before the Privy Council.)

('36) AIR 1936 Oudh 52 (53, 54) : 11 Luck 575. (Although one of law.)

('37) AIR 1937 Oudh 243 (244) : 13 Luck 167. (Plea of res judicata raised in trial Court, but

58. **Plea going to the root of the case.**—It follows from what has been said in Note 56 above that a plea of law which goes to the root of a case can be taken up even for the first time in second appeal,¹ if it arises from the evidence on record² and does not depend on other facts or further enquiry on facts.³ But such a plea will not necessarily be allowed in all cases. Where the objection is one which, if it had been taken in the lower Courts, might have been cured, it will not be allowed to be taken for the first time in second appeal.⁴ Thus, a plea of want of cause of action which is merely technical and capable of being cured if the objection had been taken in the lower Courts cannot be allowed to be raised in second appeal.⁵ But where the plea is one which is *fundamental* and *incurable*, it can be allowed to be raised for the first time in second appeal.⁶ Thus, an objection that the appellant in the lower Appellate

256. (Validity of security bond executed by guar-
dian ad litem.)
(36) AIR 1936 Cal 127 (128). (Suit for recovery of money—Plea that claim for interest should be limited to 25 p. c. by reason of S. 3, Bengal Money Lenders Act.)
(36) AIR 1936 Lab 192 (198). (Question of validity of gift.)

Note 58

1. (68) 10 South W R 218 (218).
(10) 6 Ind Cas 464 (465) (All).
(23) AIR 1923 All 343 (344). (Though it is ordinarily a sound rule of law not to permit a point to be taken in second appeal, which has not been taken before.)
(36) AIR 1936 Lab 448 (448). (Point relating to jurisdiction.)
(39) AIR 1939 Pat 140 (140).
2. (87) 14 Cal 586 (590).
(17) AIR 1917 Cal 716 (718): 44 Cal 47.
(23) AIR 1923 Lab 491 (492).
3. (17) AIR 1917 Nag 218 (218).
(27) AIR 1927 Bom 157 (158): 51 Bom 231.
4. (1843) 3 Moo Ind App 229 (242) (PC).
(34) AIR 1934 Rang 308 (308). (Maintainability of suit under S. 53 of the T. P. Act.)
5. (1864) 1 South W R 28 (28).
(69) 11 South W R 248 (248).
(69) 11 South W R 350 (351).
(11) 9 Ind Cas 385 (387) (Lab).
(78) 1 Cal T Rep 421 (424).
(90) 13 Mad 277 (281). (Plea of want of notice not allowed for the first time in second appeal as, though plaintiff alleged demand of relinquishment of possession, yet no issue was taken on it and in view of the allegations on both sides the point could not have arisen.)
(12) 15 Ind Cas 584 (586) (Mad). (Notice to quit—Want of.)
(20) AIR 1920 Mad 965 (967). (Do.)
(75) 1 All 269 (271). (Plea as to notice not affecting decision.)
(95) 19 Bom 43 (45, 46). (Suit for declaration of plaintiff's right to be registered in the revenue register—Plaintiff had not previously asked the Collector to place him on the register—Plea cannot be raised for first time in second appeal.)
6. (69) 12 South W R 24 (26). (Want of cause of action appearing on the plaint.)

- (26) AIR 1926 Nag 164 (166). (Omission to certify adjustment—If valid.)
(22) AIR 1922 Bom 148 (148). (Gift—Validity of.)
(28) AIR 1928 Cal 49 (49). (Gift—If offends against doctrine of masha.)
(29) AIR 1929 Lab 875 (876). (Gift unregistered if admissible.)
(19) AIR 1919 Cal 1077 (1078). (Interest—Liability to.)
(20) 2 Lab T Jour 230 (232). (Lis pendens—Plea of.)
(26) 97 Ind Cas 611 (612) (Mad). (Question whether a mortgage is properly executed.)
(21) AIR 1921 Cal 781 (782). (Mortgage—Subrogation—Plea as to.)
(24) AIR 1924 Nag 360 (361). (Necessaries—What are.)
(16) AIR 1916 Sind 53 (54): 10 Sind L R 38. (Legal necessity—Existence of.)
(19) AIR 1919 Cal 161 (162). (Occupancy right—Acquisition of.)
(21) AIR 1921 Lab 226 (227): 2 Lab 167. (Onus probandi in a case of custom.)
(27) AIR 1927 Mad 528 (529). (Partial partition—Maintainability of suit for.)
(29) AIR 1929 Lab 266 (267). (Partner's authority to bind partnership in winding up.)
(27) AIR 1927 All 344 (345). (Part performance—Plea of.)
(29) AIR 1929 Pat 717 (720, 721): 9 Pat 487. (Whether a certain provision is penal.)
(26) 94 Ind Cas 417 (418) (Cal). (Question of procedure dependent on facts.)
(19) AIR 1919 Cal 407 (408). (Registration—Validity of—Plea as to.)
(27) AIR 1927 Mad 311 (316). (Sale certificate—What passes under—Question as to.)
(14) AIR 1914 Low Bur 166 (168). (Question of contest between verbal sale and registered sale.)
(21) 3 Lab T Jour (470) (472). (Shamlat land—Right to, as natural accretion.)
(24) AIR 1924 Cal 353 (354). (Tennure—Nature of.)
(22) AIR 1922 Pat 390 (392): 1 Pat 15. (Ware-house rent—Claim for.)
(22) 4 Lab T Jour 432 (434). (Widow's power under custom to make a gift.)
(69) 11 South W R 485 (487, 488). (Plea of merger.)
(21) AIR 1921 Cal 816 (817, 818). (New defence of adverse possession.)
(38) AIR 1938 Rang 236 (239): 1938 Rang L R

Court was not competent to file the appeal goes to the very root of the appeal and can be raised for the first time in second appeal,⁷ where such a plea is allowed, the opposite party may be given an opportunity to meet it.⁸

59. Plea of jurisdiction.—A plea of jurisdiction is a point of law¹ and, except in cases covered by Section 21 of the Code² and Section 11 of the Suits Valuation Act, 1887,³ can even as a new plea be raised in second appeal,⁴ unless such plea cannot be determined on the facts found by or admitted in the lower Court,⁵ or on the

- (70) 14 Suth W R 420 (422). (Want of cause of action going to the root of the case.)
- (71) 6 Beng L R (App) 73 (74). (Plea affecting jurisdiction.)
- (99) 21 All 341 (345) (FB). (Want of cause of action appearing on the plaint.)
- (11) 12 Ind Cas 111 (112) (All) (Do.).
- (98) 18 Bom 110 (113). (Want of notice in ejectment suit.)
- (10) 5 Ind Cas 386 (387) (All). (Plea of want of notice which goes to the root of the case.)
- (01) 26 Bom 360 (362).
- (66) 1 Agr 1 (2). (Incompetency to bring a suit.)
- (78) 1 All 535 (537). (Objection affecting arbitrator's procedure.)
- (79) 3 Bom 437 (438). (Plaintiffs having been adjudicated insolvent.)
- (88) 6 Mad 76 (78). (Point that sale of religious office is void.)
- (93) 20 Cal 86 (92): 10 Ind App 191 (PC). (Improprity of notice of sale under regulation.)
- (01) 28 Cal 324 (328). (Irregular remand under O. 41 R. 23.)
- (07) 11 Cal W N 1127 (1128). (A point as to jurisdiction under Chota Nagpur Encumbered Estates Act.)
- (17) AIR 1917 Cal 681 (684). (The point whether in the absence of a written and registered document creating a right of way the plaintiff's suit for declaration of such a right must fail for want of legally sufficient evidence to prove the grant.)
7. (84) AIR 1934 All 677 (679).
8. (79) 2 Mad 346 (350, 351).
- (25) AIR 1925 Mad 67 (68).
- Note 59**
1. (31) AIR 1931 All 556 (557).
- (34) AIR 1934 Sind 123 (125): 28 Sind L R 54. (The plea was allowed to be raised, as it depended on public documents which required no proof.)
2. See Notes to Section 21, ante.
- (27) AIR 1927 Nag 164 (165). (Small cause tried as original suit.)
- (94) 21 Cal 249 (252) (Do.).
- (27) AIR 1927 Nag 120 (120) (Do.).
- (33) AIR 1933 Nag 318 (321, 322): 29 Nag L R 342.
- (05) 2 All L Jour 156 (159). (Wrong Court.)
- (17) AIR 1917 Pat 598 (599). (Place of suing.)
3. See Notes to Sections 15 and 21, ante.
- (76) 25 Suth W R 260 (261).
- (95) 18 Mad 418 (420).
- (01) 24 Mad 43 (45).
- (36) AIR 1936 Lah 442 (442).
4. (23) AIR 1923 Lah 551 (553).
- (34) AIR 1934 Oudh 55 (55): 9 Luck 365.
- (90) 13 Mad 25 (27).
- (68) 12 Bom 155 (157).
- (59) 13 Bom 424 (427).
- (21) AIR 1921 All 290 (291): 12 All 15.
- (24) AIR 1924 P C 95 (101): 20 Nag L R 33: 51 Ind App 72: 51 Cal 361 (PC).
- (14) AIR 1914 P C 140 (143): 42 Cal 116: 41 Ind App 197 (PC).
- (85) 7 All 230 (243).
- (24) AIR 1924 Nag 372 (373).
- (72) 18 Suth W R 345 (345). (Jurisdiction to transfer execution proceedings.)
- (89) 13 Mad 273 (274).
- (96) 20 Bom 86 (96).
- (99) 23 Bom 22 (26).
- (10) 5 Ind Cas 525 (526) (Cal).
- (08) 35 Cal 470 (474).
- (23) AIR 1923 Bom 321 (349): 47 Bom 843 (FB).
- (25) AIR 1925 Bom 162 (162): 49 Bom 152.
- (26) AIR 1926 All 401 (402).
- (89) 13 Bom 489 (491). (Want of appellate jurisdiction in the lower Appellate Court.)
- (12) 15 Ind Cas 669 (670) (Cal). (Do.).
- (18) AIR 1918 Lah 369 (370): 1918 Pun Ro No. 21. (Do.).
- (08) 8 Cal L Jour 116 (117).
- (92) AIR 1932 All 701 (702): 54 All 998. (Objection that suit must have been brought in Revenue Court.)
- (35) AIR 1935 All 422 (423).
- (86) AIR 1936 Lah 448 (448).
- (36) AIR 1936 Pat 177 (178). (Want of jurisdiction cannot be cured by waiver.)
- (39) AIR 1939 All 49 (51). (Objection that there is no proper reference to arbitration and that it could not enable arbitrator to make an award, relates to question of jurisdiction and can be raised at any stage.)
- (39) AIR 1939 All 22 (23).
- (37) AIR 1937 Nag 170 (171): 19 Nag L Jour 308 (311): 1 L R (1938) Nag 276.
- (35) AIR 1935 Oudh 325 (326): 11 Luck 106.
- [See also (32) AIR 1932 All 273 (276): 54 All 578 (F B). (Plea entertained in Letters Patent appeal.)
- (35) AIR 1935 Mad 89 (89). (Plea that suit should have been instituted on original side instead of small cause taken in revision.)
- [See however (12) 14 Ind Cas 34 (35) (Cal).]
5. (1862) 1862 Suth W R Sup No. 31 (32, 33) (FB).
- (35) AIR 1935 All 746 (748): 57 All 891.
- (35) 39 Cal W N 876 (880). (A question of jurisdiction is a question of law but it cannot always

(3) they depend on a possible question regarding which the party adversely affected might have adduced evidence.⁴

But even a plea which could be raised for the first time in second appeal cannot be heard at the hearing of the appeal unless it has been set out in the memorandum of appeal or unless the Court grants leave under O. 41 R. 2.⁵

Where an objection on the ground of limitation was taken in the trial Court but the issue was found against, and the High Court remanded the case without passing any judgment on that issue, it was held that where the case came upon second appeal again, the question of limitation could be gone into.⁶

An objection that the second appeal is barred by limitation can be raised at the hearing, if the appeal had been admitted *ex parte*.⁷

61. Plea abandoned or waived is barred.— It has been seen in Sections 9 and 21 *ante* that no amount of consent by parties can give jurisdiction and that there can be no waiver or abandonment of such a plea.⁷ Where, however, a plea whether of fact or of law is one which could be waived or abandoned and is so abandoned, it cannot be raised again in second appeal.⁸ Whether a plea has been abandoned or waived has to be gathered from the conduct of the party in the Courts below.⁹ Thus, where points taken in the pleadings or in the memorandum of first appeal are not pressed in the trial

- (39) AIR 1939 All 194 (196). (Plea of estoppel.)
(38) AIR 1938 Bom 291 (293). (Plea of estoppel cannot be allowed to be raised for the first time in second appeal, when it would necessitate the taking of further evidence of facts.)
[See (36) AIR 1936 P C 258 (259) (P C).]
[See also (35) AIR 1935 Cal 718 (715). (Question of estoppel is not a pure question of law; when the plea of estoppel, therefore, has not been raised in the Courts below it cannot be raised for the first time in second appeal.)]
(36) AIR 1936 Cal 181 (183).
(84) 8 Bom 535 (537).
4. (16) AIR 1916 Mad 535 (535).
[See also (34) AIR 1934 Oudh 55 (55) : 9 Luck 365. (Plea of bar of S. 47, Civil P. C.)]
5. (93) 15 All 123 (128).
(91) 13 All 580 (581).
(82) 4 All 69 (70, 71, 72) (FB). (S. 542 of the old Code O. 41 R. 2 applied.)
(28) AIR 1933 Lab 560 (563). (4 All 69 Foll.)
[See also (31) AIR 1931 All 556 (557). (Objection on the ground of jurisdiction was allowed to be raised under the provisions of O. 41 R. 2.)]
6. (67) 7 Suth W R 67 (69).
7. (86) 13 Cal 78 (79).
Note 61
1. (36) AIR 1936 Pat 177 (178).
[See also (27) AIR 1927 Mad 273 (274). (Plea of res judicata is akin to plea of jurisdiction and can be raised though abandoned.)]
2. (10) 6 Ind Gas 795 (795) (All).
(32) AIR 1932 Lab 343 (343) : 13 Lab 185. (Abandoning mixed issues of law, custom and fact.)

- (33) AIR 1933 Cal 865 (870).
(78) 2 Cal L Rep 208 (208).
(96) 23 Cal 374 (392).
(20) AIR 1920 Nag 45 (45) : 16 Nag L R 89.
(21) AIR 1921 Lab 294 (295).
(21) 63 Ind Gas 490 (492) (All).
(09) 2 Ind Gas 848 (849) (All). (Parties impleaded without objection.)
(22) AIR 1922 Oudh 102 (105).
(23) AIR 1923 Lab 252 (252).
(24) AIR 1924 Cal 541 (541).
(25) AIR 1925 Oudh 510 (511).
(26) AIR 1926 Nag 160 (161).
(27) AIR 1927 Mad 75 (76).
(29) AIR 1929 Pat 717 (720, 721) : 9 Pat 487. (Mixed question of law and fact.)
(31) AIR 1931 Sind 170 (176) : 25 Sind L R 403. (Do.)
(30) AIR 1930 Oudh 268 (269, 270). (Point of pure law.)
(27) AIR 1927 Oudh 37 (37). (Do.)
(30) AIR 1930 Lab 148 (149). (Future interest denied by trial Court—No cross-objections in first appeal—Cannot be claimed in second appeal)
(72) 18 Suth W R 37n. (Objection to jurisdiction not pressed before Lower Appellate Court.)
(11) 11 Ind Gas 408 (409) (Lab).
(37) AIR 1937 Lab 174 (176). (Decree transferred for execution without following procedure under O. 21 R. 5—Objection as to irregularity in procedure can be waived.)
(36) AIR 1936 Bom 10 (11) : 60 Bom 34. (Objection as to maintainability of a suit, if not brought in the lower Court, will be deemed to have been waived and cannot be raised in second appeal.)
[See (37) AIR 1937 Mad 228 (229). (Court is bound to entertain plea of res judicata even though abandoned by parties.)]
3. (02) 26 Bom 410 (413).

Court or in the lower Appellate Court, as the case may be,⁴ or where parties conduct the case in the lower Courts as if certain facts are admitted,⁵ or where the findings of the trial Court are not challenged in the first Appellate Court,⁶ such points will be taken to be abandoned or waived and cannot be raised in second appeal. Similarly, objections as to the admissibility or exclusion of evidence if not raised in the trial Court or in the lower Appellate Court cannot be raised in second appeal.⁷ But the mere fact that the lower Appellate Court has not referred to a certain point does not necessarily mean that the point was abandoned.⁸

62. Who may appeal and who may not.—The matter has been fully discussed in Notes 6, 7 and 8 of Section 96 *ante*. The questions as to who may and who may not prefer a second appeal will be governed by the same principles.

63. Remand.—Where, in appeal from an order of remand the High Court determines a question of law, the decision of the question will be final for all purposes and in any appeal that may be subsequently made to the High Court.¹ See also O. 41, Rr. 23 and 25.

64. Ex parte appellate decree is subject to second appeal.—Under the Code of 1859 there was a conflict of views on the question whether a second appeal lay against *ex parte* decrees passed in first appeals. Some decisions held that the only remedy was to proceed under Section 119 of the said Code (corresponding to O. 9 R. 13 of the present Code).¹ Others held that a second appeal was also competent.²

This conflict has been set at rest by the last paragraph of Section 584 of the Code of 1882 re-embodied as sub-section (2) to Section 100 and there is now no doubt that a second appeal from an *ex parte* appellate decree is competent.³

4. (18) AIR 1918 P C 53 (55) : 40 All 497 (P C).

(34) AIR 1934 Pat 55 (57).

(71) 15 South W R 392 (392).

(70) 14 South W R 423 (424).

(19) AIR 1919 Oudh 30 (30).

(35) AIR 1935 All 1004 (1003).

(35) AIR 1935 Pat 351 (352).

5. (70) 13 South W R 91 (91).

(75) 23 South W R 174 (175).

[See (35) AIR 1935 Oudh 168 (164). (Admission of a mixed question of law and fact made in lower Appellate Court cannot be withdrawn in second appeal.)]

6. (10) 6 Ind Cas 381 (382) (All).

7. (68) 10 South W R 50 (50). (Admission.)

(72) 18 South W R 105 (105). (Do.)

(23) AIR 1923 Cal 378 (379). (Do.)

(27) AIR 1927 Mad 1107 (1108). (Do.)

(12) 16 Ind Cas 218 (214) (Cal). (Exclusion.)

(69) 11 South W R 418 (419). (Refusal to summon witnesses—Objection not taken in Court below.)

(70) 2 N W P H C R 206 (206, 207). (Exclusion of evidence.)

(69) 12 South W R 470 (471). (Refusal to summon witnesses—Objection taken but not pressed in first appeal.)

(11) 12 Ind Cas 691 (691) (Bom). (Evidence dispensed with in trial Court and not offered in first Appellate Court.)

(69) 12 South W R 368 (364). (Refusal to take evidence—Party content to rest his case in the

1. See for instance, (66) 3 Mad H C R 109 (110).

2. (69) 10 South W R 450 (451).

(73) 20 South W R 402 (403).

(77) 3 Cal 228 (229).

(78) 2 Mad 75 (76).

3. (86) 8 All 354 (357, 358) (P B).

(92) 16 Bom 117 (118).

(96) 19 Mad 414 (416).

(22) AIR 1922 Lab 439 (440) : 3 Lab 357.

(25) AIR 1925 Cal 497 (498).

(29) 117 Ind Cas 229 (229) (Lab).

Note 63

Note 64

lower Appellate Court on the evidence let in. [(SS) 18 Bom 386 (387). (Do.) (See also (1900) 24 Bom 591 (594, 596). (Admission.)]

8. (29) AIR 1929 Lab 51 (52).

(09) 4 Ind Cas 30 (30, 31) (Mad).

[See (37) 39 Pun L R 312 (312). (Lower Appellate Court not noticing in judgment point taken in grounds—Presumption is that it is abandoned in absence of affidavit to contrary.)]

[See also (13) 18 Ind Cas 367 (368) (Oudh). (Please raised in written statement of the defendant the plaintiff-appellant to the notice of the lower Appellate Court—Defendant can raise it in second appeal.)]

102. [S. 586.] No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes,² when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees. [1877, S. 586; 1861, S. 27.]

Synopsis

1. Scope and object of the Section.
2. Suits of the nature cognizable by Courts of Small Causes.
3. Effect of trying small cause suits as ordinary suits.
4. Suit includes execution proceedings.
5. Suits for accounts.
6. Suits for contribution.
7. Suits for damages.
8. Suits for maintenance.
9. Suits relating to marriage.
10. Suits for mesne profits.
11. Suits for money.
12. Suits relating to immovable property.
13. Suits for rent.
14. Suits for title.
15. Suits for declaration.
16. Suits for specific performance of contract.
17. Suits relating to trusts.
18. Appeal from order of remand in suits of small cause nature.
19. Appeal from order of review in suits of small cause nature.
20. Other cases.

Other Topics (miscellaneous)

Appeal from order refusing to re-admit an appeal. See Note 1.

Effect of decision when question of title is raised. See Note 2.

It is the character of the suit as originally framed that determines whether second appeal lies or not. See Note 2.

pecuniary value of the suit is determined from plaintiff's allegations. See Note 2.

Prayer for declaration does not alter the nature of the suit. See Note 15.

1. Scope and object of the Section.—Section 27 of the Provincial Small Cause Courts Act (IX of 1887) enacts that where a suit of a small cause nature is tried by a Court of Small Causes, its decree or order is *final*, i. e., no appeal lies therefrom. This Section provides that where a suit of a small cause nature is tried not by a Small Cause Court, but by a Court in its *ordinary jurisdiction*, the decree or order is not open to a *second appeal*.¹ "The object of this Section," said White, C. J., in *Sundaram Aiyar v. Sennia Natchan*,² "is to take away the right of second or special appeal where the value of the subject-matter of the original suit does not exceed Rs. 500 in the case of all suits which as regards their subject-matter would lie within the jurisdiction of Courts of Small Causes but which are outside that jurisdiction by reason of the amount claimed being beyond the pecuniary limit of the Small Cause jurisdiction." Similarly,

Section 102 — Note 1

1. (35) AIR 1935 Bom 254 (255). (Nature of suit and not Court in which it is tried, determines right of appeal.)
- (37) AIR 1937 Oudh 244 (245) : 13 Luck 204. (Do.)
- (36) AIR 1936 Oudh 129 (129). (Case can be treated as application for revision under S. 115)
2. (1900) 23 Mad 547 (554) (FB).
 —It is not revisable under S. 25, Provincial Small Cause Courts Act).
 (35) AIR 1935 All 574 (575). (Suit transferred from Small Cause Court to ordinary Court by District Judge under S. 24—Decree of latter Court is open to appeal but not subject to second appeal if the value of suit does not exceed Rs. 500.)

if an order is passed by the executing Court in execution of a decree in a suit of a small cause nature, the order is not open to second appeal though it may be within Section 47.³ The reason is that when no second appeal will lie in the suit itself no such appeal will lie from an order in execution of the decree in such suit.⁴ This Section will apply even where the suit has been referred to arbitration.⁵ But it does not apply to an order refusing to re-admit a first appeal dismissed for default as an appeal lies from such order under O. 43 R. 1 (f).⁶

2. Suits of the nature cognizable by Courts of Small Causes.— Every suit is of a small cause nature except those that are excepted from the cognizance of a Court of Small Causes, by the second schedule of the Provincial Small Cause Courts Act, 1887.¹ The test therefore for finding out whether a particular suit is or is not of the nature cognizable by Courts of Small Causes is to see whether it is excepted under that schedule.² Where it is not so excepted and the value of the suit is less than Rs. 500, no second appeal will lie from the decree.³ It is the character of the suit as originally framed and presented to the Court that will determine the nature of the suit,⁴ and not the defence which may be set up,⁵ or the character which it may assume in the course of, and after the trial by operation of findings by the Court.⁶ As to

3. ('39) I.L.R. (1939) Kar 342 (343). (Bar of appeal under the Section also applies to surety against whom an order is passed in execution.)
4. ('21) AIR 1921 All 55 (55) : 43 All 408. [See however ('22) AIR 1922 Lah 290 (291) : 8 Lah 141. (While determining whether second appeal lies against order passed in execution proceedings, the amount of the subject-matter of the suit and not the amount to be recovered is to be considered.)]
5. ('68) 10 Suth W R 205 (205). ('70) 13 Suth W R 233 (233).
6. ('88) 1883 Pun Re No. 100.

Note 2

1. See Section 15 of the Provincial Small Cause Courts Act, 1887.
2. (1900) 23 Mad 547 (558, 559). See the speech of the Honourable Mr. Jibert, "Gazette of India" January 2, 1886, Sup., page 8.

3. ('37) AIR 1937 Oudh 244 (245) : 13 Luck 204.
3. ('35) AIR 1935 Bom 254 (255).
3. ('31) AIR 1931 Rang 386 (386) : 13 Rang 633 (FR).
3. ('85) 11 Cal 169 (171, 172).
3. ('36) AIR 1936 Nag 276 (277).
3. ('39) AIR 1939 Sind 35 (35) : I.L.R. (1939) Kar 134. (Suit for recovery of terminal tax on moveable property valued at less than Rs. 500—No second appeal lies.)
4. ('01) 24 Mad 508 (511).
4. ('24) AIR 1924 Cal 405 (406) : 51 Cal 62.
4. ('16) AIR 1916 Bom 106 (106) : 41 Bom 367. (Nature of the suit and not the form is to be considered.)
4. ('31) AIR 1931 Oudh 411 (411). (Plaint allegations coming under Art. 35 (ii) of Act IX of 1887—Suit tried on regular side without objection by defendant—Second appeal lies, though plaint allegations subsequently appear to have been designedly made.)

5. ('16) AIR 1916 All 343 (343).
5. ('15) AIR 1915 Nag 124 (125) : 12 Nag L R 47.
5. ('91) 15 Bom 400 (405).
5. ('76) 1876 Pun Re No. 109, page 230. (A plea of title raised by defendant does not oust Court's jurisdiction.)
5. ('09) 5 Bom L R 398 (403).
5. ('85) 1885 Pun Re No. 8, page 16.
5. ('35) AIR 1935 Oudh 418 (414). (Accordingly in a suit for damages and appropriation of fruits which is of a nature cognizable by a Court of Small Causes, a second appeal is barred under S. 102, even though the defendant raises a question of title to the land under the trees.)
6. ('24) AIR 1924 Mad 844 (844).
6. ('19) 50 Ind Cas 629 (630) (Nag).
6. ('28) AIR 1928 Lah 764 (765). (Where plaintiff brought a suit for ejectment and recovery of rent below Rs. 500 but abandons case of ejectment, second appeal is not barred.)
6. ('08) 32 Bom 356 (360). (Suit for specific performance and in the alternative for damages—First Court awarding damages and the Appellate Court dismissing the suit—Second appeal lies.)
6. ('10) 7 Ind Cas 955 (956) : 35 Bom 29.
6. ('28) 108 Ind Cas 898 (898) (Oudh).
6. ('12) 13 Ind Cas 493 (494) (Oudh). (In an ejectment suit the awarding of damages only by the Court will not bar a second appeal.)
6. ('25) AIR 1925 Bom 440 (441) : 49 Bom 596. (Plaintiff omitting a portion of claim subsequently—Suit does not change its character.)
6. ('12) 13 Ind Cas 174 (175) (Mad).
6. ('01) 25 Bom 417 (417).
6. ('13) 21 Ind Cas 120 (120, 121) : 40 Cal 537. (Suit having small cause character tried in ordinary manner—Character of the suit is not altered thereby.)
6. ('89) 11 All 13 (14). (To determine whether second appeal lies or not under this Section, the shape in which the suit is originally brought must be

whether the value of the suit is less than Rs. 500 or not is to be determined on the allegations in the plaint¹ and not upon the nature of the defence pleaded or of the relief granted. The mere fact that a Small Cause Court returns a plaint under Section 23 of the Provincial Small Cause Courts Act, 1887, to be presented to another Court on the ground that it involves a question of title will not alter the nature of the suit for the purposes of this section.² Nor would the nature of the suit be affected by the fact that the Small Cause Court decides a question of title incidentally raised.³

If a claim is partly within the jurisdiction of Small Cause Courts and partly within the jurisdiction of the regular Courts, the plaintiff is entitled to file a suit in the regular Courts,⁴ but a collateral claim to which the plaintiff is not entitled, but asked for in the plaint will not deprive the suit of the character of a small cause.⁵

See also Notes 5 to 17 *infra*.

3. Effect of trying small cause suits as ordinary suits. — If instead of trying a small cause suit in a summary way it is tried in the ordinary manner as a regular suit, the mistake will not alter the character of the suit which will nevertheless be subject to all the incidents of a small cause suit.⁶ Therefore no decree or order in such a suit will admit of a second appeal.⁷

- looked to, and not the shape in which the case comes up in appeal.)
 (18) AIR 1918 Mad 162 (162). (Character of suit is not altered by a subsequent Amending Act passed at the time of the second appeal.)
 (31) AIR 1931 AH 595 (595).
 (12) 13 Ind Cas 907 (908) (Cal).
 (38) AIR 1938 Cal 336 (337) : 1 L R (1938) 2 Cal 81. (A suit *bona fide* framed as a mortgage suit, although the only claim which could be established by the plaintiff is a money claim is still a mortgage suit.)
 7. (24) AIR 1924 Cal 405 (406) : 51 Cal 62. (01) 27 AH 200 (202).
 8. (10) 7 Ind Cas 778 (780) (Cal). (Commitment's finding increasing the valuation does not alter the nature of the suit as originally brought.)
 (86) 6 South W R 152 (153).
 (06) 30 Mad 212 (213). (Appellability determined by subject-matter of the suit, and not by the amount claimed in execution.)
 (11) 12 Ind Cas 937 (937) (Mad).
 (97) 21 Cal 557 (560, 561).
 (02) 6 Cal W N 687 (688).
 (92) 16 Mad 98 (99).
 (28) AIR 1928 Nag 136 (136).
 (21) AIR 1921 Oudh 114 (114). (Suit for damages for value of trees cut on plaintiff's land.)
 (26) AIR 1926 Mad 622 (622).
 (29) AIR 1929 Mad 389 (390). (Suit for damages for use and occupation.)
 (29) AIR 1929 Mad 626 (626). (Suit for rent or in the alternative for damages for use and occupation.)
 (01) 25 Bom 417 (417).
 (01) 26 AH 235 (236).
 (17) AIR 1917 AH 169 (169) : 33 AH 101. (03) 5 Bom L R 398 (398).
 (88) 12 Bom 156 (159).
 (92) 15 Mad 258 (259).
 2. (26) AIR 1926 Mad 622 (622).
 (28) AIR 1928 Nag 136 (136).
 Note 3
 1. (13) 21 Ind Cas 120 (121) : 10 Cal 337. (01) 25 Bom 417 (417).
 (06) 23 AH 293 (294).
 12. (01) 24 Mad 308 (311).
 11. (17) AIR 1917 Mad 123 (123).
 (35) AIR 1935 Oudh 413 (413).
 (82) 1882 Pun Re No. 38, page 111.
 (77) 1877 Pun Re No. 75, page 191.
 (16) AIR 1916 Nag 43 (44) : 11 Nag L R 100. (29) AIR 1929 Mad 389 (390).
 (26) AIR 1926 Mad 656 (656).
 (91) 1 Mad L Jour 166 (167).
 (81) 3 Mad 192 (195, 199).
 (81) 3 Mad 127 (129) (PIL).
 (12) 16 Ind Cas 201 (201, 202) (Mad).
 (23) AIR 1923 Cal 921 (921).
 (18) AIR 1918 Cal 528 (528).
 (10) 6 Ind Cas 415 (415) (Cal).
 (02) 6 Cal W N 687 (688).
 (97) 24 Cal 557 (560, 561).
 (77) 2 Cal 470 (471).
 (72) 18 South W R 104 (105).
 (68) 10 South W R 272 (272).
 (67) 7 South W R 73 (73).
 (1864) 1 South W R 35 (35).
 (14) AIR 1914 Bom 302 (302) : 33 Bom 190. (13) 20 Ind Cas 974 (975) : 37 Bom 675 (PIL).
 (08) 32 Bom 560 (562).
 (01) 25 Bom 625 (628, 629).
 (97) 21 Bom 248 (250).
 (91) 15 Bom 400 (403).
 (85) 9 Bom 259 (265).
 (14) AIR 1914 AH 516 (517).
 (87) 9 AH 691 (691).
 10. (23) AIR 1923 AH 821 (822).
 (37) AIR 1937 Oudh 211 (212) : 13 Luck 201.

of money due on an account is not excepted from the cognizance of a Court of Small Causes.³ But if it is necessary to take accounts in order to grant relief to the plaintiff, it will be a suit for account.⁴

As to suits for mesne profits, see Note 10 below.

6. Suits for contribution.—Two classes of suits for contribution have been excepted from the cognizance of Courts of Small Causes by Articles 41 and 42 of the Second Schedule of the Provincial Small Cause Courts Act, 1887—

- (1) suit by a co-sharer in joint property or by a member of an undivided family for contribution in respect of money paid by him on account of the property or family,⁵ and
- (2) suit by a co-mortgagor who has redeemed the property, for contribution from his co-mortgagors.⁶

All other suits for contribution are small causes. For such suits, see the under-mentioned cases.⁷ It should be remembered that contribution implies the existence of a

- (702) 5 Oudh Cas 130 (131). (The word account in the suit means a suit where account is expressly asked for—it also includes suits in which there must be an account.)
- (89) 1889 Pun Re No. 92, p. 329. (Suit for profits out of a partnership business.)
- (70) 1870 Pun Re No. 71. (Suit for profits in virtue of an agreement to share equally the profit and loss of a certain contract.)
- (81) 6 Cal 551 (553). (Suit involving questions of partnership account.)
- (68) 10 South W R 214 (214). (Do.)
- (15) AIR 1915 All 60 (61). (Suit for partnership account with an alternative prayer for the dissolution of the partnership.)
3. (97) 19 All 513 (514). (Suit by a retired partner for money alleged to have been agreed to be paid to him.)
- (10) 6 Ind Cas 386 (338) (Cal). (Suit for damages between date of payment of mortgage money and date of possession—See however 19 Ind Cas 427.)
- (96) 23 Cal 884 (890) (F B). (Suit for mesne profits is cognizable by a Small Cause Court.)
- (95) 27 All 200 (202). (Suit by widow of a priest for recovery of books and money received by defendant as agent of plaintiff's husband and is not one for accounts.)
- (95) 28 Mad 394 (396).
- (12) 13 Ind Cas 159 (160) (Mad).
- (12) 14 Ind Cas 786 (787) : 8 Nag L R 36.
- (12) 14 Ind Cas 578 (573) (Mad).
- (20) AIR 1920 Mad 788 (783). (Suit for specific sum as half share of the profits of land.)
- (21) AIR 1921 Lah 173 (173). (Suit on agreement to share proceeds of a tenancy is small cause.)
- (99) 4 Ind Cas 618 (619) (Mad). (Suit against an agent for some specific items of money.)
- (78) 2 Cal L Rep 17 (18). (Suit for account papers and documents and for an account of agency and in default for damages.)
- (04) 26 All 358 (360, 361).
- (73) 20 South W R 4 (5). (Suit for an unaccounted balance by an agent to conduct law suits.)
3. (20) AIR 1920 Cal 935 (936) : 62 Ind Cas 504 (505). (Joint decree for mesne profits.)
- 38CPC. 59.
1. (09) 4 Ind Cas 59 (60) (All). (Property does not cease to be joint because enjoyed by the sharers separately.)
- (15) AIR 1915 Cal 310 (311).
- (96) 28 Cal 189 (191).
- (16) AIR 1916 Cal 954 (955).
- (12) 14 Ind Cas 735 (735) (Cal). (But a suit for a rent of certain lands of which plaintiffs was a registered tenant but not for any interest in the land is small cause.)
- (12) 17 Ind Cas 90 (91) (Cal). (The fact that the recorded tenant transferred his share before the whole amount sued for fell due does not put the suit outside the scope of Art. 41.)
2. [See (28) AIR 1928 Cal 593 (596) : 55 Cal 1193. (Per Cunniff, J.—Suit by purchaser from a joint owner mortgagor—Alukherji, J. dissenting.)]
3. (20) AIR 1920 Cal 935 (936) : 62 Ind Cas 504 (505). (Joint decree for mesne profits.)

8. Suits for maintenance.— See also Article 38 of the Second Schedule of the Provincial Small Cause Courts Act, IX of 1887.

Before the date of the present Act, suits for maintenance based on a contract or bond or family arrangement or agreement, could be brought as a small cause.¹ Such a suit will now be barred under Article 38 of the Provincial Small Cause Courts Act, 1887, whether the maintenance is claimed under a will or by agreement or on a personal obligation.² But if the right to maintenance has been recognized and does not arise for determination, a *claim for arrears* will be a suit for money and hence a small cause.³ A suit must, if it is to be accepted under Art. 38 of the Small Cause Courts Act from the cognizance of a Court of Small Causes, be in *substance* a suit for maintenance.⁴ Thus, a suit by a guardian of a minor's person against the property guardian for the amount payable to the minor for his maintenance can be brought in a Small Cause Court, as the payment is from his own property.⁵

9. Suits relating to marriage.— Suits for compensation for breach of contract of betrothal or promise of marriage are not cognizable by Small Cause Courts and are excluded expressly by Art. 35 of the Act IX of 1887. The word "compensation" denotes loss sustained by the plaintiff in consequence of the articles got ready for the marriage being wasted or damaged, and denotes also the costs of presents or ornaments. It has the same meaning as in Section 73, Contract Act, 1872, and includes a suit for return of presents or ornaments given in contemplation of marriage.⁶

(31) AIR 1931 All 595 (595).

Damages for wrongful distraint :

(02) 25 Mad 540 (542).

(89) 21 Mad 239 (240).

(97) 24 Cal 168 (165).

(02) 24 All 517 (518).

(06) 16 Mad 149 (153).

Wrongful distraint and wrongful attachment :

(36) AIR 1936 Nag 257 (257) : 1 L R (1937) Nag

19. (Suit for damages for wrongful attachment

and negligence—Not of small cause nature.)

(09) 3 Ind Cas 429 (429) (Cal). (Where the war-

rant was merely issued and money paid, suit

for money paid is only a small cause.)

(89) 22 Mad 457 (459).

(97) 24 Cal 168 (165).

(11) 9 Ind Cas 537 (538) (All).

(18) 18 Ind Cas 695 (695) (All).

(11) 9 Ind Cas 317 (318) : 33 All 306.

[See also (12) 15 Ind Cas 505 (506) : 36 Bom 443.

(72) 18 Subh W R 283 (283). (Suit for money

paid by an unsuccessful claimant to prevent

sale of his property attached.)

(02) 12 Mad 149 (350). (Suit for damages

for trespass is a small cause.)

(09) 1 Ind Cas 592 (593) (Cal). (Do.)

(38) AIR 1938 Lab 363 (363). (Suit to recover

compensation for loss suffered on account of

percolation of drain water is suit of small

cause nature.)]

Damages for breach of contract :

(36) AIR 1936 Lab 293 (294). (Suit for damages

for breach of contract and for refund of earnest

money—Suit of small cause nature.)

(36) AIR 1936 Oudh 129 (129).

1. (87) 1887 All W N 94 (95). (Based on a com-

tract.)

(78) 2 Bom 624 (632) (FB).

[See (83) 7 Bom 537 (538).]

2. Provincial Small Cause Courts Act, IX of 1887

Schedule II Article 38.

(89) 1889 Pun Re No. 123, p. 417.

(01) 23 All 495 (496).

(03) 1903 All W N 226 (227). (Following 23 All

495.)

(92) 16 Bom 267 (268). (Maintenance payable

under a written agreement does not lie in a

Court of Small Causes.)

(97) 20 Mad 29 (30). (Maintenance payable under

a written agreement.)

(04) 26 All 321 (325). (Suit by a widow against

her husband's brother for recovery of income of

the property assigned to her by way of main-

tenance.)

(81) AIR 1931 Bom 286 (286).

(18) AIR 1918 All 398 (399) : 40 All 52.

(12) 16 Ind Cas 13 (14) (All).

3. (90) 1890 All W N 201 (203).

(05) 2 All 149 (149).

(14) AIR 1914 Mad 16 (17) : 38 Mad 553.

(03) 13 Mad 149 (149).

5. (17) AIR 1917 Mad 870 (870).

Note 9

1. (88) 15 Cal 833 (834).

(01) 24 Mad 652 (653).

(16) AIR 1916 Mad 1138 (1138) : 19 Ind Cas 700

(700) : 38 Mad 274.

(07) 1907 Pun Re No. 125, p. 611.

(89) 1889 Pun Re No. 132, p. 460.

2. (12) 14 Ind Cas 837 (839) (Upp Bur).

10. Suits for means profits. — In order that a person in wrongful possession may be liable for means profits, it is not necessary that he should have actually *received* any profits at all. Even if he *might* have received with due diligence any profits, he would be liable. The Calcutta High Court has held that a suit for means profits is not therefor a suit "for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant" within the meaning of Art. 31 of Act IX of 1857, and is therefore a small cause. (The Madras High Court has, on the other hand, held that where an account has, in some sense to be taken in ascertaining the amount of means profits, the suit will fall under the said Article and is therefore a small cause. The Bombay, Hongkong and Shanghai High Courts have also taken a similar view. Where, however, the claim is for a definite sum of money as means profits, it will not, as has been seen in *Nora* above, be a suit for an account and will fall to be governed by Article 31, and will, therefore, be cognizable by a Court of Small Causes. The Madras High Court has taken a contrary view.)

The words *actually received* in Article 31 mean receipt of profits under a claim of title that cannot be denied. Thus, a suit by a co-sharer for his share of the profits received by an other co-sharer does not fall under the Article.¹ or

11. Suits for money. — All suits for money whether had and received,² or payable for an annuity, or on contract, generally,³ or wrongfully collected and retained

Not a

1. (82) 4 AH 19 (20).
(83) 5 AH 331 (332).
(93) 17 Bom 42 (43). (Share in the profits of
the village.)
(18) 21 Ind Cas 181 (182) : 37 Bom 700. (Suit
for recovery of a share in the profits of a Kul-
karni village.)
(82) 4 AH 6 (8).

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- (82) 1 All 6 (S).
Karni varam.)
for recovery of a share in the profits of a Kuli-
(19) 21 Ind Cas 181 (182) : 37 Bom 700. (Suit
inam village.)
(93) 17 Bom 42 (43). (Share in the profits of
(83) 5 All 631 (632).
1. (82) 4 All 19 (20).
Note 11
terms of conveyance of immovable property.)]
recovery of money due to the plaintiff under the
[See also (10) 7 Ind Cas 157 (159) (Cutt). (Suit for
(31) AIR 1931 All 531 (532).
(93) 26 All 358 (360).
(10) 7 Ind Cas 399 (399) (Mad.).
(9) 4 Ind Cas 540 (541) : 31 Bom 171.
9. (93) 6 Bom 1, R 370 (373).
(91) 23 All 117 (117).
8. (10) 9 Ind Cas 270 (272) (All).
(93) 20 Bom 117 (121), 122.
7. (91) 25 Bom 675 (676).
(30) 10 Ind Cas 1120 (1120) (Mad.).
6. (9) 10 C P L J, H 1197.
5. (10) AIR 1932 Nag 103 (103) Nag 60 (107).
4. (91) 25 Bom 15 (15).
(10) 10 Ind Cas 102 (102) : 31 Mad 121.
3. (90) 13 Mad 311 (316).
(21) AIR 1921 Mad 185 (185). (A suit to enforce a
an award is not the same as one to enforce a
contract.)
(12) 16 Ind Cas 808 (809) : 6 Sind L R 85.
[But see (75) 7 N W P R 157 (161).]
3. (92) 21 All 203 (209). (For money paid to a
vaish for hiring sales.)
(81) 3 All 37 (40). (Value of produce of mango
trees held by tenant agreed to be given.)
(98) 1908 Pun Ro No. 9, p. 68. (On bailment.)
(11) 25 Ind Cas 933 (931) : 7 Low Bur But 183.
(66) 1 Agr 275.
(20) AIR 1920 Cal 781 (781) : 59 Ind Cas 188 (189)
(Value for coal supplied.)
(71) 12 South W R 65 (66). (Suit on bond.)
(80) AIR 1930 All 702 (703). (Do.)
(83) 7 All 896 (897, 898).
(68) 10 South W R 79 (80).
(21) AIR 1921 Lah 178 (178). (Suit on an agree-
ment to pay.)
[See also (12) 15 Ind Cas 852 (852) (Mad).]
[See however (87) 1887 Pun Re No. 74, p. 154.
(Suit not cognizable by a Court of Small Causes
as the liability of the defendant did not arise
under any arrangement between the parties.)]

See also (12) 15 Ind Cas 552 (552) (Mad.).
See however (157) 1887 Pun Re No. 74, p. 154.
(Suits not cognizable by a Court of Small Causes as the liability of the defendant did not arise under any arrangement between the parties.)]

See also undermentioned cases.

12. Suits relating to immovable property. — The policy of the Provincial

Small Cause Courts Act, 1887, is to exclude suits relating to immovable property from the cognizance of Courts of Small Causes. See Arts. 1 to 7 and 9 to 13 of the second Schedule of that Act. A suit for possession¹ or for partition² or for sale or foreclosure or redemption of a mortgage of immovable property³ or for the determination of any other right to or interest in immovable property⁴ is not a small cause. A suit for title relating

[But see (70) 14 Smith W R 175 (179). (Suit on bond, but if registered it seems to be a small case). (S7) 9 All 591 (600, 601). (Not contributory by a Small Cause Court as question of title relating to land of the plaintiff and the nature of the suit).]

[But see (170) 14 South W R 175 (179). Suit on bond, but if registered it comes to be a small cause.] (S7) 9 All 591 (600, 601). (Not assignable by a Small Cause Court as question of title relating to immovable property evidently involved.) 4. (171) 15 South W R 307 (307).

4. The following information is being furnished to you for your information only. It is not to be used for any other purpose.

(S) 68-1001-1001 (1001)
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(S) 68-1001-1001 (1001)

3. (b)(7)(D) is an exemption from the Freedom of Information Act, 5 U.S.C. 552(b)(7)(D), which prohibits the disclosure of information that is exempt from the Act. The exemption is based on the fact that the information is exempt from the Act. The exemption is based on the fact that the information is exempt from the Act.

5. (59) 26 Cal St2 (S11). (Claim in respect of excess payments made by a tenant in respect of rent against the landlord under the Tenant's Landlord's Act, 1927.)

(CO) I deny it is App 16 (17). (Said against those
tenancy Act.)
erment for recovery of money from said who

[illegible]

(2) AIR 1971 LAM 619 (017). (SAR: LIT 133
initially received.)
(69) II South W R 20(11). (Money paid in excess
of £1000.)

(But see (iii) at [1] 432-433) (LIT) (SAR)

-S. 102 does not apply.

The right alternative answer for money is obtained

(of late date)
 refund of revenue paid by her etc.)
 1861 South W R (chap) 297 (297). (Sale for
 1701-1702 (1702). (Sale for 1702)

[illegible]

employed under municipal orders to keep the streets clean and to recover cost of sweeps.

(73) 2 N W P H C R 21 (22). (Suit for value of
trees and fish.
1937 AIR 1937 Oudh 314 (215) : 13 Feb. 1937.)

(Money wrongfully recovered in execution by defendant from plaintiff — Suit for such money.

(95) AIR 1935 AN 574 (575). (Suit for recovery of money.)
 (96) AIR 1936 Pat 102 (103). (Suit for recovery of share of profits from a partnership business.)

(39) AIR 1939 Sind 35 (35) : 1 L R (1939) Kat
of money value of bhathi produce of mahmud trees
is suit for money and not suit for rent.)
(39) AIR 1939 Sind 35 (35) : 1 L R (1939) Kat
allowance.)
(39) AIR 1939 Sind 35 (35) : 1 L R (1939) Kat
or any leviable on crops of village hand.)
(39) AIR 1939 Sind 35 (35) : 1 L R (1939) Kat
for bank.

134. (Suit for recovery of terminal tax on move-
able property is small cause.)
(36) 40 Cal W N 698 (701). (Suit for rent against
by a landlord in respect of certain immovable
by an innkeeper for the recovery of sums payable
(11) AIR 1911 from 298 (298). (Suit

to immovable property cannot be tried by a Small Cause Court.⁵ But a suit which is a small cause does not cease to be so merely because a question of title is *incidentally* involved in the suit.⁶

13. Suits for rent. — See also Article 8 of Schedule II of Act IX of 1887.

Under that Article a suit for *house rent* is a small cause⁷ but a suit for rent other than house rent is not a small cause unless the Judge of the Court of Small Causes has been expressly invested by the local Government with authority to exercise jurisdiction with respect thereto. In Madras² and Bombay,³ Judges have been specially authorised as mentioned above. Independent, however, of this, the Madras⁴ and Bombay⁵ High Courts and the Nagpur Judicial Commissioner's Court⁶ have held that a suit for

- property held by him under the *inamdar* as his superior holder.)
- (18) AIR 1918 Mad 1 (2) : 41 Mad 374 (F B). (Muzasi right is an interest in the village lands and the *thundaram* payable to the *inamdar* is not of the nature of "rent" but comes under the general expression "dues" in Art. 13.)
- (95) 1895 Pun Re No. 13, page 48.
- (11) 9 Ind Cas 1 (1) (Cal).
- (98) 1898 Pun Re No. 80, page 278. (Suit for the recovery of tolls.)
- (97) 1897 Pun Re No. 48, page 215. (Do.)
- (13) 18 Ind Cas 282 (283) : 35 All 156. (Do.)
- (16) AIR 1916 Mad 445 (445). (A suit for the recovery of dues according to plaintiff by reason of his hereditary office as purveyor of ghee to a temple for a fixed annual allowance.)
- (92) 8 Mad L Jour 228 (230).
- (18) AIR 1918 Mad 366 (367) : 41 Mad 528. (Suit by an hereditary archaka of temple to recover from the defendant, the trustee, the amount which was due to him in respect of his office.)
- The following suits are not suits for the determination of a right to or interest in immovable property :
- (13) 19 Ind Cas 628 (629) (All). (Suit for participation in income of religious endowment.)
- (15) AIR 1915 Nag 106 (107) : 11 Nag L R 100. (A suit by *majnuzar* to recover the value of manure under a *wajib-ul-arz*.)
- (11) 12 Ind Cas 171 (172) : 36 Mad 126. (Suit for rent and cesses.)
- (28) AIR 1928 Mad 21 (22).
- (97) 21 Bom 387 (391).
- (20) AIR 1920 All 123 (124). (Suit for money forcibly taken away.)
- (23) AIR 1923 All 420 (420). (Suit for money.)
- (26) AIR 1926 Lab 276 (277). (Suit for cesses improperly collected.)
- (69) 12 South W R 29 (30). (Suit for share of *mahikana* realised by the collector.)
- (15) AIR 1915 Nag 124 (125) : 12 Nag L R 47. (Suit for the recovery of unpaid purchase money.)
- (97) 1 Cal W N 140 (141). (Suit by an auction-purchaser against the decree-holder for refund of the purchase money.)
- (98) 20 All 80 (81). (Do.)
- (26) AIR 1926 Nag 65 (65). (Suit for recovery of purchase money by a vendee after the sale falls through.)
- (06) 8 Bom L R 369 (370). (Suit by auction
1. (13) 19 Ind Cas 858 (859) : 9 Nag L R 72.
- (88) 15 Cal 174 (177).
- (25) AIR 1925 Cal 428 (428). (Suit for homestead land, not a small cause.)
- (94) 1894 Pun Re No. 1, page 1. (Ground rent is not same as house rent.)
- (16) AIR 1916 Mad 891 (891). (Suit for recovery of a certain sum of money for occupation of land let for the purposes of building houses is not a suit for rent under S. 3 of the Madras Estates Land Act.)
2. (1900) 23 Mad 547 (557) (F B).
- (01) 24 Mad 356 (357).
- (10) 6 Ind Cas 702 (702) (Mad).
3. (16) AIR 1916 Bom 106 (106) : 41 Bom 367.
4. (1900) 23 Mad 547 (556, 559) (F B).
5. (35) AIR 1935 Bom 254 (255). (Suit to recover rent including *galli-patti* and local cess — Amount below Rs. 500 — Suit is of small cause nature.)
6. (22) AIR 1922 Nag 15 (16).

18. Appeal from order of remand in suits of small cause nature.—No appeal lies against an order of remand made in a suit of a small cause nature.¹ This is also indicated by O. 43 R. I (u) which enacts that an appeal will lie from an order of remand only when an appeal will lie from the *decree* of the Appellate Court. The undermentioned cases² are no longer law in view of the said provision in the new Code.
19. Appeal from order of review in suits of small cause nature.—Where an Appellate Court passes a decree on *review* in a suit of a small cause nature, no second appeal lies against that decree on the merits though an appeal will lie against the order granting the review under O. 43 R. I (w) and O. 47 R. 7.¹
20. Other cases.—For other cases, see the several Articles in Schedule II of Act IX of 1887 and the undermentioned cases.¹

103. [New.] In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal² which has not been determined by the lower Appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100.

a. Substituted by the Code of Civil Procedure (Amendment) Act, 1926 (VI of 1926), Section 2 for "but not determined by the lower Appellate Court."

- (95) 22 Cal 734 (737).
 (16) AIR 1916 Pat 370 (870): 1 Pat L Jour 193.
 (02) 1902 Pun Re No. 33, p. 123.

Note 20

1. Cases under Article 3 of Act IX of 1887:

- (98) 1898 All W N 173 (174).
 (96) 18 Mad 395 (396).
 (94) 1894 Pun Re No. 97, p. 848.
 (02) 1902 Pun L R No. 91.
 (90) 17 Cal 290 (291).
 (12) 16 Ind Cas 400 (400): 37 Mad 533.
 (02) 5 Oudh Cas 403 (405).

- Cases under Article 20.—

- (89) 1889 Pun Re No. 63, p. 204.
 (90) 1890 Pun Re No. 51, p. 133.

- Cases under Article 25.—

- (88) 6 Mad 191 (192).
 (82) 6 Bom 292 (297).
 — Case under Article 26.—
 (23) AIR 1923 All 310 (311): 45 All 359.
 Cases under Article 28.—

- (90) 17 Cal 387 (389).
 (12) 16 Ind Cas 542 (543): 37 Mad 538.

- (69) 11 Subh W R 93 (94).
 (25) AIR 1925 Mad 1110 (1110).

- (72) 17 Subh W R 520 (521).

- (05) 27 All 622 (623).

- (81) 7 Cal L Rep 71 (73).

- Case under Article 32.—

- (68) 9 Subh W R 252 (254).

- Case under Article 34.—

- (13) 20 Ind Cas 155 (156) (Cal).

- (12) 13 Ind Cas 183 (184) (Mad). (Suit for emolument and nivedhanam by a hereditary pujari secured under a trust deed.)
 (14) AIR 1914 Mad 95 (96): 38 Mad 788. (Suit to enforce a provision made in favour of a daughter for the performance of her marriage.)
 (95) 18 Mad 252 (253). (Suit by the grandson of a donee to recover his share of rents and profits to which he is entitled under the will of the donor.)
 (15) AIR 1915 Mad 404 (405): 25 Ind Cas 41 (41). (Suit by a schoolmaster who had been a regular subscriber to the Schoolmaster Pension Fund for his pension after his removal.)

Note 18

1. (13) 21 Ind Cas 638 (638) (All).
 (16) AIR 1916 All 125 (125).
 (19) AIR 1919 All 6 (6): 42 All 200. (Appeal in execution proceedings of suit of small cause nature—Order of remand.)

- (21) AIR 1921 All 55 (55): 43 All 403. (Do.)

- (16) AIR 1916 Cal 581 (581).
 (14) AIR 1914 Lah 328 (331): 1914 Pun Re No. 85.

- [See (11) Ind Cas 315 (315) (Lah).]

2. (81) 3 All 18 (20) (PB).

- (96) 19 Mad 391 (393).

- (84) 10 Cal 523 (524).

- (07) 11 Cal W N 862 (865).

- (99) 21 All 291 (291).

- (83) 7 Bom 292 (294).

Note 19

1. (21) AIR 1921 Lah 124 (125).

ever, be ousted if the prayer for declaration asked for was *unnecessary* or *incidental*.³ A suit for declaration of ownership of a share in crop by virtue of purchase is one to recover moveable property or its value and is a small cause.⁴

As to suits for injunction, see the undermentioned cases.⁵

16. Suits for specific performance of contract.—Such a suit is not one cognizable by a Court of Small Causes under Article 15 of Act IX of 1887, Sch. II. See also the undermentioned cases.¹

17. Suits relating to trusts.—Suits relating to trusts are not small causes. But where the question of trust arises only *collaterally* or *incidentally*, the suit will thereby be taken out of the category of small causes.¹ The mere fact that money claimed by the plaintiff is as trustee does not make it a suit *relating* to trust.²

The undermentioned cases³ are illustrations of cases of trust excluded from the cognizance of Small Cause Courts.

(128) AIR 1928 Rang 173 (174) : 6 Rang 238. (Suit for declaring award void and for recovery of money.)

(175) 24 Suth W R 190 (192). (Declaration that a bond has been satisfied and is inoperative.)

(68) 10 Suth W R 352 (353). (Suit to alter or set aside a decision, decree or order of a Court.)

(17) AIR 1917 Cal 562 (563). (Goods illegally seized and sold in execution—If owner brings a suit against purchaser only for the recovery or value thereof such suit will lie in a Small Cause Court.)

(94) 21 Cal 430 (432, 433). (Suit to establish plaintiff's right to a standing crop.)

(85) 7 All 152 (159) (P B). (Suit to establish plaintiff's right to moveable property.)

2. (707) 30 All 101 (103) (P B). (18) AIR 1918 Cal 528 (529).

(1864) 1 Suth W R 35 (35). (12) 17 Ind Gas 704 (704) (Mad).

(98) 8 Mad L Jour 149 (150). (23) AIR 1923 Mad 689 (689) : 46 Mad 808. (Suit against President, District Board, for damages)

(23) AIR 1923 Cal 321 (321). (Suit for recovery of the price of fish removed from a tank after declaration of title.)

(96) 16 Mad L Jour 432 (432). (See also) (132) AIR 1932 Mad 226 (226, 227). (Suit for refund of profession tax not taken out of the small cause nature merely because judgment is preplaced by some sort of declaration.)

4. (13) 21 Ind Gas 638 (638) (All). (Suit for return of money less than Rs. 500 recovered as tax and injunction to prevent defendant from levying it again—Reliefs independent and necessary—Suit is not of small cause nature.)

(38) AIR 1938 Mad 941 (942). (Suit to recover tax illegally levied under Madras Local Boards Act and for injunction restraining defendant from levying it again—Suit is not of small cause nature.)

Note 16

1. Suits held to be for specific performance :

- (124) AIR 1924 Rang 192 (192) : 1 Rang 700. (Suit to enforce an award.)
- (66) 6 Suth W R 322 (322). (04) 32 Bom 356 (360). (Prayer for alternative claim of damages does not change character of suit.)
- (16) AIR 1916 Cal 530 (531) : 43 Cal 59. (Suit by a mortgagee for the recovery of the balance of the mortgage money not paid to him.)
- (32) AIR 1932 Cal 481 (481) : 59 Cal 388. (Suit for certain papers of a mahar on the basis of a registered contract or for damages in the alternative—Not of small cause nature.)
- Suits not for specific performance :
- (03) 13 Mad L Jour 299 (299). (Suit for damages for breach of contract.)
- (24) AIR 1924 Mad 485 (485). (17) AIR 1917 All 340 (341). (Suit for damages for breach of contract.)
- (08) 1908 Pun Re No. 114, p. 520. (Suit by an auction-purchaser against the decree-holder for refund of the purchase money.)
- (10) 6 Ind Gas 704 (704) (All). (Suit for money not one for specific performance.)
- (05) 27 All 200 (202). (Suit by a widow of a deceased Brahmin priest to recover from the defendant certain books containing lists of the clients of her husband.)
- (04) 1904 Pun Re No. 49, p. 149. (Suit for avoiding a sale on the ground of fraud and for recovery of damages.)

Note 17

1. (10) 5 Ind Gas 912 (913) : 33 Mad 494. (08) 26 Mad 200 (201).
- (12) 15 Ind Gas 273 (275) (Mad). (98) 21 Mad 245 (246). (Suit by the manager of a temple against his predecessor-in-office for damages sustained by the temple owing to the negligence of the defendant.)
- (92) 14 All 413 (416). (03) 26 Mad 368 (369). (Suit by a trustee for his salary.)
- (98) 22 Bom 729 (730). (For collections of subscriptions for building a temple.)
- (03) 1903 Pun Re No. 58, p. 267. (By the guardian of a minor against the latter to recover money spent in connexion with guardianship.)

Where the lower Appellate Court *did determine* an issue of fact but it was vitiated by an illegality such as an improper admission or exclusion of evidence, etc., there was a conflict of decisions as to whether the High Court could itself determine the issue of fact.⁵ The amendment of 1926 now makes it clear that the High Court can itself determine the issue of fact, under the said circumstances.⁶ The Calcutta High Court, however, has held in the undermentioned decisions⁷ that where the lower Appellate Court has relied on inadmissible evidence as also other evidence in arriving at its finding, the High Court has, generally, no power to decide whether the evidence other than that which has been improperly admitted warrants the finding of the lower Court and that the proper course for the High Court in such cases is to remand the case to the lower Court. No reference is made in the above decisions to the amendment of this Section in 1926 and it is submitted that they cannot be accepted as correct.

APPEALS FROM ORDERS

104. [S. 588, para. 2.] (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law Orders from which appeal lies.

(a) an order superseding an arbitration¹⁰ where the award has not been completed within the period allowed by the Court;

(b) an order on an award stated in the form of a special case;¹¹

(c) an order modifying or correcting an award;¹²

(d) an order filing or refusing to file an agreement to refer to arbitration;¹³

(e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;¹⁴

5. ('26) AIR 1926 Nag 339 (339). (No.) ('26) AIR 1926 Mad 1008 (1005). (No.) ('24) AIR 1924 Cal 1042 (1044). (No.) ('27) AIR 1927 Cal 140 (143). (No.) ('22) AIR 1922 Pat 417 (417, 419). (No.) ('26) AIR 1926 Nag 489 (490). (Yes.) ('16) AIR 1916 Lah 205 (206). (Yes.) ('18) AIR 1918 Oudh 221 (222). (Yes.) ('19) AIR 1919 Oudh 44 (47): 22 Oudh Cas 312. (Yes.)
6. ('27) AIR 1927 Pat 167 (169). ('27) AIR 1927 Cal 1 (8-10). (Finding based partly on inadmissible evidence.) ('30) AIR 1930 Mad 65 (67). (Finding based on wrong presumption.) ('29) AIR 1929 Cal 636 (639).
7. ('35) 39 Cal W N 277 (280). ('37) AIR 1937 Cal 537 (540): 1 L R (1937) 2 Cal 661.

Synopsis

- 1. Amendments subsequent to 1908.
- 2. Scope and object of the Section.

1. Amendments subsequent to 1908. — The words "which has not been determined Section 100" were substituted by Act VI of 1926 for the words "but not determined by the lower Appellate Court." See Note 2 below.

2. Scope and object of the Section. — This Section enables the High Court in second appeal to determine a question of fact, if there is sufficient evidence on the record, in two cases —

- (1) where the lower Appellate Court has failed to determine an issue of fact, and
- (2) where it has determined an issue of fact *wrongly* by reason of any illegality, omission, error or defect referred to in sub-section (1) of Section 100.

There was no such provision in the old Code. It was therefore held that though the lower Appellate Court had not determined an issue of fact and though there was sufficient evidence on the record, the High Court could not itself determine it but could only remand the case for such determination.¹ The present Section negatives this view and enables the High Court to determine the issue itself in such cases.² This power applies also to cases where a case is remanded under O. 41 R. 25 and the lower Appellate Court fails to give the findings or its findings are incomplete.³ But where the necessary finding has actually been given it cannot be said that it was not given merely because a *correct issue* was not framed.⁴

As the Section stood before its amendment by Act VI of 1926, the High Court could determine any issue of fact necessary which *had not been determined* by the lower Appellate Court.

Section 103 — Note 2

- 1. ('92) 16 Bom 545 (547). ('87) 9 All 147 (153) (PB). (Overruling 7 All 765 and 8 All 172.) ('83) 5 All 14 (16, 17). ('81) 7 Cal 293 (296). ('96) 23 Cal 179 (185, 186). ('21) AIR 1921 Pat 61 (63). 2. ('15) AIR 1915 Mad 774 (775). ('38) AIR 1938 All 341 (343). ('32) AIR 1932 Mad 545 (552). ('24) AIR 1924 Oudh 266 (268). ('25) AIR 1925 Mad 763 (764). ('28) AIR 1928 Pat 318 (321). 7 Pat 260. ('20) AIR 1920 P C 67 (69, 70) : 43 Mad 567 : 47 Ind App 76 (PC). ('28) AIR 1928 All 220 (221) : 50 All 640. ('19) AIR 1919 P C 29 (31) : 47 Cal 107 : 15 Nag L R 97 : 46 Ind App 140 (PC). ('23) AIR 1923 All 134 (135) : 45 All 191. ('15) AIR 1915 Cal 284 (287). ('23) AIR 1923 All 71 (73). (Documentary evidence not considered by lower Court — High Court can give finding itself.) ('18) AIR 1918 All 428 (428). ('27) AIR 1927 Bom 228 (229, 230) : 51 Bom 258. ('13) 18 Ind Cas 878 (879) (All). ('09) 4 Ind Cas 1143 (1143) (Mad).
- (28) AIR 1928 Pat 410 (419) : 7 Pat 690.
- (29) AIR 1929 Pat 728 (729).
- (81) AIR 1981 Rang 29 (30) : 8 Rang 425. (No definite finding on question of fact in the judgment of the lower Appellate Court — Clear finding necessary for dealing with law in the case — High Court will go into question of fact.) ('31) AIR 1931 Cal 129 (130, 131). (Small question of fact relating to damages — High Court can determine to avoid remand.) ('18) AIR 1918 Mad 543 (544).
- 3. ('20) AIR 1920 P C 67 (69) : 43 Mad 567 : 47 Ind App 76 (PC).
- (30) AIR 1930 Mad 489 (490).
- (22) AIR 1922 P C 292 (297) : 45 Mad 586 : 49 Ind App 286 (PC).
- (36) AIR 1936 Nag 140 (142) : 1 L R (1936) Nag 188. (Court of second appeal cannot examine finding of fact after remand under R. 25 except as provided by S. 103.) [See ('39) AIR 1939 Nag 173 (174). (High Court in second appeal remanding case to trial Court for determination of issue — Case returned to High Court after finding — High Court can determine the issue itself as the issue cannot be said to have been determined by the lower Appellate Court.)]
- 4. ('97) 21 Bom 325 (327).

Where the lower Appellate Court *did determine* an issue of fact but it was vitiated by an illegality such as an improper admission or exclusion of evidence, etc., there was a conflict of decisions as to whether the High Court could itself determine the issue of fact.⁵ The amendment of 1926 now makes it clear that the High Court can itself determine the issue of fact, under the said circumstances.⁶ The Calcutta High Court, however, has held in the undermentioned decisions⁷ that where the lower Appellate Court has relied on inadmissible evidence as also other evidence in arriving at its finding, the High Court has, generally, no power to decide whether the evidence other than that which has been improperly admitted warrants the finding of the lower Court and that the proper course for the High Court in such cases is to remand the case to the lower Court. No reference is made in the above decisions to the amendment of this Section in 1926 and it is submitted that they cannot be accepted as correct.

APPEALS FROM ORDERS

104. [S. 588, para. 2.] (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force,⁸ from no other orders:—

(a) an order superseding an arbitration¹⁰ where the award has not been completed within the period allowed by the Court;

(b) an order on an award stated in the form of a special case;¹¹

(c) an order modifying or correcting an award;¹²

(d) an order filing or refusing to file an agreement to refer to arbitration;¹³

(e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;¹⁴

5. ('26) AIR 1926 Nag 339 (339). (No.)
 ('24) AIR 1924 Cal 1042 (1044). (No.)
 ('27) AIR 1927 Cal 140 (143). (No.)
 ('22) AIR 1922 Pat 417 (417, 419). (No.)
 ('26) AIR 1926 Nag 489 (490). (Yes.)
 ('16) AIR 1916 Lah 205 (206). (Yes.)
 ('18) AIR 1918 Oudh 221 (222). (Yes.)
 ('19) AIR 1919 Oudh 44 (47): 22 Oudh Cas 312. (Yes.)
 6. ('27) AIR 1927 Pat 167 (169).
 ('27) AIR 1927 Cal 1 (8-10). (Finding based partly on inadmissible evidence.)
 ('30) AIR 1930 Mad 65 (67). (Finding based on wrong presumption.)
 ('29) AIR 1929 Cal 636 (639).
 7. ('35) 39 Cal W N 277 (280).
 ('37) AIR 1937 Cal 537 (540): 1 L R (1937) 2 Cal 661.

(30) AIR 1930 Cal 235 (238).
 ('31) AIR 1931 Cal 129 (131).
 ('36) AIR 1936 Lah 788 (789). (Lower Court deciding question of title on inadmissible and other evidence—High Court can remand case or itself determine the issue.)
 [See ('18) AIR 1918 Mad 1166 (1167): 40 Mad 1108. (Where, however, the judgment of a Court of appeal is reversed on a question of custom or usage on a preliminary point the High Court should not take on itself to examine the evidence as to usage as if it were hearing the first appeal.)
 7. ('35) 39 Cal W N 277 (280).
 ('37) AIR 1937 Cal 537 (540): 1 L R (1937) 2 Cal 661.

(f) an order filing or refusing to file an award in an arbitration without the intervention of the Court;¹⁵

(ff) "an order under section 35A;¹⁶

(g) an order under section 95;¹⁷

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;¹⁸

(i) any order made under rules from which an appeal is expressly allowed by rules;¹⁹

"Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section.²¹

[1877, S. 588; 1859, Ss. 363 to 365. See O. 16 Rr. 10 and 12; O. 38 R. 1; O. 39 R. 2; O. 43 R. 1; the Second Schedule.]

a. Inserted by the Civil Procedure (Amendment) Act, 1922 (IX of 1922), S. 3. See also foot-note to Section 85 A, *supra*.

Synopsis

1. Legislative changes.
2. Scope and applicability of the Section.
3. Retrospective effect.
4. Non-appealable orders.
5. "Save as otherwise expressly provided in the body of this Code or by any law for the time being in force,"
6. Letters Patent appeals.
7. Execution proceedings.
8. Appeals to Privy Council.
9. Revision or review.
10. Order superseding arbitration—Clause (a).
11. Order on award stated as special case—Clause (b).
12. Order modifying or correcting an award—Clause (c).
13. Order filing or refusing to file agreement to refer to arbitration—Clause (d).
14. Order staying or refusing to stay suit—Clause (e).
15. Order filing or refusing to file private award—Clause (f).
16. Order under Section 35A—Clause (ff).
17. Order under Section 95—Clause (g).
18. Order imposing fine, etc.—Clause (h).
19. Order appealable under rules—Clause (i). See Order 43 Rule 1.
20. Proviso to sub-section (1).
21. Bar of appeal from appellate order—Sub-section (2).

1. Legislative changes.—This Section introduces some material changes in the law as laid down in Section 588 of the old Code.¹

1. The words "save as otherwise . . . in force" are new (See Notes 4, 5 and 6 below).

Section 104—Note 1

new Sections corresponding to the old Sections referred to in those clauses—*Vide* S. 104 (1) (489) : 46 Ind App 76 (P O). (*Vide* cls. 2 to 5, 7, 11, 12, 13, 18, 19 and 22 of S. 588, which are omitted in the present Section and notes to the

(m), (n), (o), (v), and (w) and notes thereon.)

2. Clause (i) of Section 588 of the old Code providing for an appeal against an order under Section 20 of the old Code is omitted as that Section itself has been omitted.
3. Clause (17) of the old Code dealing with orders in insolvency proceedings has been omitted, as provisions have been made therefor in the Provincial Insolvency Act.
4. Sub-section (2) repealing the last paragraph of the old Section makes it clear that what is prohibited is only a right of *further appeal* and not a right of *revision* or *review*.
5. Clause (ii) and the proviso to the Section have been newly added to the Section by Act IX of 1922.

2. Scope and applicability of the Section. — The Section is restrictive in character. By sub-section (1) it limits a party's right of appeal against an order to the cases specified in clauses (a) to (i) and by sub-section (2) that right is further restricted to only one appeal.¹

Where an order is one *not specified* in the Section but is a "decree" within the meaning of Section 2 clause (2) of the Code,² or a right of appeal therefrom is *expressly provided* for elsewhere in the Code or by any other law for the time being in force,³ this Section will, of course, have no application. Where, however, an order is one *specified* in this Section, and is *also* appealable as a "decree" or under other express provision of law, it has been held that the right of appeal is governed only by the provisions of this Section, and that consequently no second appeal will lie in such cases.

Illustration

A applied under the Code of 1882 for setting aside an execution sale on the ground of *fraud*. His application was dismissed. An appeal against that order was also dismissed; held that a second appeal lay. The reason is that under the old Code an order refusing to set aside an execution sale on the ground of *fraud* was *not appealable* under Section 588 clause (16) (now O. 43 R. (1) but was a "decree" under Section 244 (now Section 47), and therefore a second appeal lay.⁴

Suppose a similar application is made under the new Code which *provides* for an appeal against an order refusing to set aside a sale on the ground of *fraud* also. Such an order is appealable under Section 104 and O. 43 R. 1 *as an order* and therefore no second appeal will lie, though the order may be one within Section 47.⁵ It may here be noted that a decree as defined by Section 2 excludes an order appealable *as an order* even though it is within Section 47.⁶

Note 2

1. ('11) 38 All 479 (480). (Order returning a plaint for presentation to proper Court — Appeal — Case remanded to Court of first instance — Appeal from order of remand inadmissible.)
- (94) 21 Cal 789 (791). (Order made by the lower Appellate Court on appeal, setting aside a sale under Section 294 (old Code).)
2. ('26) AIR 1926 Lah 547 (547).
3. See for instance S. 154 which expressly saves a right of appeal accrued to a party before the passing of this Code.
4. ('99) 26 Cal 539 (541).
- (09) 3 Ind Cas 46 (47) : 32 All 3. (Order specially excluded. Hence second appeal lay. Observation at page 47 though general must be deemed to apply to the facts of the case.)
- (09) 2 Ind Cas 983 (984) (All).
5. ('12) 17 Ind Cas 884 (885) : 8 Nag L R 177.
- (26) Cal 539 was not properly understood and seems to be wrongly dissented from.)
- (11) 9 Ind Cas 135 (136) (Cal).
- (11) 10 Ind Cas 345 (345) : 38 Cal 339.
- (12) 15 Ind Cas 679 (681) (Cal).
- (12) 16 Ind Cas 436 (436) (Cal).
- (18) AIR 1918 All 209 (210) : 40 All 122.
- (20) AIR 1920 Bom 60 (60) : 44 Bom 472. (Decree-holder being the auction-purchaser is immaterial.)
- (23) AIR 1923 Lah 592 (593) : 4 Lah 243.
- (17) AIR 1917 Cal 443 (444).
- [See also ('38) AIR 1938 Nag 107 (107) : 1 L R (1938) Nag 436.
- (35) AIR 1935 Rang 521 (521). (Application to set aside sale on ground of material irregularity in publication and conduct of sale.)
- (35) AIR 1935 Lah 962 (962).
6. ('11) 10 Ind Cas 345 (345) : 38 Cal 339.
- (26) AIR 1926 Cal 400 (400).

The Section being a disabling one must, under general principles of interpretation, be construed strictly.

3. Retrospective effect.—A disabling provision of law such as this Section cannot be so interpreted as to have a retrospective effect.¹ This is also expressly made clear by Section 154 of the Code which saves rights of appeal accrued before the commencement of this Code.

4. Non-appealable orders.—No appeal lies from any order except as provided for by this Section. In other words, orders [not being "decrees" within Section 2 (2)] not falling within clauses (a) to (i) of this Section nor within O. 43 R. 1 are not appealable.¹

Note 3

1. ('10) 5 Ind Cas 102 (105) (Mad). (Following '1905) 1905 App Cas 369. Vide also Maxwell's "Interpretation of Statutes" Chap. VII, S. 4 and Craies "Statute Law," pages 327 and 328.)

Note 4

1. ('09) 36 Cal 130 (132, 133). (Order between stranger and party to suit under Section 295, 1862, Code.)

('34) AIR 1934 Pat 41 (42). (Order under S. 151 setting aside a compromise decree is not appealable.)

('32) AIR 1932 Mad 714 (715). (Where no appeal lies from an order on the merits, no appeal lies from the portion of the order relating to costs.)

('32) AIR 1932 All 415 (415). (No appeal lies from a mere finding in a suit on the question of jurisdiction.)

('34) AIR 1934 Pesh 43 (44). (Decree removing a mahant from office—Order in miscellaneous application appointing a committee which was to appoint a new mahant—Order not appealable.)

('33) AIR 1933 All 10 (11). (Two applications for sale in execution of different decrees of different decree-holders—Order directing one sale to be prior is not appealable.)

('88) 1888 All W N 255 (256). (Insolvent judgment-debtor—Distribution of assets—Order deciding priority of claims between two decree-holders is not appealable.)

('14) AIR 1914 Mad 437 (437). (Order under S. 73 of the Code.)

('13) 35 All 582 (586). (Order under Section 148.)

('30) AIR 1930 Pat 280 (282) : 9 Pat 685. (Order of restitution under Section 151.)

('30) AIR 1930 Lab 789 (790). (Order setting aside sale under Section 151.)

('94) 21 Cal 539 (541). (Order refusing to make person party defendant to an application for probate.)

('86) 13 Cal 100 (101). (Order rejecting an application under S. 32 (old Code) to be made a party to suit.)

('80) 2 All 904 (904). (Order under O. 1 R. 10 refusing to make a person a party to a suit or proceeding.)

('14) AIR 1914 Cal 795 (795). (Order dismissing suit for misjoinder of parties and causes of action.)

('86) 8 All 191 (193). (Order under S. 44 of the

Code (now O. 2 R. 4) rejecting application for leave to join another cause of action with that for the recovery of immovable property.)

('09) 4 Ind Cas 492 (492) (All). (Order under O. 6 R. 18 admitting amended plaint after time fixed.)

('83) 9 Cal 627 (628). (Order under S. 97 of the old Code (O. 9 R. 2) dismissing the suit for failure to pay process fees.)

('11) 9 Ind Cas 484 (485) (All). (Order under O. 9 R. 2) dismissing the suit for failure to pay process fees.)

('11) 9 Ind Cas 238 (238) (Lab). (Order under O. 9 R. 4 refusing to restore suit dismissed for default.)

('99) 22 Mad 221 (222). (Dismissal of suit for default.)

('02) 29 Cal 60 (62, 63). (Do.)

('96) 23 Cal 115 (117). (Order dismissing appeal for default under O. 41 R. 17.)

('96) 23 Cal 827 (829). (Do.)

('12) 39 Cal 341 (343). (Do.)

('14) AIR 1914 Oudh 303 (304). (Order dismissing appeal for default under O. 41 R. 17.)

('25) AIR 1925 Rang 96 (98) : 4 Upp Bur Rui 164. (Order dismissing appeal for default under O. 41 R. 17.)

R. 17.)

('79) 1879 Pun Re No. 113. (Do.)

('17) AIR 1917 All 300 (300) : 39 All 450 (452). (Order under O. 10 R. 4 (2), striking off defence of one party but proceeding with suit.)

('05) 1905 Pun Re No. 103, page 308. (Order setting aside ex parte decree.)

('04) 28 Bom 378 (382). (Order under S. 225 of the old Code (now O. 21 R. 7) by the Court to which case is transferred for execution declining to become the executing Court.)

('07) 10 Oudh Cas 171 (172). (Order dismissing for default application to set aside sale under Section 311, C. P. Code, 1882.)

('10) 6 Ind Cas 148 (148) (Cal). (Do.)

('04) 31 Cal 207 (209). (Do.)

('00) 27 Cal 414 (415). (Do.)

('07) 29 All 596 (598). (Order refusing to restore to file an application under S. 310 (O. 21 R. 88), which had been dismissed for default.)

('09) 31 All 82 (101, 102) (F B). (Section 318 O. P. Code, 1882. Cases discussed.)

('07) 10 Oudh Cas 353 (354). (Order refusing to restore application under Ss. 310 and 311 (now O. 21 R. 89, 90) dismissed for default.)

('18) AIR 1918 All 405 (405) : 40 All 216 (218). (Order delivering possession under O. 21 R. 95.)

('97) 1 Cal W N 658 (658). (Order under O. 21 R. 95; see Section 318 of the old Code.)

There are some orders which, though *appealable at the time* they are passed, become unappealable subsequently. These are *interlocutory orders* passed in a suit or appeal and coming within the provisions of this Section. The right of appeal from

- (95) 17 All 172 (173). (Dissenting from 10 Bom 220.)
- (14) AIR 1914 All 402 (403). (Order under O. 22 R. 3 directing abatement—Following 17 All 172.)
- (22) AIR 1922 All 118 (114). (Order that pending appeal has abated.)
- (19) AIR 1919 Mad 971 (971). (Order under O. 22 R. 5.)
- (13) 19 Ind Cas 904 (905) (Cal). (Order allowing decree-holder to withdraw the execution proceedings.)
- (02) 24 All 532 (537) (F B). (Order on application to be brought on record as legal representative.)
- (22) AIR 1922 Pat 525 (526) : 1 Pat 282. (Order refusing withdrawal of execution case.)
- (91) 18 Cal 322 (323). (Order by Appellate Court under S. 378 (O. 23 R. 1) giving permission to withdraw a suit with liberty to bring a fresh suit.)
- (26) AIR 1926 Oudh 185 (185). (Order granting permission to withdraw suit with liberty under O. 23 R. 1 (S. 378 of the old Code).)
- (19) AIR 1919 Lab 813 (814). (Withdrawal under O. 23 R. 1.)
- (16) AIR 1916 Cal 80 (81). (Order dismissing suit for want of prosecution.)
- (78) 1 All 746 (747). (Order under O. 33 R. 5 refusing permission to sue as pauper.)
- (07) 17 Mad L. Jour 144 (145). (Order on application for appointment of Commissioner.)
- (21) AIR 1921 Bom 427 (428) : 45 Bom 99. (Order granting permission to sue receiver for damages.)
- (03) 1903 All W N 67 (68). (Order on application for removal of receiver and rendition of accounts.)
- (08) 30 All 143 (146). (Refusing to restore appeal dismissed under S. 549 of 1882 Code.)
- (16) AIR 1916 Cal 227 (228). (Order refusing to readmit appeal rejected under O. 41 R. 10 for not furnishing security for costs.)
- (22) AIR 1922 Cal 246 (246) : 49 Cal 355. (Order rejecting appeal under O. 41 R. 10.)
- (10) 8 Ind Cas 436 (437) (Mad). (Do.)
- (07) 80 Mad 84 (60) (F B).
- (98) 1898 Pun Re No. 15, page 31. (Order of Appellate Court—Court returning plaint for presentation to proper Court (S. 588 (6) of the old Code).)
- (12) 14 Ind Cas 39 (39) (Cal). (Order granting review of appellate judgment on grounds other than those under O. 47 R. 7.)
- (26) AIR 1926 Lab 513 (513). (Order removing name of person who died before suit.)
- (01) 23 All 476 (477). (Order refusing amendment of sale certificate.)
- (69) 11 Suth W R 505 (505). (Order to proceed with case notwithstanding representation of compromise by parties.)
- (29) AIR 1929 All 375 (376). (Order keeping a review application, pending disposal of appeal.)
- (12) 16 Ind Cas 794 (795) (Mad). (Order framing issues.)
- (21) AIR 1921 Oudh 224 (224) : 24 Oudh Cas 366. (Order of directions to Commissioner in partition case.)
- (21) AIR 1921 Lab 265 (266). (Interlocutory order.)
- (16) AIR 1916 Pat 156 (157) : 1 Pat L. Jour 90. (Order recording award.)
- (09) 32 Mad 510 (511). (Decree in terms of an award under S. 522—Code of 1882.)
- (24) AIR 1924 Pat 603 (604) : 3 Pat 839. (Order refusing to set aside ex parte order dismissing objections to award through Court.)
- (11) 9 Ind Cas 385 (385) (Lab). (Order rejecting objections to award on reference through Court.)
- (12) 16 Ind Cas 595 (595) (Oudh). (Do.)
- (16) AIR 1916 Lab 89 (91) : 1916 Pun Re No. 117. (Order declaring award invalid for misconduct of arbitrators.)
- (18) AIR 1918 Lab 83 (85). (Order setting aside second award when application to file previous award was pending.)
- (09) 38 Bom 104 (107). (Order under S. 505 of 1882 Code.)
- (81) 7 Cal 719 (721). (Order under S. 505 of old Code now omitted.)
- (08) 35 Cal 568 (570). (Order giving directions by Court in passing receiver's accounts.)
- (06) 2 Nag L R 179 (189). (Order imposing terms on defendant on setting aside ex parte decree.)
- (24) AIR 1924 Bom 324 (325). (Order disallowing objection to award on the ground of its invalidity.)
- (29) AIR 1929 Rang 127 (127). (Order granting interest on the mortgage money during period of sale proceeds of mortgaged property lying in Court.)
- (98) 21 Mad 152 (153). (Order dismissing petition to receive appeal represented with excess court-fee after time.)
- (80) 5 Cal 711 (712). (Order directing a suit to be restored to file.)
- (98) 3 Mad L. Jour 223 (224). (Order dismissing the suit as against one of the defendants.)
- (93) 8 Mad L. Jour 258 (258). (Order allowing amendment of plaint.)
- (07) 6 Cal L. Jour 214 (216). (Appellate order admitting plaint.)
- 2 May 286. (Adverse order under O. 41 R. 27.)
- (74) 6 N W P H C R 124 (125). (Order of Sub-judge granting sanction to prosecute. This was under the Code of 1861.)
- (39) AIR 1939 Nag 39 (39). (Order that cross-objection abates is not appealable.)
- (34) AIR 1934 Lab 301 (303). (Order rejecting review application at second stage.)
- (29) AIR 1929 Cal 676 (678) : 57 Cal 549. (Order granting amendment of decree.)
- (35) AIR 1935 Bom 78 (79). (Order refusing to file award on ground that there was no award to the under para. 15 of Sch. 2.)
- (37) AIR 1937 All 694 (695, 696). (Partition suit—Preliminary decree—Any order passed before—

such orders ceases with the disposal of the suit or appeal² according to the Calcutta High Court but the Allahabad High Court takes a contrary view.³ However, under Section 105 (2) they may be challenged in an appeal from the final decree.

5. "Save as otherwise expressly provided in the body of this Code or by any law for the time being in force."—These words are now. The former Code did not provide any exception as to orders under other laws, such as the Letters Patent, the Guardians and Wards Act, etc., which contain provisions as to rights of appeal against orders passed thereunder. And there was consequently a conflict of opinion as to which provision was to prevail.⁴

¹This defect has now been remedied by the introduction of the saving clause.

6. Letters Patent Appeals.—The conflict referred to in the previous Note arose chiefly in connexion with Letters Patent Appeals.

Under the Letters Patent certain orders are appealable when they come within the definition of the word "judgment."¹ The High Courts of Calcutta, Madras and Bombay held that such appeals were not barred by Section 558 clause 16² following the decision of the Privy Council in *Irish Chunder v. Kali Sundari*.³ The Allahabad High Court took a contrary view distinguishing the said Privy Council case.⁴

The introduction of the saving clause as already mentioned sets at rest the conflict of views and it is now clear that an appeal may lie from an order under the Letters Patent, although such order may be unappealable under this Section.⁵

The Allahabad High Court has, however, held even in a case under the new Code that Section 104 would bar an appeal under the Letters Patent if the order

final decree is interlocutory—No appeal lies from such order.)

(35) AIR 1935 All 1016 (1017); 55 All 360. (Order of sale under O. 21 R. 61, Civil P.C., is not appealable.)

(35) AIR 1935 Mad 609 (610) : 55 Mad 814. (Application to set aside ex parte decrees dismissed for default—Application to set aside such order dismissed—No appeal lies.)

(See (101) 6 Cal WN 614 (615). (Decree in terms of award.)

2. (109) 36 Cal 762 (763). (Order deciding maintainability of suit.)

(105) 82 Cal 1023 (1029). (Suit remanded—Trial Court deciding the suit in plaintiff's favour—No appeal—Appeal by defendant against the order of remand not maintainable.)

(107) 6 Cal L. Jour 547 (551). (Stephen, J.)

3. (108) 30 All 479 (485) (F.R.). (Remand—Appeal from order of remand filed after decision of suit in accordance therewith.)

Note 5

1. (106) 28 All 88 (89). (Case under the Agra Tenancy Act.)

(190) 12 All 129 (127) (F.R.). (Order under S. 5 Court-fees Act—Order not specified in S. 588 though coming under S. 2 is not appealable.)

48 Ind App 76 (P.C.).

Note 6

1. (81) 7 Cal 839 (342). (Order passed by a single Judge of High Court under R. 2 of the Privy Council Orders refusing leave to appeal is not

"judgment".) (91) 18 Cal 182 (186). (Order of Judge in Privy Council Department refusing to extend time for furnishing security for costs is not "judgment".) (89) 16 Cal 788 (793). (190) 17 Cal 455 (457, 458). (Order of Judge granting a certificate that a case is a fit and proper one for appeal to the Privy Council.) (See (137) AIR 1937 Rang 522 (523). (In this case the order in question was held not to come within the meaning of "judgment".)) [See also (135) AIR 1935 Rang 267 (273) : 13 Rang 457 (F.R.).] 2. (99) 22 Mad 68 (80, 84) (F.R.). (9 Mad 253, 9 Mad 447, 20 Mad 152, 20 Mad 407 overruled.) (101) 25 Mad 555 (557). (Following 22 Mad 68 (F.R.).) (103) 4 Bom L R 343 (348). (109) 2 Ind Cas 150 (151) (Bom.). (99) 26 Cal 361 (367, 368) (F.R.). (Order made by a single Judge in the exercise of original civil jurisdiction refusing to set aside an award—Order appealable.) (103) 13 Mad L Jour 497 (498). (81) 6 Cal 594 (599). 3. (83) 9 Cal 482 (494) : 10 Ind App 4 (P.C.). 4. (92) 14 All 226 (232, 236, 238) (F.R.). (89) 11 All 375 (377). 5. (74) AIR 1924 Cal 1025 (1026) : 51 Cal 905. (22) AIR 1922 Lab 380 (383) : 3 Lab 188. (16) AIR 1916 Cal 361 (362, 365) : 43 Cal 857 (872). (Effect of S. 104 is not to take away a right of appeal but to create one even in cases where the Letters Patent is not applicable.)

appealed against is unappealable under Section 104.⁶ The decision simply purports to follow the Full Bench case of *Mohammed v. Ishanullah*⁷ which was a case under the old Code and makes no reference to the change of the law in the Code. The decision does not seem to be a sound one.

Suppose, now, that A prefers an appeal under this Section to the High Court from an order appealable under this Section, and the High Court passes a judgment therein. Does a further or second appeal lie against that judgment on the ground that it is also a "judgment" within the meaning of the Letters Patent? In an earlier decision of the Allahabad High Court it was held that in such a case no further appeal will lie.⁸ The decision was based on the ground that sub-section (2) of Section 104 expressly bars such an appeal and there is no saving clause such as has been inserted in sub-section (1). But this view has been dissented from in a recent decision of the Allahabad High Court⁹ which proceeds on the ground that by virtue of the provisions of Section 4 *ante*, the right of appeal under the Letters Patent is unaffected by Section 104 sub-section 2.

7. Execution proceedings.—Orders passed in execution proceedings, though in many cases fall within Section 47 of the Code, may in some cases fall outside its scope, *e. g.*, orders passed on objections by third parties to attachment or delivery of possession in execution of decrees.¹

Where an order in execution is *specified* as appealable under this Section, then, as has been seen already,² there will be only *one* appeal notwithstanding the fact that the order falls also within the scope of Section 2 (2) of the Code.

Where an order in execution neither falls under Section 47 nor is *specified* in this Section, then there will be no appeal at all.³

An appeal against an order in execution which is appealable under this Section is not barred by the mere fact that the order is only a preliminary one, and that a final order has been passed at the time of appeal.⁴

8. Appeals to Privy Council.—Sub-section (1) saves rights of appeal "expressly provided in the body of this Code." Section 109 which gives a right of appeal to the Privy Council from certain decrees and final orders is one of such provisions, and consequently this Section does not govern appeals to the Privy Council.¹

9. Revision or review.—As has already been seen in Note 1 above, the restriction in sub-section (2) is to prevent only a further appeal and not to bar a right of revision or review. The word "final" which had been used in the last paragraph of Section 588 of the old Code was held not to bar a right of review or revision.² The

(21) AIR 1921 P C 80 (82) : 48 Cal 481 : 48 Ind

App 76 (PC).

(23) AIR 1923 All 356 (357) : 45 All 535 (536).

(The Privy Council decision in AIR 1921 P C 80

is not cited in this case.)

7. (92) 14 All 226 (232, 237, 238) (PB).

8. (17) AIR 1917 All 325 (326) : 39 All 191 (192).

9. (37) AIR 1937 All 165 (167).

Note 7

1. See O. 21 Rr. 58 to 63 and 99 to 103.

2. (11) 11 Ind Cas 545 (545) : 38 Cal 717 : 38

Ind App 126 (PC). (Order refusing permission to

a decree-holder to bid—See Note 2.)

3. See Note 2.

4. (15) AIR 1915 Mad 197 (199) : 37 Mad 29 (37).

Note 8

1. (24) AIR 1924 P C 95 (100, 101) : 51 Cal

361 (PC).

(34) AIR 1934 Oudh 291 (292). (Section refers to

appeals to High Courts in British India.)

(98) 20 All 412 (418) : 25 Ind App 146 (PC). (The

Privy Council judgment is not directly in point

since the appeal was dismissed on the merits,

the implication however being that an appeal

lay to the Privy Council.)

(13) 40 Cal 635 (647, 648) : 40 Ind App 140 (PC).

Note 9

(03) 13 Mad L Jour 497 (498).

1. (97) 1 Cal W N 626 (631).

(14) AIR 1914 Lah 187 (187). (Doubted.)

(96) 19 Mad 167 (168).

possibility of any doubt in this matter has now been removed by the insertion of the words "No appeal shall lie from any order passed in appeal under this Section" in sub-section (3).

10. Order superseding arbitration—Clause (a).—The order of supersession, in order to be appealable, must be one based on the ground mentioned in the clause, namely that the award was not completed within the period allowed by the Court. An order of supersession, therefore, on any other ground (e. g., refusal of the arbitrators to act) is not within this Section.² This clause applies only to an order superseding an award; it does not apply to an order refusing to supersede an award.³ The clause does not apply to an order refusing to file an award.⁴

11. Order on award stated as special case—Clause (b).—For the statement of a special case by the arbitrators, see Paragraph 11 of Schedule II. An award cannot be said to be stated in the form of a special case, where the arbitrators take the opinion of the Court after submitting their own opinions.¹

12. Order modifying or correcting an award—Clause (c).—This clause is new. As to the circumstances under which awards can be modified or corrected, see Paragraph 12, Schedule II.

The right of appeal exists only where the award is modified or corrected.¹ Thus, a disallowance of costs allowed by the award,² an amendment of the award³ and an interpolation in the award by the arbitrators after the same is signed,⁴ are all modifications or corrections of the award and an appeal will therefore lie.⁵

The whole award cannot, however, be called into question, but only the portions modified or corrected.⁶

The clause confers a right of appeal against an order modifying or correcting an award and it is in respect of such order that a second appeal is prohibited under sub-section 2. But, where an appeal is filed against the decree passed in accordance with the modified award, a second appeal will lie.⁷

13. Order filing or refusing to file agreement to refer to arbitration—Clause (d).—See also Para. 17 of Schedule II. This clause is new. Under the old Code, there was a conflict of views whether such an order was appealable.¹ The present

(109) 3 Ind Cas 607 (608) : 1909 Pun Re No. 77. [See also (132) AIR 1932 Cal 718 (713).]

Note 10

1. (126) AIR 1926 All 55 (56) : 48 All 27.
2. (112) 17 Ind Cas 388 (388) : 1912 Pun Re No. 125.
3. (136) AIR 1936 Rang 240 (240). (Order rejecting objections made to an award and passing a decree on the award is not maintainable.)
4. (135) AIR 1935 Bom 78 (79).

Note 11

1. (110) 35 Bom 130 (136).

Note 12

1. (112) 15 Ind Cas 519 (520) (Cal).
(106) 1906 Pun L R No. 33, p. 112 : 1906 Pun Re No. 13.

(136) AIR 1936 Rang 240 (240). (Order rejecting objections to an award and passing decree on award is really one refusing to correct or modify the award and no appeal lies from such order under this clause.)

Note 13

1. Note:—Under the old Code such an order was appealable as a decree. However the conflict was whether such an order amounted to a decree. In the following decisions it was held that it amounted to a decree:

(130) AIR 1930 Lah 26 (29) : 11 Lah 342.
(135) AIR 1935 Pat 109 (110). (Under Sec. 2, para. 16 an appeal is barred only from a decree passed in accordance with an award—But where the award is modified and a decree is passed in accordance with the modified award, an appeal is not barred.)
(106) 1906 Pun L R No. 33, p. 112 : 1906 Pun Re No. 13.
6. (112) 15 Ind Cas 519 (520) (Cal).
5. (109) 1 Ind Cas 328 (328) : 12 Oudh Cas 23.
4. (126) AIR 1926 Lah 519 (520) : 7 Lah 327.
3. (109) 2 Ind Cas 858 (858) (All).
(112) 15 Ind Cas 519 (520) (Cal).
2. (126) AIR 1926 Oudh 370 (370).

Code clearly allows an appeal therefrom. This clause applies only to agreements to refer disputes about which *no suit is pending*. An application to file an agreement to refer a dispute *pendente lite* is outside the scope of this Section, and is not appealable under this clause.²

Again, the order must be one *filing or refusing* to file the agreement. An order neither *rejecting* nor *accepting* the agreement but *declaring* it invalid is not one within this Section.³ Refusal to file an agreement need not necessarily be on merits; it may be on the preliminary question of jurisdiction.⁴

14. Order staying or refusing to stay suit—Clause (e).—The order referred to in this clause is the one passed under Paragraph 18 of Schedule II. Even where the Court refuses to stay on the ground that there was no agreement, this clause has been held to apply.¹

But the orders must have been passed *under the Second Schedule of the Code*. An order under Section 9 of the Arbitration Act is not appealable under this clause.²

15. Order filing or refusing to file private award—Clause (f).—This clause is new and refers to orders passed under Paragraph 21 of Schedule II. It does not apply to proceedings under Section 11 of the Arbitration Act.¹ Under the old Code there was a conflict of authorities as to whether such an order was appealable as a decree and as to what the procedure was when an objection was raised to the filing of an award without the intervention of the Court.² The present clause sets the conflict at rest by expressly making the order appealable.³

- (81) 3 All 286 (291).
 (11) 36 Mad 353 (355).
 (02) 29 Cal 167 (184) : 29 Ind App 51 : 1902 Pun Re No. 25 (PC).
 (11) 21 Mad L J our 268 (280) (PB). (Per Krishna-swamy Iyer, J.)
 (99) 22 Mad 299 (300).
 Note:—The following decisions held a contrary view that the order was not a decree :
 (88) 5 All 383 (385) (PB).
 (66) 8 Mad H O R 183 (185).
 (73) 5 N W P H C R 179 (180).
 2. (15) AIR 1916 Oudh 172 (173).
 3. (16) AIR 1916 Lab 89 (91) : 1916 Pun Re No. 117.
 4. (91) AIR 1931 Lab 673 (673).
Note 15
 (18) AIR 1918 Cal 191 (192) : 45 Cal 502. [But see (73) AIR 1933 Lab 44 (44) : 14 Lab 248. (Submitted that the decision is not correct.)]
 2. (04) 27 Mad 255 (258) (PB). (Order appeal-able as a decree.)
 (06) 29 Mad 303 (304). (Do.)
 (09) 2 Ind Cas 92 (93) (Mad). (Do.)
 (81) 3 All 427 (432, 433). (Appealable as a decree).
 (11) 10 Ind Cas 450 (451) (Cal).
 (30) AIR 1930 Lab 418 (419).
 (14) AIR 1914 Cal 581 (583). (Schedule II, Paras. 20, 21 and S. 104 (2) discussed. No con- flict between body of the Code and Schedule.)
 (23) AIR 1923 Rang 199 (200, 201) : 1 Rang 265. (27) AIR 1927 All 771 (772) : 50 All 365.
 (28) AIR 1928 Mad 969 (970). (Order refusing to set aside an ex parte decree passed in terms of award.)
- (84) 6 All 186 (188) (PB). (Not appealable as a decree—3 All 427, distinguished.)
 (04) 26 All 205 (206). (Not appealable as a decree.)
 (06) 28 All 21 (23). (No appeal lies.)
 (98) 25 Cal 757 (763, 764, 773, 777, 778) (PB). (Order is appealable as a decree.)
 (06) 33 Cal 11 (13). (Do.)
 (81) 7 Cal 490 (492, 493). (Where objection is raised to the filing of the award the procedure is to refuse to file it, allowing the parties to fight the matter out in a regular suit.)
 3. (16) AIR 1916 All 113 (114) : 38 All 380 (387). (38) AIR 1933 All 59 (60). (Although no appeal lies from a decree incorporating an award.)
 (19) AIR 1919 All 98 (99) : 42 All 185 (186). (Passing of decree in terms of award does not affect the right of appeal.)
 (21) AIR 1921 All 273 (274) : 43 All 348 (352). (Award under Arbitration Act—Order refusing to file award.)
 (13) 37 Bom 442 (443, 444).
 (10) 38 Cal 143 (146).
 (28) AIR 1928 Lab 137 (139) : 9 Lab 380.
 (29) AIR 1929 Lab 367 (367). (Such order is not a decree.)

The right of appeal is not taken away by the fact that a decree has been passed in pursuance of the award,⁴ or that the filing of the award and the decree were both passed by the same order,⁵ or that the decree passed in accordance with the award has to be set aside.⁶

But the right of appeal under this clause is distinct from the right of appeal against the decree passed in pursuance of the award.⁷

When the Court simply passes a decree in accordance with the award without specifically passing any order allowing or disallowing the objections thereto, it will be deemed to be an order filing the award⁸ and the appeal against the decree will be treated as an appeal against the order.⁹ An order rejecting an award on the ground of misconduct of the arbitrators is not one filing or refusing to file an award and is not within the Section.¹⁰ Similarly, an order remitting an award for making a fresh award in accordance with the agreement of reference is not a final order of refusal to file an award and is not appealable, as this clause refers only to final orders.¹¹

This clause applies only to arbitration without the intervention of the Court.¹² There is a conflict of views as to whether it applies to a refusal to file an award under the Arbitration Act though the same may be without the intervention of the Court. The Calcutta and Lahore High Courts and the Lower Burma Chief Court and the Sind Judicial Commissioner's Court hold that this clause refers only to proceedings under Para. 20 and other Paragraphs of the Second Schedule of the Code,¹³ while the Allahabad High Court holds that the application of the clause is not so limited.¹⁴

16. Order under Section 35A—Clause (H).—This clause, the proviso to Section 104 clause (1), and Section 35A were newly introduced by Act IX of 1922.

17. Order under Section 95—Clause (G).—Section 58 of the old Code provided for an appeal against an order for compensation under Section 497 for obtaining an injunction on insufficient grounds, and not for obtaining an improper *arrest or attachment*, and there was a conflict of opinion as to whether an appeal lay from an order of improper attachment.¹ The present Section read with Section 95 now shows

- (16) AIR 1916 All 51 (52) : 38 All 297 (299).
(Order rejecting application for setting aside order filing award under Sch. II, Para. 21.)
[See also (29) AIR 1929 Lah 369 (370).]
4. (16) AIR 1916 All 113 (114) : 38 All 380 (387).
(19) AIR 1919 All 98 (99) : 42 All 185 (186).
(31) AIR 1931 Oudh 345 (346) : 7 Luck 128.
(14) AIR 1914 Cal 899 (899).
(15) AIR 1915 Cal 745 (746). (On appeal being allowed the decree becomes vacated.)
(11) 10 Ind Cas 512 (513) : 1912 Pun Re No. 128 (PB).
(26) AIR 1925 Pat 810 (812) : 4 Pat 670.
(13) 21 Ind Cas 298 (300) (Lah).
5. (25) AIR 1925 All 404 (404) : 47 All 743 (744).
(35) AIR 1935 Pesh 69 (71). (Appellate Court can consider question of existence of reference and award and also questions under paras. 14 and 15.)
6. (24) AIR 1924 Lah 231 (231).
7. [See (33) AIR 1933 All 59 (60).]
8. (25) AIR 1925 Lah 921 (921). (In this case objections were dismissed and decree passed in terms of the award—*Held* that the order dismissing the objections amounted to an order filing an award.)
9. (11) 21 Ind L Jour 1005 (1007).
(33) AIR 1933 All 166 (167, 168).
of the Code of 1859—No appeal.)
(67) 8 South W R 332 (332). (Case under S. 8 Distinguished.)
Following—28 All 81 Not followed; 24 Mad 62, order awarding compensation for improper attachment—21 Mad L Jour 460 (461). (Appeals against followed.)
1. (06) 28 All 81 (84). (No appeal—24 Mad 62, and 15.)

Note 17

- (25) AIR 1925 All 154 (155) : 47 All 179.
14. (21) AIR 1921 All 273 (274) : 43 All (348, 352).
(25) AIR 1925 Sind 218 (219, 220).
(11) 10 Ind Cas 211 (211, 212) : 5 Sind L R 61.
(12) 17 Ind Cas 902 (902) : 6 Low Bur Rul 88.
act—
(12) 17 Ind Cas 902 (902) : 6 Low Bur Rul 88.
(22) AIR 1922 Lah 369 (376) : 3 Lah 296. (The filing of award under that Act is a ministerial act.)
(11) 10 Ind Cas 211 (211, 212) : 5 Sind L R 61.
(25) AIR 1925 Sind 218 (219, 220).
14. (21) AIR 1921 All 273 (274) : 43 All (348, 352).
(25) AIR 1925 All 154 (155) : 47 All 179.
1. (06) 28 All 81 (84). (No appeal—24 Mad 62, and 15.)

or to His Majesty in Council (*vide* Note 8) nor does it interfere with a right of revision or review (*vide* Note 9).

105. [S. 591.] (1) Save as otherwise expressly provided,³

no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from,⁴ any error, defect or irregularity⁵ in any order,³ affecting the decision of the case,⁶ may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

[1877, Ss. 580, 591; 1861, S. 26; 1859, S. 360 last para.]

Synopsis

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| <p>1. Legislative changes.</p> <p>2. Scope and object of the Section.</p> <p>3. Order must be one under the Code.</p> <p>4. "Where a decree is appealed from."</p> <p>5. Error, defect or irregularity.</p> <p>6. "Affecting the decision of the case."</p> <p>7. Compliance with order is no bar to questioning it in appeal.</p> | <p>8. Effect of not appealing against order of remand.</p> <p>9. Privy Council appeals.</p> <p>10. Letters Patent appeals.</p> <p>11. Order granting review.</p> <p>12. Revision of orders that can be challenged under the Section.</p> |
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Other Topics (*miscellaneous*)

Appeal apparently against the decree, but not really directed against interlocutory order. See Note 4.

Preliminary decree. See Section 97.

Save as expressly provided. See Note 8.

Section does not control O. 47 Rr. 7 and 9. See Note 11.

1. Legislative changes. —

1. Section 591 of the old Code contained the words "any such order" after the word "irregularity." This gave rise to a contention that the Section was applicable to non-appealable orders only. That contention was negatived by the Privy Council.¹ The word "such" has now been omitted in order to make this view clear.

2. Sub-section (2) is new. See Note 8 *infra*.

The above alterations do not effect any material changes in the law as it stood before.²

2. Scope and object of the Section. — Under Section 96, every decree is appealable save where otherwise expressly provided in the body of the Code or by any other law for the time being in force. No order is, however, appealable except those

Section 105 — Note 1

1. (169) 11 South W R 19 (21); 12 Moo Ind App 157 (PC).
- (66) 5 South W R 47 (52); 10 Moo Ind App 340 (PC).
2. (12) 15 Ind Cas 62 (63); 1912 Pun Re No. 97.

specified in Section 101. Section 105 enacts that every order whether appealable or not, except an order of remand, can be attacked in an appeal from the final decree on the ground —

(1) that there is an error, defect or irregularity in the order; and

(2) that such error, defect or irregularity affects the decision of the case.

In *Moheshur Singh v. The Bengal Government*, the Privy Council observed as follows :

"We are not aware of any law or regulation prevailing in India which renders it imperative upon the author to appeal from every interlocutory order, by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby, on the one hand he might be harassed with endless expense and delay and on the other inflict upon his opponent similar calamities."

"This is the principle on which the Section has been based.³ As has been mentioned already, this Section applies to appealable⁴ as well as to non-appealable⁵ orders.

This Section and Section 99 are not mutually destructive as the latter Section deals only with an error, defect or irregularity not affecting the merits of the case while this Section deals with any error, etc., affecting the decision of the case.⁶

Note 2

1. See also Section 105 (1) first sentence, and

the following cases:

(78) 2 Cal L. Rep 589 (591).

(72) AIR 1925 Loh 308 (309). (Order refusing

leave under S. 20 (b) of the Code is not appeal-

able.)

(11) 11 Ind Cas 315 (316) : 1911 Pun No. 60.

(Where it was impossible to say whether or not

an order was appealable it was held that appeal

from such an order would not lie.)

(12) 13 Ind Cas 690 (690) Cal 563. (Order assign-

ing administration bond is not appealable.)

2. (59) 7 Moo Ind App 283 (302) (PC).

3. (14) AIR 1914 Nag 58 (59, 60) : 10 Nag L.R. 25.

[See also (1865) 10 Moo Ind App 157 (185) (PC).

(68) 12 Moo Ind App 157 (185) (PC).

(1865) 10 Moo Ind App 340 (359, 360) (PC).]

4. (96) 18 All 19 (21, 22).

(1900) 23 Mhd 491 (495, 496). (Order declaring

the joint and several liability of defendants for

mesne profits.)

(36) AIR 1936 Nag 8 (10) : 31 Nag L.R. (Sup) 72.

(36) 168 Ind Cas 700 (700) (Cal).

(96) 23 Cal 335 (338).

(89) 11 All 35 (37, 41).

(96) 23 Cal 335 (338).

L.R. 140.

(01) 28 Cal 324 (328).

(02) 29 Cal 758 (769) (FB).

(87) 9 All 447 (451).

(89) 14 Bom 232 (234).

(09) 2 Ind Cas 338 (341) : 36 Cal 422.

(88) 10 All 97 (105).

5. (1900) 24 Bom 302 (304, 305). (An order vary-

ing a commissioner's report.)

(97) 24 Cal 725 (736, 738). (Order appointing a

commissioner to make the partition.)

(38) AIR 1938 All 511 (512) : 1 L.R. (1938) AIR

751. (Order in appeal under O. 43 R. 1 (a) though

not appealable under S. 104 (2) can be challenged

in second appeal from the appellate decree.)

(35) AIR 1935 Rang 245 (246) : 13 Rang 289.

(21) AIR 1921 Oudh 23 (23) : 24 Oudh Cas 215.

(An order of adjournment on payment of costs.)

(17) AIR 1917 Mhd 404 (405). (Interlocutory

order leading up to final order appealed from.)

(29) AIR 1923 Mhd 147 (149) : 46 Mhd 47. (Right

to share in mesne profits in a partition suit.)

(25) AIR 1925 All 768 (769) : 47 All 853. (Order

implementing a person in appeal.)

(09) 2 Ind Cas 677 (680) (All).

(97) 21 Bom 392 (393).

(94) 1894 Pun Re No. 38, page 284. (Section

applies to all orders.)

(89) 1888 Pun Re No. 156. (Do.)

(28) AIR 1928 Sind 100 (101) : 23 Sind L.R. 87.

(Directions given to commissioner to give cre-

dit to one of the parties in respect of partnership

goods in a partnership suit.)

(18) 19 Ind Cas 894 (895, 896) : 37 Bom 480.

(78) 2 Bom 644 (648, 649). (Whether made be-

fore or after the decree.)

(14) AIR 1914 Sind 70 (74, 75) : 8 Sind L.R. 69.

(Order permitting an amendment of the plaint.)

[See also (30) A.I.R. 1930 Mhd 988 (991). (Where

it was held that an order embodied in the final

decree can be attacked only in an appeal

against such decree.)]

6. (27) AIR 1927 Rang 150 (154) : 5 Rang 80.

(S. 105 should be looked at as being supplement-

3. Order must be one under the Code.—The word "order" in the Section refers to orders passed *under the Code*.¹ The words "save as otherwise expressly provided" contemplate appeals from orders of a character provided for elsewhere than in the Civil Procedure Code and include appeals allowed under *other laws*.²

4. "Where a decree is appealed from."—It is only where the erroneous or defective order has been passed by the very Court by which the decree appealed from has been passed that the order can be attacked in the appeal. Thus, an erroneous order of remand passed by an *Appellate* Court cannot be attacked in an appeal from a decree of the *trial* Court passed on such remand.¹ There is a conflict of opinion as to whether an appeal will lie from a decree where the *only* ground of appeal is the defect, error or irregularity of an order made in the suit. The High Courts of Bombay,² Calcutta³ and Madras⁴ have held that such an appeal will lie. The High Court of Allahabad has held in the undermentioned cases⁵ a contrary view. In a recent case, however, the same High Court has expressed the same view as that of the other High Courts.⁶

The ground of objection must be set out in the memorandum of appeal, otherwise it will not be entertained at the hearing of the appeal.⁷

The principle of this Section would apply not only to decrees and interlocutory orders but also to orders and interlocutory orders which lead up to the final order.⁸ In the undermentioned case,⁹ however, the Allahabad High Court took a contrary view and held that it is only when a *decree* is appealed from that prior orders passed by the Court from whose decree the appeal has been passed can be questioned. It is submitted that in view of the express provisions of Section 108 clause (b) *infra*, the above decision does not seem to be correct.

5. Error, defect or irregularity.—The error, defect or irregularity referred to in the Section must be one in *law or procedure* and not in matters of *fact*.¹

6. "Affecting the decision of the case."—An error, defect or irregularity in any order may be raised as a ground of objection in an appeal from the decree if such error, etc., should have *affected the decision of the case*.¹ The words "affecting

Note 3

1. (95) 17 All 475 (477).
- (95) 17 All 438 (440).
- (83) 7 Bom 5 (12). (An order for attachment for contempt cannot come under this Section.)
- (90) 12 All 129 (158) (F.B.). (A decision under S. 5, Court-fees Act, cannot be questioned under this Section.)
2. (24) AIR 1924 Rang 237 (238) : 2 Rang 117. (Probate and Administration Act.)
- (95) 17 All 438 (440). (Right of appeal created by the Indian Companies Act (VI of 1882) in a matter entirely outside the Code is not forbidden by this Section.)
- See also Sec. 192 (a) of the Madras Estates Land Act I of 1908.

Note 4

1. (09) 2 Ind Cas 525 (526) : 32 Mad 318. (Order of remand passed by a Judge cannot be reviewed by his successor.)
2. (90) 14 Bom 282 (285).
- (81) 7 Cal 148 (149).
4. (10) 6 Ind Cas 239 (239) : 34 Mad 228.
5. (96) 18 All 19 (22).
- (1900) 22 All 366 (367).

Note 5

1. (90) 12 All 200 (202).
- (30) AIR 1930 Pat 266 (269) : 9 Pat 102.
- (29) AIR 1929 Cal 26 (27).
- (36) AIR 1936 Nag 8 (11) : 31 Nag L R (Sup) 72. [See also (08) 27 Bom 162 (187).]
- Note 6
1. (90) 12 All 200 (202).
- (90) 12 All 200 (202).
- of names.)
- Note 5
9. (36) 164 I C 730 (731) (All). (In an appeal against an order of remand, no objection could be taken on the ground that the lower Appellate Court had no jurisdiction to entertain the appeal which had abated and to order substitution of names.)
- (99) 1899 All W N 136 (137).
6. (28) AIR 1928 All 194 (196).
- (93) 15 All 119 (120).
- (95) 18 All 19 (22) (F.B.).
- (98) 20 All 370 (372).
8. (17) AIR 1917 Mad 404 (405).
- (36) AIR 1936 Mad 936 (937). (Plaintiff asked to amend plaint and pay court-fees for added relief—Plaint amended but Court returning it for presentation to proper Court—Appeal—Order directing amendment can be challenged.)
- [See also (32) AIR 1932 All 392 (393).]
- (36) 164 I C 730 (731) (All). (In an appeal against an order of remand, no objection could be taken on the ground that the lower Appellate Court had no jurisdiction to entertain the appeal which had abated and to order substitution of names.)

(1) Order setting aside an award and directing the case to be tried by the Court.³

(2) Order extending the time for payment of money under a preliminary mortgage decree.

(3) Order in a suit for the dissolution of partnership that a particular party

(4) Order admitting or excluding a document.⁶

(5) Order refusing amendment of plaint.⁷

(6) Order giving directions for the preparation of a final decree.⁸

(7) Order deciding that the mortgagor was liable to pay interest only at a particular rate.⁹

(8) Order making a person respondent in appeal.¹⁰
(9) Order refusing to set aside a judgment.¹¹

(1984 T-312, 312). (Order under appeal) The previous order for amendment did not affect the decision.

(37) AIR 1987 All 582 (584).
(16) AIR 1916 Pat 21 (22). (The acceptance or supersession of an award affects the decision on the merits of the case.)
(81) 1881 Pun Re No. 72, page 162.
(88) 1888 Pun Re No. 134, page 362. (Order directing the filing of award can be questioned in an appeal against the final decree on ground of absence of agreement to refer.)
(12) 15 Ind Cas 62 (68) : 1912 Pun Re No. 97.
(29) AIR 1929 Cal 322 (323, 324) : 56 Cal 21.
(70) 14 Suth W R 327 (327).
(78) 2 All 181 (187).
(28) AIR 1928 Lah 758 (754). (AIR 1921 Lah 145, Not followed.)
(29) AIR 1929 Lah 174 (175). (Distinguishing AIR 1921 Lah 145 as in that case the order of supersession of the reference was before the award itself was passed.)
(08) 31 Mad 345 (346).
(13) 20 Ind Cas 773 (775) : 16 Oudh Cas 233.
(08) 5 All L Jour 644 (646, 647).
(97-01) 2 Upp Bur Bur 310.
(25) AIR 1925 All 566 (567) : 47 All 916.
(21) AIR 1921 All 16 (18) : 43 All 805.
[See also (02) 26 Bom 551 (552).]
[But see (33) AIR 1933 Lah 530 (531). (The same principle as is applicable to order setting aside an ex parte decree.)]
4. (11) 12 Ind Cas 795 (796) : 7 Nag L R 162. (No analogy between an order setting aside an ex parte decree and an order extending time.)
5. (96) 23 Cal 406 (409).
6. (13) 18 Ind Cas 309 (310) (Lah).
(25) AIR 1925 Cal 711 (713).
7. (14) AIR 1914 Mad 17 (17).
8. (13) 18 Ind Cas 701 (701) : 35 All 159.
9. (69) 2 Beng L R 44 (48) : 12 Moo Ind App 157 (P C).
10. (87) 9 All 447 (451).
11. (33) AIR 1933 All 294 (295).
(36) 163 Ind Cas 700 (701) : 39 Cal W N 1173 (1175).

order setting aside an abatement does not affect the decision of the case whether it was made simultaneously or not.³⁰ As to whether an order refusing to set aside an abatement affects the decision of the case on the merits, see foot-note (11) above.

The High Court of Rangoon has held that the words "affecting the decision of the case" cannot be read as meaning "affecting the decision of the case on the merits."³¹ It has been held by the High Courts of Bombay and Calcutta that an order under O. 22 R. 5 imploding a person as the legal representative of the deceased plaintiff does not affect the decision of the case and cannot be challenged in an appeal from the final decree.³² The High Court of Madras took a contrary view in the undermentioned case,³³ but in a later case³⁴ has taken the same view as that of the Bombay High Court.

7. Compliance with order is no bar to questioning it in appeal.—A compliance with the directions contained in an interlocutory order does not deprive a party from objecting to it in an appeal against the final decree.¹ Nor does the dismissal of an appeal against an order which is non-appealable take away that right.²

8. Effect of not appealing against order of remand.—Orders of remand can be divided into two classes—

(1) appealable orders of remand, for which see Order 41 Rule 23 and Order 43 Rule 1 (u); and

(2) orders of remand which are not appealable, for which see O. 41 R. 25.

As regards the latter they stand on the same footing as any other order and can be challenged in the appeal from the final decree.¹ As regards the former, it was held under the old Code that the order could be challenged in an appeal from the final decree though no appeal had been preferred against the order itself.² Under the present Code this has been expressly negatived by the addition of sub-section (2), the policy of the Legislature being to treat an order of remand as a special case³ and to give a finality to it.⁴ Where, therefore, an appealable order of remand has not been appealed against, the propriety or correctness thereof⁵ or of any of the incidental affects decision of case.)

30. ('25) AIR 1925 Cal 766 (768) : 52 Cal 472.

('33) AIR 1933 Cal 498 (500).

('25) AIR 1925 Cal 473 (474).

('35) 39 Cal WN 1173 (1175) : 163 Ind Cas 700 (701).

31. ('27) AIR 1927 Rang 150 (152) : 5 Rang 80.

32. ('02) 27 Bom 162 (187, 188).

33. ('33) AIR 1933 Cal 498 (500).

O. 22 R. 5 bringing on record legal representative

34. ('19) AIR 1919 Mad 971 (971).

Note 7

1. ('19) AIR 1919 Lah 38 (39) : 1 Lah 54.

('91) 1891 Pun Re No. 89, page 431 (R.B.). (Sub-

mitting to the proceedings resulting from the

order of remand.)

2. ('27) AIR 1927 Cal 733 (735).

2. ('22) AIR 1922 All 118 (119) : 44 All 534.

Note 8

1. ('26) AIR 1926 Mad 900 (901).

('38) AIR 1938 All 37 (38) : 1 L R (1938) All 79.

(Order of remand under the Agra Tenancy Act, not

appealable—Such order can be questioned in

appeal from final decree.)

('35) AIR 1935 All 553 (554). (The prohibition

contained in sub-section 2 of this Section exists

('21) AIR 1921 All 276 (277) : 43 All 377.

('16) AIR 1916 Mad 127 (128).

('23) AIR 1923 Pat 45 (47) : 2 Pat 207.

('28) AIR 1928 Rang 297 (298) : 6 Rang 506.

5. ('21) AIR 1921 Lah 154 (155) : 2 Lah 252.

('11) 10 Ind Cas 514 (515) (Cal).

('28) AIR 1928 Cal 325 (326, 327) : 55 Cal 506.

4. ('23) AIR 1923 Cal 385 (386).

3. See also report of the Special Committee.

[But see ('05) 32 Cal 1023 (1029).]

('74) 21 South W R 326 (326).

('90) 12 All 510 (513, 514) (R B).

('89) 11 All 35 (41).

('06) 1906 Pun L R No. 32, p. 109 (110).

('95) 18 Mad 421 (422).

('07) 6 Cal L Jour 547 (556).

('01) 28 Cal 324 (328).

('90) 14 Bom 232 (235).

('96) 18 All 19 (21, 22).

2. ('93) 15 All 119 (120).

('22) AIR 1922 Cal 255 (257).

decided therein beyond possibility of revision.)

ment is not conclusive on points not specifically

judg-

('25) AIR 1925 Oudh 527 (528). (A remand judg-

668.

('18) AIR 1918 Pat 680 (682) : 2 Pat L Jour 668.

('26) AIR 1926 Mad 695 (697).

only when the order of remand is appealable.)

findings and decisions which are a material part of the basis of that order⁶ cannot be challenged in an appeal from the final decree, or by the lower Court.⁷ To prevent obvious injustice, however, the High Court can refuse to be bound by a remand order of a subordinate Court though neither party can question it by reason of their not having been appealed therefrom.⁸

It has been held by the High Court of Allahabad⁹ that this Section deals with orders which the Court had *jurisdiction* to make, but in the making of which it had committed an error or irregularity and that, therefore, an order of remand passed without jurisdiction is outside sub-section (2) and open to question in an appeal from the final decree.

A failure to appeal from the order of remand does not affect the right of appeal from the final decision on remand.¹⁰

9. Privy Council appeals.—Sub-section (2) of this Section does not apply to appeals to the Privy Council.¹¹ But the principle of sub-section (1) will apply to appeals to the Privy Council also.¹²

10. Letters Patent appeals.—Clause 15 of the Letters Patent is not controlled by Section 105 of the Code and an order of remand, though not appealed against, can be challenged in a Letters Patent appeal against the final judgment.¹³ For a full discussion, see Note 6 to Section 104.

11. Order granting review.—An order granting review is appealable under O. 43 R. 1 (w). But it is appealable only on the grounds mentioned in O. 47 R. 7. It follows that under this Section, read with O. 47 R. 7, the order can be challenged in an appeal from the final decree only on the grounds specified in O. 47 R. 7.¹⁴

(36) AIR 1936 Cal 590 (592).
(18) AIR 1918 Cal 182 (182).
(19) AIR 1919 Cal 946 (946).
(21) 63 Ind Cas 845 (846) (Cal).
(10) 5 Ind Cas 667 (668) (All).
(17) AIR 1917 All 144 (145).
(19) AIR 1919 Cal 65 (65) : 46 Cal 738.
(17) AIR 1917 Lab 892 (393).
(13) 20 Ind Cas 761 (762) (Lab).
(10) 8 Ind Cas 246 (246) (Lab).
(26) AIR 1926 Cal 509 (509).
(22) AIR 1922 Cal 255 (257). (But not precluded from showing that they have been prejudiced by the further amendment made in the course of retrial.)
(25) AIR 1925 Mad 916 (917).
(25) AIR 1925 Mad 1046 (1047).
(25) AIR 1925 Nag 185 (186).
(26) AIR 1926 Nag 164 (167).
(23) AIR 1923 Rang 29 (30) : 4 Upp Bur Rui 93.
(20) AIR 1920 Pat 735 (737) : 4 Pat L Jour 645.
(26) AIR 1926 Nag 147 (148). (This does not take away the power vested in the Court of appeal under O. 41 R. 2.)
(07) 2 Ind Cas 525 (526) : 32 Mad 818.
(22) 65 Ind Cas 745 (746) (Lab).
(20) AIR 1920 Lab 193 (193, 194).
(23) AIR 1923 Nag 283 (283).
[But see (10) 5 Ind Cas 764 (764) (Mad). (Quare.)]
(14) AIR 1914 Nag 58 (59, 60) : 10 Nag L R 28. (He is also precluded from disputing the correctness of any of the incidental findings and decisions which are an essential or material part

of the basis of that order.)
(23) AIR 1923 Pat 226 (228).
(09) 2 Ind Cas 525 (526) : 32 Mad 318.
(25) AIR 1925 Mad 1019 (1020).
(21) 62 Ind Cas 703 (704) (Mad).
(23) AIR 1923 Mad 67 (70).
(28) AIR 1928 Rang 297 (298) : 6 Rang 506.
(25) AIR 1925 Pat 580 (583).
(21) AIR 1921 Nag 129 (130).
(18) AIR 1918 Nag 264 (267).
(30) AIR 1930 Lab 719 (721).
(8) (29) AIR 1929 All 421 (428) : 51 All 780.
(9) (10) 6 Ind Cas 464 (465) (All).
[See also (10) 6 Ind Cas 205 (206) (All).]
(10) (10) 5 Ind Cas 577 (578) : 37 Cal 552.
Note 9
(15) AIR 1915 Mad 423 (423, 424) : 38 Mad 509.
(39) AIR 1933 Bom 251 (252).
(33) AIR 1933 Bom 260 (262).
(11) 9 Ind Cas 932 (932) : 33 All 391.
(25) AIR 1925 Nag 349 (349) : 22 Nag L R 182.
(28) AIR 1928 Rang 182 (183) : 6 Rang 169.
(33) AIR 1933 Bom 251 (252).
Note 10
(29) AIR 1929 Mad 349 (351).
Note 11
(08) 81 Mad 49 (50, 51).
(05) 27 All 695 (696).
(95) 22 Cal 984 (989).
(13) 19 Ind Cas 481 (485) : 1913 Pun Re No. 109
(77) 1 All 363 (365, 366).

12. Revision of orders that can be challenged under the Section.—Where an interlocutory order can be challenged in an appeal from the final decree under this Section, the High Court will not, as a rule, interfere in revision¹ but in the exercise of its powers of superintendence the High Court may interfere in proper cases in order to avoid irreparable injury being caused.²

106. [S. 589.] Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

What Courts to hear appeals.

[1877, S. 589.]

1. Scope of the Section.—This Section provides that appeals from orders in cases in which they are appealable, shall lie to the Court to which an appeal would lie from the decree in the suit in which the order was made. The appellate jurisdiction of the District Judge, for instance, extends under the various Civil Courts Acts to decree in suits of the value of Rs. 5,000 and less. Hence, where the value of the subject-matter of the suit does not exceed Rs. 5,000, the appeal from the order lies to the District Judge and where the value of the suit exceeds Rs. 5,000 the appeal lies to the High Court, because the *forum* of appeal in regard to the decree passed in the suit is determinable in like manner.¹ But where the order appealed from is passed by a Court in exercise of *appellate jurisdiction*, the appeal lies to the High Court.²

The following cases decided under the previous Code in regard to appeals from orders in insolvency are only of academic interest as the chapter relating to insolvency has been removed from the Civil Procedure Code.³

- (97) 24 Cal 878 (880).
 (13) 20 Ind Cas 670 (671) (Cal).
 [See also (95) 22 Cal 734 (737, 738).]
Note 12
 1. (82) 4 All 91 (92).
 (83) 5 All 293 (294).
 (17) AIR 1917 All 321 (321).
 (94) 18 Bom 35 (37).
 (02) 26 Bom 551 (552).
 (83) 12 Cal L Rep 148 (151).
 (86) 9 Mad 256 (257).
 (14) AIR 1914 Mad 17 (17).
 (17) AIR 1917 Low Bur 55 (36).
 (08) 2 Sind L R 22 (23).
 (12) 16 Ind Cas 1 (2) : 34 All 592.
 2. (20) AIR 1920 Pat 131 (136) : 5 Pat L Jour 550.
Section 106 — Note 1
 1. (08) 6 Cal L Jour 38 (39).
 (90) 17 Cal 680 (682, 683).
 from.)
 (06) 2 Nag L R 54 (55). (17 Mad 377, Dissented
 (92) 15 Mad 89 (90).
 377, Dissented from.)
 (09) 4 Ind Cas 617 (617, 618) (Mad). (17 Mad
 (94) 17 Mad 377 (378, 379).
 (89) 12 Mad 472 (473).
 (03) 27 Bom 604 (606).
 Court lies to the District Judge's Court.)
 Cause
 Appeal from Small
 (01) 23 All 56 (60). (Appeal from Small
 (91) 14 Mad 462 (464).
 (99) 1899 Pun Re No. 59, page 265.
 (99) 26 Cal 275 (279).
 (84) 10 Cal 523 (524).
 (14) AIR 1914 All 128 (128) : 36 All 58.
 2. (03) 25 All 174 (177) (F B).
 Judicial Commissioner's Court.)
 Judge in a suit in which the subject-matter was
 over Rs. 1000 in value—*Held* appeal lay to the
 (01) 14 C P L R 62 (63). (Order passed by civil

GENERAL PROVISIONS RELATING TO APPEALS

107. [S. 582, First part.] (1) Subject to such conditions and limitations as may be prescribed,³ an Appellate Court shall have power¹⁰ —

- (a) to determine a case finally;⁴
- (b) to remand a case;⁵
- (c) to frame issues and refer them for trial;⁶
- (d) to take additional evidence⁷ or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties⁸ as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

[See O. 41 Rr. 23-25, 27, 28, 33.]

Synopsis

16. Power to add, transpose or substitute parties.
17. Powers regarding court-fee.
18. Power to direct stay of proceedings, grant interim injunctions and pass interlocutory orders.
19. Power to entertain application to set aside *ex parte* decree. See S. 96 Note 12; O. 41 R. 21.
20. Power to permit withdrawal of proceedings. See O. 23 R. 1.
21. Power to reject plaint or memorandum of appeal.
22. Power to return memorandum of appeal for presentation to the proper Court.
23. Power to allow amendment.
24. Power to decide new point *suo motu*. See O. 41 R. 2.
25. Power to make new case in appeal. See O. 41 Rr. 2 and 25.
26. Power to interfere with appointment of a receiver.
27. Power to refer to arbitration.
28. Power to examine *amoen*.
29. Power to expunge remarks from the judgment.
30. Duties of the Appellate Court.

Other Topics (miscellaneous)

- Power of Appellate Court to pass a decree for an amount larger than that claimed. See Note 17.
- Power of Appellate Court to decide on points not raised or covered by issues. See Notes 11 and 24.
- Power of Appellate Court in cases of assignment, creation or devolution of any interest, pending appeal. See Notes 16 and 9.
- Procedure on order directing return of plaint being set aside by Appellate Court. See Note 5.
- Appellate Court, powers of—Admission and rejection of documents. See Note 13.
- Appellate Court, powers of—Return of plaint. See Note 9.
- Appellate Court, powers to raise objection to court-fee on plaint *suo motu*. See Note 17.
- Appellate Court, power to remand on amendment of plaint or substitution of parties. See Note 5.
- Power of Appellate Court to direct local investigation. See Note 9.

1. Legislative changes.
2. Scope and object of the Section.
3. "Prescribed." See S. 2 clauses 16 and 18.
4. Power to determine case finally — Clause (a). See O. 41 Rr. 4, 24 and 33.
5. Power to remand case — Clause (b). See O. 41 R. 23.
6. Power to frame issues and refer them for trial — Clause (c). See O. 41 R. 25.
7. Power to take additional evidence — Clause (d). See O. 41 Rr. 27, 28.
8. Power to summon witnesses. See O. 41 Rr. 27 and 28.
9. Appellate Court to exercise the same powers and perform the same duties as original Court — Sub-section (2).
10. "Powers," meaning of.
11. Inherent powers.
12. Competence of the Appellate Court to interfere with the discretion of the Court below.
13. Powers of the Appellate Court in matters of evidence.
14. Appreciation of evidence by the Appellate Court.
15. Failure to consider weight of evidence.

1. **Legislative changes.**—Sub-section (1) is new. Sub-section (2) corresponds to the first clause of the first part of Section 582 of the Code of 1882.

2. **Scope and object of the Section.**—Sub-section (1) specifies the powers conferred on an Appellate Court in order to enable it to dispose of a case completely and effectively. The powers themselves are mentioned in clauses (a) to (d) and the conditions and limitations subject to which such powers are to be exercised are prescribed in the First Schedule. See Notes 4 to 7 below.

Sub-section (2) provides that an Appellate Court shall have the same powers as those of the original Court under this Code and thereby comprehensively makes the relevant provisions of the Code applicable to appeals except such as are specifically excluded. A second Appellate Court has also the same powers and duties as those of the first Appellate Court. See also Section 108.

The powers and duties contemplated in this Section are such as are provided for in the Civil Procedure Code, and not in any other enactment, such as the Limitation Act.

3. "Prescribed."—See Section 2 clauses 16 and 18.

4. Power to determine case finally—Clause (a).—See O. 41 Rr. 4, 24 and 33.

5. Power to remand case — Clause (b).—See Order 41 Rule 23.

6. Power to frame issues and refer them for trial — Clause (c).—See Order 41 Rule 25.

7. Power to take additional evidence—Clause (d).—See O. 41 Rr. 27 and 28.

8. Power to summon witnesses.—See O. 41 Rr. 27 and 28.

9. Appellate Court to exercise the same powers and perform the same duties as original Court—Sub-section (2).—Sub-section (2) is based on the general principle that an Appellate Court has full powers as the original Court, and can do, while the appeal is pending, what the original Court could have done, while the suit was pending. The provisions of the Code relating to incidental proceedings in original Courts are thus equally applicable to an Appellate Court. But they do not apply to

Section 107 — Note 2

1. ('94) 18 Mad 94 (98).
 - ('06) 8 Cal L Jour 29 (36).
 - ('85) 7 All 698 (698, 699) (FB). (Per Mohomed, J., dissenting.)
 2. ('90) 12 All 129 (151, 152) (FB). (Certain provisions not applicable to the original side of the High Court are equally inapplicable to the appellate side of that Court.)
 3. ('07) 29 All 535 (536).
 4. ('86) 12 Cal 590 (593) (FB).
- Note 9
1. ('10) 7 Ind Cas 1017 (1017); 1910 Pun Re No. 82.
 - ('12) 22 Mad L Jour 225 (227, 228).
 - ('11) 21 Mad L Jour 824 (827).
 2. ('81) AIR 1981 Lah 610 (611) : 13 Lah 195.
 - (O. 1 R. 8.)
 - (1865) 4 South W R 109 (110). (O. 2 R. 6.)
 - ('69) 12 South W R 11 (12). (O. 2 R. 6.)
 - ('23) AIR 1923 Nag 310 (311). (O. 7 R. 10).
 - ('32) AIR 1932 Mad W N 104 (104). (O. 7 R. 11).
 - ('32) AIR 1932 Cal 482 (484, 486) : 59 Cal 388.
 - (O. 7 Rr. 11 and 13).
 - ('02) 1902 Pun L R No. 46, page 173 (174). (O. 9 R. 5).

- ('16) AIR 1916 Mad 641 (641). (O. 9 R. 13—Application under—Competent in second appeal.)
- ('19) AIR 1919 All 49 (49) : 42 All 48. (Power to examine parties in appeal—O. 10 R. 2.)
- ('96) 1896 Bom F J 541 (541). (O. 20 R. 2).
- ('10) 7 Ind Cas 1017 (1017, 1018) : 1910 Pun Re No. 82. (O. 21 R. 29).
- ('88) 10 All 228 (234) (FB). (O. 22 R. 4.)
- ('81) 8 Cal 440 (441, 442). (O. 22 Rr. 3 and 11).
- ('80) 4 Bom 654 (655). (O. 22 R. 4.)
- ('96) 18 All 86 (88). (O. 22 R. 10).
- ('96) 18 All 285 (287). (O. 22 R. 10).
- ('31) 132 Ind Cas 194 (195) (All). (O. 23 R. 1).
- ('02) 5 Oudh Gas 49 (53). (O. 23 R. 3).
- ('28) AIR 1928 Mad 964 (965, 968). (O. 25 R. 2).
- ('72) 17 South W R 300 (301). (O. 26 R. 9).
- ('32) AIR 1932 All 270 (271). (O. 26 R. 9).
- ('84) 8 Bom 577 (581) (FB). (O. 33 R. 11).
- ('04) 14 Mad L Jour 471 (472, 474) (FB).
- ('17) AIR 1917 Mad 448 (449, 451) : 39 Mad 907 (912). (O. 39 R. 2 (3).
- ('17) AIR 1917 All 443 (446) : 38 All 398 (407). (Amendment.)
- ('17) AIR 1917 All 153 (154). (Do.)
- ('10) 7 Ind Cas 797 (797) (Mad). (Do.)
- ('26) AIR 1926 Oudh 98 (99) : 1 Luck 33. (Do.)

cases where the subject which is being dealt with by the Appellate Court is not the actual appeal itself. The words "as nearly as may be" mean, so far as may be necessary, to carry into effect the requisite reliefs. See also Notes 10 to 30 below.

10. "Powers," meaning of.—The word "powers" is not synonymous with "jurisdiction" but comprehends the authority to carry out such of the functions as are indicated in Notes 12 to 30 below.

The decisions of the English and American Courts on the functions of an Appellate Court are to be followed with great caution in India as they are based on practice and procedure of a highly technical character. See also Section 151.

11. Inherent Powers.—Every Court trying civil causes has inherent jurisdiction to take cognizance of questions cutting at the root of the subject-matter in controversy, and, in fact, such powers should be exercised in order to meet the ends of justice although there may be no direct statutory provision therefor. Thus, an Appellate Court has inherent powers to add, as a party respondent or allow to figure as an appellant a person who was not a party to the suit.

12. Competence of the Appellate Court to interfere with the discretion of the Court below.—Ordinarily a Court of appeal will not interfere with the exercise of discretion by the lower Court and substitute for it its own discretion. Nor can the Appellate Court lay down any rules with a view to indicate the particular groove in which the discretion of the lower Court should run.

- (130) AIR 1980 All 181 (181, 182). (Amendment to correct bona fide error in preferring appeal against dead person and to implead legal representatives.)
- (106) 3 Cal L Jour 29 (36). (Appointment of a guardian *ad litem*.)
- (128) AIR 1928 All 458 (459). (Power to correct errors and mistakes apparent on the face of the record.)
- (137) AIR 1987 All 248 (245). (Amendment of a memorandum of appeal can be made by an Appellate Court by virtue of the powers conferred by Section 107 (2), C. P. Code.)
3. (168) 10 South W R 160 (163, 164).
4. (85) 7 All 693 (697) (FB).
- Note 10**
1. (168) 10 South W R 160 (164).
2. (17) AIR 1917 Mad 597 (599). (31 Mad 268, Followed.)
- Note 11**
1. (12) 35 Mad 607 (612) : 39 Ind App 218 (PC).
- (20) AIR 1920 Cal 434 (435).
- (26) AIR 1926 Mad 631 (633).
3. (06) 3 Cal L Jour 29 (36). (To hold otherwise would render intrusive the exercise of appellate jurisdiction in many instances.)
4. (10) 12 Cal L Jour 91 (101).
5. (18) AIR 1918 Mad 409 (410, 411).
- Note 12**
1. (17) AIR 1917 PC 116 (118) : 42 Bom 380 : 45 Ind App 61 (PC).
- (10) 14 Cal W N 532 (534).
- (16) AIR 1916 Cal 564 (566) (FB).
- (14) AIR 1914 Cal 314 (318). (Appointment of a guardian to a minor.)

An interference, however, will be justified in the following cases —

- (1) where the lower Court acts arbitrarily or perversely or capriciously³ or in disregard of sound legal principles;⁴
- (2) where the discretion has been exercised where it ought not to have been exercised;⁵
- (3) where the Judge misdirects himself by wrongly assuming that there is no general rule to guide him in the exercise of his discretion;⁶ or
- (4) where the discretion which is vested in the Judge and which ought in law he is to exercise has not been exercised at all.⁷

The mere possibility of the Appellate Court coming to a different conclusion on the same facts and evidence will not justify interference.⁸ See also Note 14 below.

13. Powers of the Appellate Court in matters of evidence.—An Appellate Court will not interfere with the decision of the lower Court as to *admissibility* of evidence¹ except to prevent a clear miscarriage of justice.² But the question of the relevancy of evidence is always open to reconsideration in appeal.³ See also Note 14 below.

- (177) AIR 1917 P C 116 (118) : 42 Bom 380
- (359) : 45 Ind App 61 (P C).
- (66) 3 Bom 11 C R App 91 (101). (A bond insufficiently stamped — Refusal to grant relief arbitrarily.)
- (25) AIR 1925 Cal 711 (713). (Discretion used properly and not arbitrarily.)
- (27) AIR 1927 Sind 28 (30) : 21 Sind L R 55. (Amendment of charges not allowed—Discretion cannot be said to have been used capriciously.)
- (18) AIR 1918 Cal 467 (470) : 45 Cal 188 (148). (A judgment on admission of the defendant.)
- (17) AIR 1917 P C 116 (118) : 42 Bom 380 (359) : 45 Ind App 61 (P C). (So to allow would cause great inconvenience.)
- (25) AIR 1925 Cal 1027 (1029). (The order as to costs.)
- (35) AIR 1935 Mad 280 (282).
- (19) AIR 1919 All 453 (454) : 40 All 558
- (11) 21 Mad L Jour 1018 (1019). (Appellate Court giving specific directions — Trial Court not to exercise discretion.)
- (17) AIR 1917 P C 156 (159) : 45 Cal 94 (107) : 44 Ind App 218 (P C).
- (38) AIR 1938 Pat 418 (417) : 17 Pat 507. (Lower Court misdirecting itself on a point of law.)
- (22) AIR 1922 Pat 47 (48) : 6 Pat L Jour 444. (Useless expenditure of money and unprofitable waste of time would be incurred and great embarrassment caused.)
- (26) AIR 1926 Lab 228 (224).
- (24) AIR 1924 Lab 629 (630).
- (24) AIR 1924 Oudh 326 (328).
- (18) 46 Ind Cas 794 (795) (Nag).
- (26) AIR 1926 Oudh 522 (525).
- (27) AIR 1927 Oudh 66 (67).
- (25) AIR 1925 Cal 224 (225).
- (27) AIR 1927 Cal 830 (831).
- (28) AIR 1928 Mad 489 (491).
- (16) AIR 1916 All 181 (182).
- (03) 5 Bom L R 584 (586). (Judgment of the lower Court should not be reversed.)

1. See Section 167 of the Evidence Act.
- (92) 19 Cal 438 (442) : 19 Ind App 79 (P C).
- (04) 26 All 581 (587) : 30 Ind App 217 (P C). (Presumption as to genuineness of a document cannot be lightly overruled.)
- (15) AIR 1915 Mad 839 (839).
- (19) AIR 1919 Lab 69 (70). (Presumption as to genuineness of document.)
- (68) 3 Agre 148 (148). (Admission of documents produced late.)
- (13) 36 Mad 418 (422). (Admission of secondary evidence on grounds satisfactory to the lower Court.)
- (24) AIR 1924 Lab 265 (269). (Evidence admitted without objection in the lower Court.)
- (24) AIR 1924 Lab 303 (304).
- (17) AIR 1917 Mad 483 (488). (Document withheld properly attested.)
- [But see (26) AIR 1926 All 537 (537). (A suspicious document.)
- (14) AIR 1914 Mad 473 (474) : 37 Mad 455 (457). (Where there is no evidence at all.)
- (92) 19 Cal 438 (442) : 19 Ind App 79 (P C).
- (26) AIR 1926 Mad 1003 (1004).
- (13) 11 All L Jour 537 (538, 539). (Plaintiff's late production of documents — Surprise to defendant.)
- (28) AIR 1928 Cal 512 (512).
- (27) AIR 1927 Mad 60 (60).
- [See also (35) AIR 1935 Lab 251 (259) : 16 Lab 782. (Relevancy and admissibility — Relevant document — Objections to admissibility not raised — Document is admissible — Irrelevant)]

14. **Appreciation of evidence by the Appellate Court.** — Where the appreciation of oral testimony is concerned, the Appellate Court has to reconcile two conflicting view-points, namely, on the one hand, the undoubted duty of the Court of appeal to review the recorded evidence and to draw its own inferences and conclusions, and, on the other hand, the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner.¹ On questions of fact, therefore, largely depending on oral testimony, the conclusions of the trial Judge will not be lightly interfered with.² But this rule should not be treated as having a too general application.³ An Appellate Court is entitled to interfere with questions of fact in the following cases —

document though admitted can be discarded by Appellate Court.)

Note 14

1. (21) AIR 1921 Cal 677 (681) : 17 Cal 1019.
- (16) AIR 1916 Cal 961 (971) : 43 Cal 823 (827).
- (36) AIR 1936 P C 154 (155) (P C).

[56] (35) AIR 1935 P C 91 (92) (P C). (Trial Judge is in superior position than Appellate Judge of credibility of witness on question of fact.)

- (32) AIR 1935 Cal 80 (81) : 61 Cal 927.
- (38) AIR 1935 Bom 301 (308). (When the trial Judge does not approach the examination of the evidence from the correct standpoint, the opinion of the trial Judge is not entitled to much weight.)

2. (09) 13 Cal W N 752 (751, 757) (P C).

- (33) AIR 1933 Cal 449 (452).
- (33) AIR 1933 Oudh 295 (297).
- (33) AIR 1933 Oudh 212 (215).
- (33) AIR 1933 Oudh 170 (175) : 5 Luck 535.

(26) AIR 1926 P C 29 (30) : 1 Rang 513 (P C).

(Especially where testimony of a witness is rejected on demerit.)

- (11) 15 Cal W N 717 (721, 722) (P C).
- (15) AIR 1915 P C 1 (2) : 39 Bom 356 : 42 Ind App 110 (P C). (Decision as to the credibility of a witness.)

(16) AIR 1916 P C 256 (261) : 43 Cal 707 (722) : 48 Ind App 73 (P C).

(16) AIR 1916 P C 73 (73) (P C). (Case of collision of two steamers.)

- (16) AIR 1916 P C 166 (169) (P C). (Authority to adopt given by an oral will.)
- (19) AIR 1919 P C 188 (189) (P C).
- (22) AIR 1922 P C 371 (372) : 46 Bom 557 (P C).

(23) AIR 1923 P C 156 (158) : 1 Rang 451 (P C).

(Credibility of a witness.)

- (28) AIR 1928 P C 277 (280) (P C).
- (16) AIR 1916 All 181 (182). (If the credibility of a witness can be inferred otherwise than by his manners and demeanour, the Appellate Court can differ from the trial Court.)

- (14) AIR 1914 Cal 801 (302).
- (26) AIR 1926 Cal 116 (119).
- (27) AIR 1927 Oudh 485 (487).
- (16) AIR 1916 Pat 284 (288) : 1 Pat L 555.
- (16) AIR 1916 Cal 400 (401).
- (18) AIR 1918 Cal 363 (368) (S B).
- (20) AIR 1920 Cal 249 (250) : 47 Cal 577.

15. Failure to consider weight of evidence.—The failure of the Appellate Court to tackle the crucial question between the parties and consider the evidence in the case amounts to a substantial error of procedure.¹ See Section 101, Notes 23 and 24.

16. Power to add, transcribe or substitute parties.—An Appellate Court has, under sub-section (2) of this Section, the same power to add,¹ transpose² and substitute parties under the provisions of the Code as a Court of original jurisdiction. See O. 1 R. 10, O. 22 Rr. 3, 4 and 11 and O. 41 Rr. 20 and 33 and Note 11 above and Section 151.

As to whether a person not party to the first appeal can be added in second appeal, see O. 1 R. 10, Note 11 and O. 41 R. 20. Under the old Code, it was doubted in the undermentioned case³ whether Section 27 of that Code corresponding to the present O. 1 R. 10, sub-rule (1) applied to appeals. The doubt was expressed in view of the wording of the old Section 582. In view however of the changes made in the wording of the Section, it is submitted that there can be no doubt about it now.

17. Powers regarding court-fee.—An Appellate Court cannot deal with the appeal until the court-fee payable on the memorandum of appeal is paid.¹ Nor can it, in the generality of cases, award an amount in excess of that in respect of which the appeal is brought and court-fee paid.² As to the power of the Appellate Court to entertain an objection as to the valuation of the suit in the original Court, see Section 11 of the Suits Valuation Act of 1887.

18. Power to direct stay of proceedings, grant interim injunctions and pass interlocutory orders.—An Appellate Court having seisin of an appeal has power to pass all such interlocutory orders as are necessary in the interests of justice, such as an order granting an *interim* injunction,¹ appointing a temporary guardian in a pending appeal from an order of appointment under the Guardians and Wards Act,² or staying further proceedings or execution.³

See also Section 94, Order 41 Rules 5, 6 and 33 and Section 151.

19. Power to entertain application to set aside ex parte decree.—See Section 96 Note 12, Order 41 Rule 21.

20. Power to permit withdrawal of proceedings.—See Order 23 Rule 1.

21. Power to reject plaint or memorandum of appeal.—This Section makes the provisions relating to the rejection of plaints applicable to the memorandum of appeal.¹

Note 15

1. ('20) AIR 1920 Pat 359 (362).

Note 16

1. ('38) AIR 1938 Mad 806 (810). (O. 41 R. 20 does not exhaust Appellate Court's powers to add parties.)

[But see (29) AIR 1929 Bom 353 (354): 58 Bom 598. (Case of impleading a person not a party to suit.)]

2. ('30) AIR 1930 All 786 (787).

Note 17

3. ('99) 4 Cal W N 58 (61, 62).

1. ('12) 16 Ind Cas 46 (47) (Cal). (*Held* also that Appellate Court is not entitled to raise objection to court-fee on plaint *suo motu* under S. 11 of

Act VII of 1887).

2. ('08) 30 Cal 516 (519, 520).

See for fuller discussion Notes to Section 6. ('11) 1911 Pnn L R No. 218, p. 821. (Memo of cross-objections.)

Note 18

1. ('04) 14 Mad L Jour 471 (473, 474) (P B).

2. ('06) 3 Cal L Jour 29 (36).

3. ('07) 11 Cal W N 1030 (1040): 34 Cal 1037 (P B).

Note 21

1. ('97) AIR 1937 All 280 (281): 1 L R (1937) All 484. (Section 107 read with O. 7 R. 11 empowers the Appellate Court to reject a memorandum of appeal for non-payment of court-fees on it.)

103. (Appellate Court has power under S. 107 (2) ('36) AIR 1936 Cal 804 (805): 1 L R (1937) 1 Cal 103. (Appellate Court has power under S. 107 (2) of appeal for failure to pay requisite fees on it.)

22. Power to return memorandum of appeal for presentation to the proper Court.—Section 107 (2) read with O. 7 R. 10 makes it clear that the Appellate Court has the power to return the memorandum of appeal for presentation to the proper Court.¹

23. Power to allow amendment.—See Section 153, O. 1 R. 10, O. 6 R. 17 and O. 41 R. 3 and Note 9.

24. Power to decide new point suo motu.—See Order 41 Rule 2.

25. Power to make new case in appeal.—See Order 41 Rules 2 and 25.

26. Power to interfere with the appointment of a receiver.—An Appellate Court will not ordinarily interfere with the appointment of a receiver except on the ground of infringement of a general principle of law or improper exercise of discretion.¹

See also Note 12 above.

27. Power to refer to arbitration.—An Appellate Court can act under Paragraph 1 of Schedule II, Civil Procedure Code, by virtue of Section 107 (2) and refer the matter in dispute in appeal to arbitration.¹ See Schedule II, Paragraph 1.

28. Power to examine ameen.—An Appellate Court has power to send for the ameen and examine him on his report.¹

29. Power to expunge remarks from the judgment.—An Appellate Court would also seem to have the power to expunge remarks in a judgment where the observations are seditious, blasphemous, irrelevantly scandalous or indecent.¹

30. Duties of the Appellate Court.—Before an Appellate Court reverses the finding of the lower Court it should apply its mind to a consideration of the whole of the evidence in the case.¹ It should bring on the record all the necessary parties to the appeal.² It should apply correct principles of law³ and give clear findings of fact⁴ and directions free from doubt⁵ and rectify the errors of the lower Court.⁶ It is the duty of the Appellate Court to decide an appeal according to law, giving findings on all the issues decided by the lower Court against the appellant, however small the subject-matter of the appeal may be⁷ unless the appellant waives his objection to the findings against him.⁸

Note 22

1. (23) AIR 1923 Nag 810 (811).
2. (25) AIR 1925 Oudh 499 (499).

Note 26

1. (17) AIR 1917 Mad 1009 (1010).
2. (15) AIR 1915 Mad 926 (929).

Note 27

1. (11) 38 All 645 (647).
2. (31) 18 Cal 507 (509).

Note 28

1. (75) 24 South W R 342 (342).

Note 29

1. (17) AIR 1917 Mad 223 (224). (The view in this case proceeded on the powers under the Charter.)

Note 30

1. (17) AIR 1917 Mad 689 (690).
2. (18) AIR 1918 Low Bur 62 (62); 9 Low Bur Rul

159. (To take cognizance of a defect in attestation not noticed in the lower Court.)
2. (16) AIR 1916 Mad 828 (829).
3. (16) AIR 1916 Pat 363 (363, 364).
4. (15) AIR 1915 Low Bur 36 (37).
5. (15) AIR 1915 Cal 618 (619) : 42 Cal 451 (454).
6. (19) AIR 1919 Cal 360 (360). (Because the High Court in second appeal cannot go behind them.)
7. (07) 31 Mad 28 (32). (Appellate decree must state clearly extension of time for performance beyond that fixed by the lower Court.)
8. (26) AIR 1926 Pat 159 (160). (Appoint another commissioner where previous commissioner's report is unsatisfactory.)
9. (12) 1912 Pnn L R No. 240, page 759. (Appellate Court should set aside orders of lower Court passed without hearing.)
10. (17) AIR 1917 Lab 210 (210).
11. (16) AIR 1916 P O 14 (15, 16) : 38 All 440 : 43 Ind App 179 (P O).
12. (87) 1887 All W N 214 (214).

the dismissal of an appeal for default (O. 41 R. 17),⁷ the documents to accompany a memorandum of appeal (O. 41 R. 1),⁸ the power to entertain objections as to misjoinder of causes of action,⁹ the power to entertain cross-objections,¹⁰ and the bringing on the record of legal representatives of deceased parties,¹¹ a Court of second appeal has been held to be governed by rules similar to those applicable to a Court of first appeal. But the expression "so far as may be" makes it clear that the provisions relating to first appeals cannot be applied to second appeals indiscriminately, but can be applied only subject to the principles governing the entertainment and disposal of second appeals.¹² Thus, O. 41 R. 24 cannot be applied so as to enable the High Court in second appeal to enter into questions of fact.¹³ On the same principle it has been held that a Court of second appeal cannot grant a review on the ground of a discovery of fresh evidence,¹⁴ nor remand a case for a fresh hearing in order that a record of rights published after the decision of the first Court might be taken into consideration.¹⁵ Similarly, a party will not be ordinarily allowed to raise a new plea for the first time in second appeal.¹⁶ But an objection as to absence of cause of action can be entertained though raised for the first time in second appeal.¹⁷ Order 41 R. 32, read with the present Section and O. 42 R. 1, does not enable the High Court in second appeal to

[Note.—It should be noted that the decisions above cited differ as to whether a person who was not added as party to the second appeal, the Allahabad High Court has held in AIR 1914 All 293 and 16 All 5 that such a person cannot be added as a party to the second appeal while the contrary view was taken in 19 Mad 151 and AIR 1920 Low Bur 61.]

7. (93) 16 All 359 (361, 362). (Order of dismissal for default is not decree—No appeal lies.)

8. (08) 92 Bom 14 (24). (Presentation valid even if decree and judgment of first Court not filed.)

(82) 4 Mad 419 (420). (Judgment and decree of original Court need not be filed.)

(21) AIR 1921 Lah 73 (73) : 2 Lah 227.

(21) 67 Ind Cas 670 (671) (Lah).

(19) AIR 1919 Lah 42 (43) : 1 Lah 83. (Time was extended under S. 5, Limitation Act.)

(93) 16 All 198 (196, 197). (Grounds should be set forth in memorandum of appeal.)

(21) AIR 1921 All 28 (29) : 48 All 660. (Under the rules of the High Court, Court in second appeal cannot dispense with copy of judgment of first Court.)

(22) AIR 1922 Lah 93 (93). (The omission to annex copy of an interlocutory order incorporated by reference in the judgment may be excused. The above decisions will reveal a conflict of opinion as to whether a second appeal is properly filed when the memorandum of appeal is not accompanied by a copy of the judgment and decree of the trial Court and as to whether the appellant is entitled to exclude the time taken for obtaining copies of these, in computing the period of limitation for second appeal. The question is more fully dealt with under O. 41 R. 1.)

9. (73) 20 South W R 240 (241).

(05) 2 Cal L Jour 602 (607, 609).

10. (99) 21 All 297 (300). (S. 561, O. P. Code of 1882, not applicable to Letters Patent appeals.)

11. (07) 29 All 535 (536).

(05) 28 Mad 498 (499). (The controversy under the old Code and the old Limitation Act as to the period of limitation applicable to an application for bringing on the record of a second appeal the legal representatives of a deceased party can have only an academic interest now.)

See the following cases:—

(79) 3 Cal L Rep 440 (442). (Application made after 60 days granted—Art. 171, Limitation Act, 1877, did not apply.)

(07) 34 Cal 1020 (1023). (Art. 175 (c), Limitation Act (1877), applied.)

(06) 29 Mad 529 (530). (Limitation Act, 1877—Art. 178—3 years limitation—Applied.)

(11) 34 Mad 292 (293). (Prior to Limitation Act of 1908, application was governed by Art. 178 of period of limitation.)

12. (85) 7 All 765 (768, 769) (PB). (Finding upon issues remanded by High Court in second appeal cannot be challenged as in first appeal.)

(84) 7 Mad 52 (54).

(86) 9 All 26 (30, 31).

13. (86) 9 All 147 (152, 153, 154). (The maxim *optimus interpres rerum est usus* applied.)

(74) 21 South W R 52 (53).

(67) 7 South W R 326 (327).

(86) 12 Cal 97 (98).

(97) 24 Cal 98 (101).

(89) 5 All 14 (17).

(87) 9 All 29n.

14. (10) 33 All 71 (72).

15. (17) AIR 1917 Pat 189 (140) : 2 Pat L Jour 564.

16. See the following cases:—

(20) AIR 1920 Cal 325 (326).

(10) 12 Bom L R 795 (800). (Waiver of plea.)

(74) 20 South W R 240 (241). (No defect in original trial in consequence of misjoinder of causes of action—Plea of misjoinder not entertained.)

17. (10) 5 Ind Cas 386 (387) (All). (Plea went to the root of the case.)

vary an order for execution in such a way as to grant the decree-holder a relief for which he had not asked.¹⁸

3. Appeals from orders.—Where an order recording a compromise under O. 23 R. 3, *infra* is made with the consent of the parties, the order is not appealable by virtue of Section 96 sub-section 3, read with this Section, even though O. 43 R. 1, *infra* provides for an appeal against the order.¹⁹

As the provisions relating to appeals from original decrees apply to appeals from orders only "so far as may be," it is not open to the Appellate Court in an appeal from an order of remand under O. 41 R. 23 to enter into the merits of the whole case as in a regular appeal.²⁰ An Appellate Court has inherent jurisdiction to grant an interim injunction pending an appeal from an order refusing temporary injunction.²¹

It is only where a different procedure is not provided by the Code or by any special or local law, that the procedure in an appeal from an order is to be governed by the provisions relating to appeals from original decrees. Thus, the procedure as to appeals from original decrees is not applicable to appeals from orders under the Provincial Insolvency Act, as a special procedure is provided for such matters.²² Likewise, this Section is not applicable to proceedings under the Madras Estates Land Act (I of 1908).²³

APPEALS TO THE KING IN COUNCIL

109. [S. 595.] Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

(a) from any decree²⁴ or final order²⁵ passed on appeal²⁶ by a High Court or by any other Court of final appellate jurisdiction;²⁷

(b) from any decree or final order passed by a High Court²⁸ in the exercise of original civil jurisdiction; and

(c) from any decree or order, when the case, as herein-after provided, is certified to be a fit²⁹ one for appeal to His Majesty in Council.

[1877, S. 595. See O. 45 and Cl. 39 of the Letters Patent.]

18. (82) 8 Cal 174 (177).

Note 3

1. (133) AIR 1933 Bom 205 (207, 208) : 57 Bom -206. (Application for review or under S. 151 would be the proper remedy.)

2. (185) 7 All 136 (138).
3. (104) 14 Mad L. Jour 471 (473) (FB).
4. (186) 12 Cal 629 (634). (By S. 73 of Provincial Insolvency Act.)
5. See Section 192 of the Act.

Synopsis

1. Legislative changes.
2. Scope and object of the Section.
3. "Decree," meaning of.
4. "Final order," meaning of.
5. "Order passed on appeal."
- 5a. Whether appeal to Privy Council lies against appellate order from which no second appeal lies.
6. "Any other Court of final appellate jurisdiction."
12. Appeal to the Privy Council in criminal cases.
11. Form of certificate. See O. 45 R. 3.
10. Certificate of fitness — Clause (c).
9. Prerogative of the Crown. See Section 112, *infra*.
8. Limitation.
7. Orders passed by High Court in the exercise of original civil jurisdiction.

Other Topics (miscellaneous)

- Part of appeal under the Code not applicable to the Privy Council appeals. See Notes 3 and 6.
- Cases where no appeal lies. See Note 2.
- Extra-judicial decisions. See Note 2.
- Insolvency Acts—Appeal under. See Note 2.
1. Legislative changes. —
- The following amendments have been introduced in the Section: —
1. In clauses (a) and (b) the words "decree or final order" have been substituted for the words "final decree."
 2. In clause (c) the words "or order" have been added after the word "decree."
- It was enacted by Section 594 of the old Code that the word "decree" for the purposes of this Section meant "judgment or order" so that a "final decree" meant a "final decree or final order." It was also held in cases arising under the corresponding Section of the old Code (i. e., Section 595) that "final decree" included also decisions in the nature of preliminary decrees.

2. Scope and object of the Section. — The right of appeal to the Privy Council is governed by Sections 109, 110, 111 and 112 and O. 45 of the Code, and Clause 39 of the Letters Patent granted to the High Courts of Bombay, Calcutta and Madras and the corresponding Clauses of the Letters Patents granted to the other High Courts.

Sections 109 and 110 enact provisions very similar to the said Clause of the Letters Patent but are wider in their applicability than the Letters Patent. Whereas the Letters Patent only applies to *Chartered* High Courts, Sections 109 and 110 apply to all "High Courts" as defined by Section 3 (24) of the General Clauses Act² and to other Courts of final appellate jurisdiction. Clause 39 of the Letters Patent must also be read subject to Sections 109 and 110 of the Code.

Sections 109 to 112 and Clause 39 of the Letters Patent should be read together, and, when so read, the law enacted therein can be briefly summarized as follows: —

(1) An appeal will lie to the Privy Council from *any* decree or order when, either the case is *certified to be a fit one* for such appeal [see Section 109 clause (c)] or when *special leave* is given by the King in Council. (Section 112.)

Section 109 — Note 1

1. (91) 15 Bom 155 (159) : 18 Ind App 6 (P C).

Note 2

1. Clause 30, Letters Patent, Allahabad.

Clause 31, Letters Patent, Patna.
 Clause 29, Letters Patent, Lahore.
 Clause 37, Letters Patent, Rangoon.
 Clause 29, Letters Patent, Nagpur.

2. (92) AIR 1932 Oudh 163 (163, 164). (Oudh Chief Court is a High Court for purposes of Section 109.)

3. See Clause 44 of Letters Patent, Calcutta, and the corresponding Clauses in other Letters Patents.

(25) AIR 1925 Mad 243 (243, 244). (Appeal may lie under Clause 39 of Letters Patent, though not under Section 109.)

where the suit itself has become non-existent.⁹

(4) *Where a right of appeal is barred by the other provisions of the Code or by any special law.*—An order granting a review is not appealable except in the cases mentioned in O. 47 R. 7. Section 109 must be read subject to O. 47 R. 7, as is indicated by the words "subject to . . . the provisions hereinafter contained" in the Section, and therefore no appeal will lie from an order by the High Court on review if it is not appealable under O. 47 R. 7.¹⁰ Again, Section 109 will not affect any special law or any special jurisdiction conferred by any other law for the time being in force.¹¹ Where therefore a special law like the Rangoon City Municipal Act enacts that a decree of the High Court under Section 91 (3) of that Act is *final* in the sense that it is conclusive, a further appeal of any kind is barred and Section 109 will become inapplicable.¹²

In *Bhaya Mohammad Azim Khan v. Raja Saadat Ali Khan*,¹³ a question arose as to whether an appeal to the Privy Council was competent from a decree of a single Judge of the Oudh Chief Court in the exercise of original civil jurisdiction notwithstanding that under the Oudh Courts Act such decree was appealable to a Bench of the Chief Court itself. Their Lordships of the Privy Council held that in such a case the appeal to the Privy Council should be rejected in exercise of the prerogative of His Majesty under Section 112. Their Lordships also expressed the view that Sections 109 and 110 did not prohibit an appeal being brought within the Chief Court in like manner as a Letters Patent Appeal was brought within a Chartered High Court and that the two Sections taken together seemed rather to be intended to provide an appeal to His Majesty on the footing that no further appeal in India was provided.

It was held in the undermentioned cases¹⁴ that an award by a Court under the Land Acquisition Act was not open to an appeal to the Privy Council on the ground that only a *special and limited right* of appeal was given by that Act from the award of the Court to the High Court. These cases are no longer law since the amendment of Section 54 of that Act by Act XIX of 1921, by which an appeal to the Privy Council is expressly provided for.¹⁵

The right of appeal to the Privy Council is not confined to the King's subject.¹⁶ Subject to the limitations set forth above, an appeal will lie to the Privy Council from any judicial order or decree of a Court, by any person injured or aggrieved by it. Where the petitioner *prima facie* satisfies the conditions prescribed by this Section, leave to appeal must be granted. The chance of success of the appellant in the proposed appeal is immaterial.¹⁷ See also the undermentioned cases.¹⁸

- (192) AIR 1922 Pat 256 (257) : 6 Pat L Jour 171. (So assumed.)
 9. (25) AIR 1925 P C 174 (175) (P C). (Order of the High Court on review set aside by the Privy Council and suit dismissed—No more appeal to the Privy Council.)
 10. (26) AIR 1926 Oudh 17 (18).
 11. See Section 4, *ante*.
 (32) AIR 1932 Oudh 163 (164). (Special provision in Sec. 12 of the Oudh Courts Act, IV of 1925.)
 12. (27) AIR 1927 Rang 88 (89, 90) : 4 Rang 508.
 13. (39) AIR 1939 P C 122 (127) : 66 Ind App 160 : 14 Luck 252 : 1 L R (1939) Kar 234 (P C).
 14. (12) 16 Ind Cas 188 (189) : 40 Cal 21 : 39 Ind App 197 (P C).
 (12) 17 Ind Cas 952 (952, 953) : 37 Bom 506.
 (13) 21 Ind Cas 427 (427) (Cal). (16 Ind Cas 188, 189.)
 (21) AIR 1921 Bom 378 (378). (Refusal of application for an order under Section 45 of the need not be considered.)
 —Considerations where plaintiff is applicant (Leave to appeal to Privy Council by defendant (34) AIR 1934 Rang 65 (65, 66) : 12 Rang 164. Income-Tax Act—Appeal lies to Privy Council).
 High Court on reference under Sec. 51 of the (18. (24) AIR 1924 Mad 63 (65, 66). (Decision of (32) AIR 1932 Mad 46 (52).
 17. (32) AIR 1932 Mad 46 (52).
 16. (33) AIR 1933 Cal 219 (253) : 33 Ind App 1 (P C).
 Ind App 133 (P C).
 15. (25) AIR 1925 P C 91 (92) : 6 Lah 69 : 52 (15) AIR 1915 Low Bur 94 (94) : 8 Low Bur 163. (Award is neither decree nor order.)
 (13) 20 Ind Cas 763 (764, 765) (P C). (Followed.)

But in *Ramchand Manjimal v. Goverdhandas*, A. I. R. 1920 Privy Council 86, a case arising under the present Code, in which the question was whether an order refusing stay of a suit under Section 19 of the Arbitration Act was final or not, Viscount Cave observed :

"The question as to what is a final order was considered by the Court of Appeal in *Salaman v. Warner*, (1891) 1 Q. B. 734, and that decision was followed in the same Court in the case of *Bosson v. Altwicham Urban District Council*, (1903) 1 K. B. 647. The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties. The orders now under appeal do not finally dispose of those rights but leave them to be determined in the ordinary way."

In *Abdul Rahman v. D. K. Cassim and Sons*,⁵ after stating that the decisions in I. L. R. 15 Bombay 155 and I. L. R. 17 Allahabad 112 were not applicable to cases arising under the present Section, Sir George Lowndes observed :

"The finality must be a finality in relation to the suit. If after the order the suit is still alive suit in which the rights of the parties have still to be determined no appeal lies against it under Section 109 (a) of the Code. . . . In their Lordships' opinion it is impossible to distinguish the present case from that upon which Lord Cave pronounced. The effect of the order from which it is here sought to appeal was not to dispose of finally the rights of the parties. It no doubt decided an important and even a vital issue in the case but it left the suit alive and provided for its trial in the ordinary way. . . . For these reasons their Lordships think that the appeal is incompetent."

The decision of a cardinal point may in many cases finally dispose of the rights of the parties in the suit; but the test to find out whether an order is a final one is not whether the point decided thereby is a cardinal one, but whether the rights of the parties in the suit are finally disposed of by it.⁶

The mere fact that an order decides one issue on the rights of the parties does not make it a final order if there are other issues left to be decided later on.⁷ Where an order merely gives a direction as to procedure or where it does not dispose of the suit or proceeding but reserves some further question for further determination, it is only an *interlocutory* and not a final order.⁸

the point of limitation—The order of remand was *interlocutory*.)
(31) AIR 1981 Nag 24 (25) : 27 Nag L R 172.
(1900) 22 All 405 (407).
(109) 4 Ind Cas 459 (460, 462) (Cal). (Order continuing an order of remand.)
(22) AIR 1922 Bom 388 (383) : 47 Bom 106.
(The word "final" in its ordinary sense explained.)
(11) 9 Ind Cas 188 (187) (Cal).
(11) 10 Ind Cas 439 (440) (Cal). (Order appointing a receiver not "final.")
(15) AIR 1915 Cal 624 (625). (Order refusing temporary injunction not final.)
(11) 11 Ind Cas 65 (66) (Cal). (Leave to sue in forma pauperis refused on the ground of non-disclosure of cause of action—Order of refusal final.)
(96) 1896 Pun Re No. 12.
(17) AIR 1917 Pat 126 (127, 128) : 3 Pat L Jour 339.
(21) AIR 1921 Pat 37 (38) : 6 Pat L Jour 116.
(Partition suit dismissed after preliminary decree in effect a restoration of the preliminary decree—Order of High Court reversing the dismissal is and is a final order.)
5. (33) AIR 1938 P C 58 (59, 60) : 11 Rang 58 : 60 Ind App 76 (P C).
6. (33) AIR 1938 P C 58 (60) : 11 Rang 58 : 60 Ind App 76 (P C).
Ind App 76 (P C).

(19) AIR 1919 All 31 (32) : 42 All 174.
(82) 4 All 238 (240).
(01) 23 All 220 (227) : 28 Ind App 28 (P C).
8. (11) 9 Ind Cas 188 (188) (Cal).
(77) 1 Cal L Rep 354 (358). (Order directing execution to proceed not final.)
(25) AIR 1925 All 263 (263, 264) : 47 All 335.
(Refusal by Lower Court to set aside an abatement—High Court reversing the order and directing the Lower Court to rehear the application for permission to implead the heirs—Order is not final.)

(19) AIR 1919 All 31 (32) : 42 All 174.
(82) 4 All 238 (240).
(01) 23 All 220 (227) : 28 Ind App 28 (P C).
8. (11) 9 Ind Cas 188 (188) (Cal).
(77) 1 Cal L Rep 354 (358). (Order directing execution to proceed not final.)
(25) AIR 1925 All 263 (263, 264) : 47 All 335.
(Refusal by Lower Court to set aside an abatement—High Court reversing the order and directing the Lower Court to rehear the application for permission to implead the heirs—Order is not final.)

(19) AIR 1919 All 31 (32) : 42 All 174.
(82) 4 All 238 (240).
(01) 23 All 220 (227) : 28 Ind App 28 (P C).
8. (11) 9 Ind Cas 188 (188) (Cal).
(77) 1 Cal L Rep 354 (358). (Order directing execution to proceed not final.)
(25) AIR 1925 All 263 (263, 264) : 47 All 335.
(Refusal by Lower Court to set aside an abatement—High Court reversing the order and directing the Lower Court to rehear the application for permission to implead the heirs—Order is not final.)

Thus, an order of remand under O. 41 R. 23, which decides an important issue but leaves the suit alive to be tried in the ordinary way, is not a final order.⁹ In the

- (26) AIR 1926 Mad 748 (749). (Order holding the suit not to abate as regards setting of scheme is not final order.)
- (24) AIR 1924 Mad 701 (702). (Order refusing to interfere in revision with order of lower Court restoring suit to file.)
- (25) AIR 1925 Cal 857 (859, 860). (Compromise not recorded and suit ordered to be proceeded with as usual.)
- (81) 6 Bom 260 (265). (Order in a partnership suit for account, refusing to allow the plaintiffs to have their accounts taken in particular manner suggested by themselves.)
- (02) 6 Cal W N 41 (41). (Order of Court under Rr. 615 and 617 of Belchamber's Rules and Orders (2nd Edn.) merely refusing to reopen a Registrar's Report.)
- (15) AIR 1915 Cal 624 (624). (Order by High Court reversing an order refusing to issue a temporary injunction against execution of mortgage decree.)
- (11) 10 Ind Cas 439 (440) (Cal). (Order refusing the appointment of a receiver in a suit.)
- (25) AIR 1925 Pat 173 (175). (Refusal to appoint a receiver.)
- (95) 22 Cal 929 (930). (Order refusing to appoint a receiver in a suit.)
9. (33) AIR 1938 P C 58 (60) : 11 Rang 58 : 60 Ind App 76 (PC). (And no appeal lies against it — Enforcement of this principle involves no practical hardship by virtue of Section 109 (c).)
- (31) AIR 1981 Lab 556 (558, 559).
- (23) AIR 1923 Bom 39 (40).
- (18) AIR 1918 Nag 193 (194).
- (34) AIR 1984 All 58 (59, 60) : 56 All 277.
- (33) AIR 1938 Lab 82 (83).
- (93) AIR 1938 Bom 260 (261, 262). (Remand on decision on merits setting aside plea of limitation.)
- (11) 9 Ind Cas 932 (932) : 33 All 391. (Order of remand merely interlocutory.)
- (08) 11 Oudh Cas 169 (172). (17 All 112 and 15 Bom 115, Distinguished.)
- (20) AIR 1920 Oudh 268 (268, 269) : 28 Oudh Cas 324. (Order that applicant was competent to apply for probate and remanding case for disposal on merits.)
- (15) AIR 1915 Mad 423 (423) : 38 Mad 509. (Remand on the ground that lower Court took erroneous view of pleadings.)
- (01) 23 All 220 (227) : 28 Ind App 28 (PC). (Refusal to set aside ex parte decree — Order set aside by High Court and case remanded.)
- (18) AIR 1918 Cal 878 (878). (Suit dismissed by lower Court — High Court setting aside dismissal and remanding case.)
- (88) 1888 Pun Re No. 56. (Order of remand after finding that plaintiff had a cause of action and asking lower Court to try the case on the merits.)
- (04) 1 All L Jour 26 (28). (Order holding that lower Court was competent to try the case and remanding the case.)
- (17) AIR 1917 Pat 77 (78, 79). (Do.)
- (25) AIR 1925 Cal 574 (574). (Suit dismissed due to plaintiff's want of locus standi — Appeal — Prima facie case made out — Case remanded for further hearing — Order is not final.)
- (24) AIR 1924 Lab 571 (579, 580) : 5 Lab 329 (PB). (Remand of case on the ground that plaintiff had locus standi — Matter of procedure can never be treated as the cardinal point of the suit.)
- (13) 21 Ind Cas 430 (431) (Cal). (Order deciding that suit as framed was not barred under Section 91 of the Chota Nagpur Tenancy Act and remanding the case for trial.)
- (15) AIR 1915 Mad 423 (423) : 38 Mad 509. (Remand on the ground that lower Court took erroneous view of pleadings.)
- (29) AIR 1929 Mad 308 (308, 309). (Scheme suit under Section 92 — Trial Court finding temple to be private and dismissing suit — High Court on appeal finding temple to be public and remanding suit.)
- (09) 31 All 545 (549, 550). (17 All 112 (P C), Distinguished.)
- (30) AIR 1930 Sind 254 (255) : 123 Ind Cas 231. (Do.)
- (07) 1907 Pun Re No. 52.
- (78) 2 All 65 (67). (District Judge re-calling execution application to his own file from that of the Sub-Judge and dismissing it — High Court remanding case for trial by the Sub-Judge.)
- (24) AIR 1924 Oudh 81 (81, 82). (Order merely disposing of a subsidiary issue and remanding case.)
- (19) AIR 1919 All 34 (34) : 42 All 176. (Order holding that there was no fraud on the part of the mortgagees in the registration so as to render the suit on the mortgage liable to dismissal.)
- (78) 1 All 726 (727). (Order holding that execution was not barred and remanding it for disposal.)
- (27) AIR 1927 Pat 368 (368) : 6 Pat 282. (Order directing that a compromise decree passed under O. 23 R. 3 be set aside and the suit proceeded with from the stage at which the compromise was filed.)
- (21) AIR 1921 Lab 203 (204) : 2 Lab 106. (Dismissal of suit as wrongly framed — Order setting aside dismissal and remanding case.)
- (16) AIR 1916 Oudh 242 (243) : 19 Oudh Cas 36. (Question of limitation and estoppel decided without evidence — Decision reversed and remanded for taking evidence — Order is not final.)
- (98) 2 Cal W N 1001.
- (25) AIR 1925 Nag 349 (349, 350) : 22 Nag L R 132.
- (39) AIR 1939 Oudh 224 (224) : 182 Ind Cas 1007 (1007).
- (36) AIR 1936 Mad 311 (311).
- (39) AIR 1939 Mad 697 (699).
- (39) AIR 1939 Mad 95 (95). (But question of jurisdiction being of general importance case held to be certified under clause (c).)
- [See also (36) AIR 1936 Oudh 205 (205). (Order under O. 41 R. 25.)

undermentioned decision,¹⁰ the Rangoon High Court has, however, proceeded on the view that a "final order" within the meaning of this Section need not completely dispose of the suit and an appellate order of remand may also under certain circumstances be a "final order." In that case, the Appellate Court held that a certain award was not binding on the persons against whom it had been set up and remanded the case to the lower Court for the investigation of their claims. It was held that this was a "final order" as it finally disposed of the rights of such persons to prosecute their claims in the suit. Reliance was placed upon the decisions of the Privy Council in *Rahimbihoj v. Turner and Saïyid Manzhar Hussain v. Bodha Bibi* above referred to. The decisions of the Privy Council in *Ramchand Manjimal v. Goverdhandas* and *Abdul Rahman v. D. K. Cassim and Sons* were distinguished on the ground that in neither case did the order dispose of any question affecting the substantive rights or liabilities of the parties in any way. An order granting leave to sue in *forma pauperis*¹¹ or refusing leave to appeal in *forma pauperis*¹² is a mere matter of *procedure* not finally deciding any rights of the parties and is not a "final order." An order extending the time for presenting an appeal under Section 5 of the Limitation Act¹³ or an order granting a review for re-hearing an appeal¹⁴ or an order rejecting an application made by the legal representatives of a deceased party to be brought on record¹⁵ or an order refusing to interfere in revision with an order of the lower Court allowing a co-degree-holder to join in executing the decree¹⁶ or an order directing the lower Court to proceed with the execution and determine the questions in dispute in execution,¹⁷ are all interlocutory orders and are not appealable under this Section.

See also the undermentioned cases.¹⁸

It has been held by the High Court of Allahabad¹⁹ that where an application to set aside an *ex parte* decree is rejected and on appeal the order is set aside, the appellate order is a "final order" within this Section inasmuch as such order finally determines the proceedings for setting aside the *ex parte* decree.

It has been seen in Note 6 to Section 2 (2) that a decision that a suit is not barred by *res judicata* or by limitation or in other like manner, is not a decision on any *substantive rights* of the parties. Such an order will, however, be a "final order" where the question as to bar by *res judicata* or limitation disposes of the rights of the parties in the suit.²⁰

- (35) 158 Ind Cas 117 (118) (Lah).
 (36) 88 Pun L R 112 (112). (Order remanding execution proceeding.)
 [But see (38) AIR 1938 Bom 251 (251, 252). (Order under O. 41 R. 25 is not "final" order.)]
 10. (38) AIR 1938 Rang 333 (334, 335) : 1938 Rang L R 330.
 11. (38) 8 Cal W N 296 (297).
 12. (27) AIR 1927 Pat 175 (176) : 6 Pat 67.
 (32) AIR 1932 Rang 192 (192) : 10 Rang 504.
 (25) AIR 1925 Oudh 548 (549).
 13. (26) AIR 1926 Pat 102 (102). (Order refusing extension and dismissing appeal is appealable to Privy Council as a "decree passed on appeal".) [See also (36) AIR 1936 Oudh 110 (112) : 11 Luck 599. (Order refusing to excuse delay under S. 5, Limitation Act, and rejecting appeal as time barred is not final order.)]
 14. (23) AIR 1923 Mad 57 (57).
 (32) AIR 1932 All 318 (318) : 54 All 401.
 15. (14) AIR 1914 Bom 6 (8) : 38 Bom 421.
 16. (22) AIR 1922 Pat 611 (613). (It is a mere

- matter of procedure.)
 17. (19) AIR 1919 Pat 383 (383) : 4 Pat L Jour 461.
 18. (37) AIR 1937 All 566 (567). (Second appeal rejected and dismissed for want of prosecution—Application for leave to appeal from order dismissing application—No cardinal point decided, nor rights of parties adjudicated upon in that order—*Held* order was not final.)
 (35) AIR 1935 Lah 458 (459). (Order hold- sible and remanding suit—Order not final.)
 (38) AIR 1938 Oudh 107 (110) : 14 Luck 13. (Order dismissing an appeal as premature cannot be said to be a final order within the meaning of Section 109.)
 19. (33) AIR 1933 All 15 (17) : 54 All 941. (Final order need not be in suit, it may be made in a proceeding arising out of a suit.)
 20. (19) AIR 1919 Oudh 256 (257) : 21 Oudh Cas 336. (Limitation.)
 (21) AIR 1921 Cal 177 (178). (Res judicata.)

5. "Order passed on appeal."—An order cannot be deemed to have been passed "on appeal" unless it is an order by a superior Court reversing, modifying or confirming the order of an inferior Court.¹ Two essentials must exist:—(a) the relationship of superior and inferior Court and (b) the power in the superior Court to review, affirm or modify, the decision of the inferior Court.² Again, the words "final order passed on appeal" are not equivalent to "final order passed in the exercise of final appellate jurisdiction" but imply orders disposing of an appeal at the hearing.³

Illustrations

1. A applies to the High Court to review its decision in an appeal before it. The High Court passes an order refusing the application for review. The order is not one "passed on appeal."⁴ The reason is that the High Court is not asked to deal with any order of an inferior Court.⁵ Nor does it dispose of the appeal at the hearing. Similarly an order of the High Court refusing stay of execution of his appellate decree⁶ or an order refusing an application for restoration of an appeal dismissed for default⁷ or an order rejecting an application for amendment of an appellate decree⁸ is not an order passed on appeal.

2. A applies to the High Court to pass a final decree according to the preliminary decree of the Privy Council. The order of the High Court on such application is not one "passed on appeal."⁹

3. A applies to the High Court for leave to appeal in *forma pauperis* and the same is dismissed. He subsequently files another application to be allowed to deposit the court-fees and that is also dismissed. The last order of dismissal is not an order "passed on appeal."¹⁰ The reason is that the appeal not having been admitted at all, the order in question could not be one passed "on appeal."

On the same principle as that mentioned in the last illustration, it has been held that an order rejecting an appeal for failure to furnish security for costs under O. 41 R. 10 is not an order passed "on appeal."¹¹ There is however a conflict of opinion whether an order refusing to admit an appeal after the period of limitation under Section 5 of the Limitation Act is an order passed "on appeal". According to the Bombay High Court and the Chief Court of Oudh such an order is not one passed on appeal.¹² The Calcutta¹³ and Patna¹⁴ High Courts and the Punjab Chief Court¹⁵ have held that the order is one passed on appeal within the meaning of clause (a) of Section 109.

necessarily not the same as the latter.)
4. (14) AIR 1914 Oudh 41 (42): 16 Oudh Cas 264.
(68) 10 Suth W R 1 (3) (FB).
(66) 6 Suth W R Misc 102 (103).
(66) 9 Ind Cas 183 (186) (Cal).
5. (11) 10 Ind Cas 444 (445) (Cal).
6. (11) 10 Ind Cas 444 (445) (Cal).
7. (17) AIR 1917 All 453 (453).
(83) AIR 1933 All 453 (453).
(24) AIR 1924 Rang 208 (208).
(37) AIR 1937 All 566 (566, 567). (Though it would be an order passed in the exercise of appellate jurisdiction.)
8. (03) 30 Cal 679 (681).
9. (25) AIR 1925 Mad 187 (187).
(32) AIR 1932 Bom 90 (91 to 93): 55 Bom 785.
(In pursuance of Privy Council decree High Court takes accounts and passes a decree—High Court decrees not one made on appeal.)
10. (19) AIR 1919 All 331 (331).
11. (10) 5 Ind Cas 940 (941): 18 Oudh Cas 59. [But see (32) AIR 1932 All 312 (314): 54 All 390. (5 Ind Cas 940, Disapproved.)]
12. (08) 32 Bom 108 (109).
(36) AIR 1936 Oudh 110 (112): 11 Luck 599.
13. (21) AIR 1921 Cal 415 (416). (32 Bom 108, Distinguished.)
14. (26) AIR 1926 Pat 102 (102). (Obiter.)
15. (17) AIR 1917 Lab 448 (448).
[See also (27) AIR 1927 Rang 20 (27): 4 Rang 265.]

Note 5

1. (11) 10 Ind Cas 444 (445) (Cal).
(26) AIR 1925 Mad 243 (243, 244). (Order of the High Court on the insolvency side on appeal is order on appeal under O. 39, Letters Patent.)
2. (11) 11 Ind Cas 65 (65) (Cal).
(11) 9 Ind Cas 183 (185 to 187) (Cal).
3. (14) AIR 1914 Oudh 41 (42): 16 Oudh Cas 264. (Order passed on application for review by Appellate Court is not "a final order passed on appeal.")
(33) AIR 1933 Lab 690 (691): 14 Lab 609. (Dismissal of appeal as having abated is final order on appeal.)
(32) AIR 1932 All 318 (318): 54 All 401.
(36) AIR 1936 Pat 465 (467): 15 Pat 659. (There is vast difference between an order made or a judgment passed on the appellate side of a Court and the final order passed on appeal—The latter may be included in the former but the former is not.)
(32) AIR 1932 All 318 (318): 54 All 401.
(36) AIR 1936 Pat 465 (467): 15 Pat 659. (There is vast difference between an order made or a judgment passed on the appellate side of a Court and the final order passed on appeal—The latter may be included in the former but the former is not.)

There is also a conflict of decisions as to whether an order passed by the High Court in the exercise of its powers of *revision* under Section 115 of the Code or in the exercise of its powers of *superintendence* under Section 15 of the High Courts Act, 1861, (24 & 25 Vict., C. 104) is one passed on appeal. The High Courts of Allahabad and Patna and the Judicial Commissioner's Court of Peshawar have held that it is not, while the Calcutta High Court has held that it is.¹⁷

5a. Whether appeal to Privy Council lies against appellate order from which no second appeal lies.—The provisions of the Code which preclude a further appeal from various appellate orders deal with internal appeals in British India and do not affect the maintainability of an appeal to the *Privy Council* against such orders.¹ Thus, an order passed by the High Court in appeal from one of the appealable orders specified in Section 104 sub-section 1 *ante* will be open to appeal to the Privy Council (notwithstanding the provisions of Section 104 sub-section 2) if the requirements of this Section and Section 110 as to valuation etc. are satisfied.²

The decision of the High Court on appeal from an order of the District Court which under Section 4, sub-section 2 of the Provincial Insolvency Act is 'final' subject to the right of appeal to the High Court under Section 75 of the Act, can be appealed against to the Privy Council. The reason is that when a right of appeal is given to one of the ordinary Courts of the country, the procedure, orders and decrees of that Court will be governed by the ordinary rules of the Civil Procedure Code.³

6. "Any other Court of final appellate jurisdiction."—Suppose a "final order" is passed by a District Court on appeal and that no second appeal lies from such order. Is the order to be treated as an order of a Court of final appellate jurisdiction within the meaning of clause (a)? In *Official Receiver, Madurai v. Kuppuswami Chettiar*⁴ it was held by the Madras High Court that an order passed by the District Court on appeal under Section 75 of the Provincial Insolvency Act was not the order of a Court of final appellate jurisdiction within the meaning of clause (a) of this Section. The decision proceeds on the ground that the expression "appellate jurisdiction" includes revisional jurisdiction and inasmuch as the order of the District Court was subject to the revisional jurisdiction of the High Court, the District Court cannot be considered to be a Court of final appellate jurisdiction. In *Saadatmand Khan v. Phul Kuar*,⁵ however, a direct appeal from an appellate order of a District Court was entertained and disposed of by the Privy Council. But this decision was distinguished by the Madras High Court in the above case on the ground that the mere fact that an appeal is heard by the Privy Council does not amount to a ruling that such appeal is maintainable.

7. Orders passed by the High Court in the exercise of original civil jurisdiction.

— See commentary on Clauses 15 and 40 of the Letters Patent.

16. (126) AIR 1926 AH 202 (202, 208) : 48 AH 226. Cal 635 (PC).
2. (13) 19 Ind Cas 296 (300) : 40 Ind App 140 : 40 Cal 361 : 20 Nag L R 33 (PC).
- (24) AIR 1924 P C 95 (100) : 51 Ind App 72 : 51 Cal 361 : 20 Nag L R 33 (PC).
1. (12) 15 Ind Cas 2 (3) : 15 Oudh Cas 55. (34) AIR 1934 Oudh 291 (292).
- (24) AIR 1924 P C 95 (100) : 51 Ind App 72 : 51 Cal 361 : 20 Nag L R 33 (P C).
- (34) AIR 1934 Oudh 291 (292).
3. (34) AIR 1934 P C 81 (82) : 61 Ind App 158 : 12 Rang 194 (PC). (AIR 1916 P C 21, Followed.)
- [See also (37) AIR 1937 Mad 930 (931).]
- Note 6
1. (37) AIR 1937 Mad 930 (932, 934).
2. (98) 20 AH 412 (418) : 25 Ind App 146 (PC).

8. Limitation.—Under Article 179, Schedule I of the Limitation Act, 1908, the time prescribed for an application for leave to appeal to the Privy Council is ninety days from the date of the decree or order appealed from.¹ There was a conflict of opinion as to whether Sections 5 and 12 of the Limitation Act could be applied to such applications.² Under the Limitation Act of 1908, those Sections have been made applicable to such applications³ and the decisions under the Act of 1877 to the contrary are no longer law.⁴

A *single* application cannot be filed for leave to appeal in two separate suits and appeals; where one such application is filed it is not open to the party to file another application out of time, though he can amend the former by confining the prayer for a certificate to one of the cases.⁵

9. Prerogative of the Crown. — See Section 112, *infra*.

10. Certificate of fitness — Clause (c). — This Section must be read with Order 45 Rule 3.

There are two kinds of certificates —

- (1) In a case coming under clauses (a) and (b) of Section 109, a certificate that, as regards amount or value and nature, the case fulfils the requirements of Section 110.
- (2) In a case coming under clause (c), that it is *otherwise* a fit one for appeal to His Majesty in Council.

It is not necessary that an order, in order to be appealable under this clause, should be a *final* one. *Any* decree or order, whether coming under clauses (a) and (b) or not, is appealable under this clause if it is certified to be a fit one for appeal.¹ Thus, even an *interlocutory* order may be appealable if there are questions fit for a certificate,² though Courts will hesitate to grant leave if it should involve needless expense at that stage.³

This clause is intended to meet special cases such as those in which the point in dispute is not measurable in money though it may be of great public or private importance⁴ and the grant of a certificate is in the *discretion* of the Court; but it must

Note 8

1. See Art. 179 of Sch. I of the Indian Limitation Act of 1908.
- (32) AIR 1932 Cal 587 (587, 588) : 59 Cal 251. (Time runs from date of judgment—S. 5, Limitation Act, can be applied.)
2. (06) 28 All 391 (392, 393). (Ss. 5 and 12 not applicable—1 All 644 and 15 All 14, Followed.)
- (95) 19 Bom 301 (302). (Sec. 12 not applicable.)
- (92) 15 Mad 169 (169). (Do.)
- (09) 3 Ind Cas 400 (401) (Cal). (Applicable.)
3. (14) AIR 1914 Cal 679 (680, 681) : 42 Cal 35. (It is within the legislative powers of the Government of India to make S. 12 of Limitation Act applicable to applications for leave to appeal to Privy Council.)
- (22) AIR 1922 Pat 255 (256) : 1 Pat 429. (Time for obtaining copy of judgment can be excluded.)
- (25) AIR 1925 Sind 60 (60, 61) : 17 Sind L.R. 306. (Time for obtaining copy of judgment not to be excluded—AIR 1922 Pat 255 distinguished on the ground of practice of that Court.)
4. [See (15) AIR 1915 All 335 (336) : 38 All 82.]
5. (32) AIR 1932 Lah 441 (442).

Note 10

1. (19) AIR 1919 Oudh 7 (8). (Leave should be sparingly granted.)
- (02) 24 All 174 (178) : 29 Ind App 40 (PC). (Omission to certify—Appeal incompetent.)
2. (22) AIR 1922 Cal 130 (133). (Order refusing to stay execution.)
- (15) AIR 1915 Cal 624 (625). (Order granting temporary injunction against execution of mortgage decree.)
- (27) AIR 1927 Cal 481 (483, 488). (Order removing a receiver appointed in suit under S. 92, Civil Procedure Code.)
- (37) AIR 1937 Sind 217 (217).
3. (10) 8 Ind Cas 1189 (1190) (Razvi). [See also (32) AIR 1932 Rang 137 (138, 139) : 10 Rang 385. (Remand for *certiorari*—*Remand at that stage for certiorari*.)
4. (34) AIR 1934 Lah 515 (515, 516). (AIR 1931 P.C. 25, Followed.)
- (37) AIR 1937 All 167 (167).

*cases*¹⁰ or whether there are any other *exceptional circumstances* justifying the grant of a certificate,¹¹ as for example where there are several suits in which the same question is involved and the grant of a certificate in some only of those cases would result in contradictory decrees.¹² Even the fact that a point is of general importance is not enough to support the grant of a certificate under this clause if it has been settled by the Privy Council,¹³ or by a Full Bench of the High Court concerned.¹⁴ Another consideration which the Court must keep in view in granting the certificate is that litigation is not made oppressively expensive and the elucidation of the real issues in the case by a trial of the suit is not unduly postponed or delayed.¹⁵

A question will be one of *public importance* if it affects not merely the parties to the case¹⁶ but also large bodies of persons or communities.¹⁷ The mere existence of a substantial question of law is not sufficient.¹⁸ A question of *private importance* means private importance to *both* parties to the litigation,¹⁹ (Bom). (Suit for money — Result of suit of no importance to others — No certificate granted.)

(13) 21 Ind Cas 788 (789) (Bom). (Suit for money — Result of suit of no importance to others — No certificate granted.)

(123) AIR 1928 Mad 125 (126).
(72) 9 Beng L R 423 (425). (Suit for less than Rs. 10,000 — Decision likely to govern other suits contemplated.)

(722) AIR 1922 Mad 34 (35). (Interpretation of Section 12 of the Madras Estates Land Act.)

(23) AIR 1923 Cal 451 (453).
(24) AIR 1924 Oudh 81 (83).
(39) AIR 1939 Mad 95 (96). (Question whether jurisdiction of Civil Court barred under Sea Customs Act — Question awaiting decision in other suits pending in the province.)

(36) AIR 1936 Rang 65 (65, 66) : 14 Rang 86. [See also (32) AIR 1932 Bom 218 (221). (Application under Cl. 15, Letters Patent (Bombay).)]

11. [See (29) AIR 1929 Oudh 248 (244). (Under O. 45 R. 3, Civil Procedure Code.)]

12. (19) AIR 1919 Cal 118 (119, 120).
(10) 5 Ind Cas 588 (584) (All).
(15) AIR 1915 All 129 (130) : 37 All 124. (Two appeals arising out of same suit.)

(85) 11 Cal 740 (745).
For other cases of exceptional circumstances in which leave can be granted see also the following cases :

(19) AIR 1919 Oudh 7 (8). (Where two Judges of the High Court have arrived at diametrically opposite conclusions on the vital question on which the suit should be decided.)
(24) AIR 1924 Pat 468 (470, 471). (Reversal based on evidence not before lower Court — Procedure unusual — Value involved very large.)

13. (29) AIR 1929 All 339 (340, 341). (Question of cow sacrifice.)
(29) AIR 1929 Mad 780 (781).
(26) 92 Ind Cas 1013 (1015) (All).
See also Section 110 Note 17.

(1) Right of procession claimed by Mahomedans against Hindus.²¹

The following questions have been held to be of public importance : —

But the fact that the question raised affects third parties is no ground of fitness.²⁰

The fact that the question raised affects third parties is no ground of fitness.²⁰ But the fact that the question raised affects third parties is no ground of fitness.²⁰

14. (28) AIR 1928 Mad 448 (450).
(18) 18 Ind Cas 305 (306) (All). (Certificate granted — The judgment of the Full Bench was not unanimous.)
(87) AIR 1937 Sind 217 (218). (The fact that a Full Bench decision of one High Court differs from a decision of a Full Bench of another High Court is not in itself sufficient ground to make a case a fit one for appeal to the Privy Council under the provisions of S. 109 (c), C. P. C.)

[See also (36) AIR 1936 Pesh 194 (195). (No inconsistency in rulings of Court — Different High Courts holding divergent views regarding similar matters is no ground for certifying case as fit one for appeal to Privy Council.)]

15. (36) AIR 1936 Mad 311 (313).
(34) AIR 1934 Pat 564 (565).
16. (21) AIR 1921 Oudh 30 (31). (Exercise of discretion under S. 90, Evidence Act — No substantial question of law involved.)
17. (23) AIR 1923 Nag 272 (272).
(30) AIR 1930 Nag 91 (92) : 12 Nag L R 170. (A I R 1921 P C 25, Followed.)
(13) 28 Ind Cas 793 (793) : 7 Sind L R 92. (Or threatens the religious or civil rights of any class of community.)

(27) AIR 1927 Nag 63 (64). (Inheritance of "Tawa-jama" in Benar — Whether governed by Inam Rules or by Law of Pensions is a question of public importance.)
(28) AIR 1928 All 220 (221) : 50 All 640.
(31) AIR 1931 Mad 642 (643, 644). (Substantial question of law of some difficulty — Not sufficient in absence of general and public importance.)
(21) AIR 1921 Pat 33 (34) : 6 Pat L J 125.
(34) AIR 1934 Pat 564 (565).
(23) AIR 1923 Mad 282 (284).
(24) AIR 1924 Mad 281 (281, 282). (Disputes about temples — Certificate was granted.)

(22) AIR 1922 Mad 34 (35).
(29) AIR 1929 Mad 780 (781).
(26) 92 Ind Cas 1013 (1015) (All).
See also Section 110 Note 17.

- (2) Constitution of an agreement between two rival temples affecting rights of great importance.²²
- (3) The nature of the constitution of a community and whether the constitution amounts to a trust.²³
- (4) The nature of the resolution to be passed by a company for the alteration of its memorandum of association.²⁴
- (5) Whether certain kinds of permanent tenure in Malabar carry with them the incident of forfeiture on alienation.²⁵
- (6) The extent of control acquired by one who has built a Parsi Fire Temple.²⁶
- (7) The status and legal position of one who has collected the debts of a deceased person in relation to the beneficiaries and others by virtue of his holding a succession certificate.²⁷
- (8) The necessity or otherwise for registration of documents containing an option of re-purchase.²⁸
- (9) The burden of proof of family necessity for a debt contracted by the manager of joint Hindu family and the liability of the mortgagor's share alone for such debts.²⁹
- (10) Whether the fraud of the mortgagor alone in registration proceedings would affect the mortgagee's right of suit.³⁰
- (11) Whether a suit by a Hindu widow is one of a representative character.³¹
- (12) The form of ritual in an important public temple.³²
- (13) The question of jurisdiction of a Civil Court.³³
- (14) The question whether in a suit for partition, the value for purposes of appeal to the Privy Council is the value of the entire property or the value of the share claimed.³⁴
- The questions raised in the following cases were held not sufficient to justify the grant of a certificate under this clause : —
- (1) Where it would not be right to call upon a party whose financial interest in the matter is too small to incur the risk of the costs of the appeal.³⁵
- (2) Where the question is merely a matter of practice, such as an order for the inspection of documents.³⁶
- (3) Where the question is merely the sufficiency of evidence in proof of a particular fact³⁷ or where the case merely rests upon evidence and there are concurrent findings of fact.³⁸
- (4) Whether the non-joinder of certain parties is fatal to the suit or appeal.³⁹

22. ('24) AIR 1924 Mad 281 (232).
23. ('28) AIR 1928 Nag 202 (203).
24. ('03) 27 Bom 418 (418).
25. ('23) AIR 1923 Mad 443 (444).
26. ('05) 6 Bom L R 286 (287).
27. ('16) AIR 1916 All 253 (253) : 38 All 188.
28. ('27) AIR 1927 Bom 19 (20, 21) : 50 Bom 753.
29. ('13) 18 Ind Cas 305 (305, 306) (All).
30. ('19) AIR 1919 All 34 (35) : 42 All 176.
31. ('34) AIR 1934 All 198 (201).
32. ('39) AIR 1939 Mad 847 (848) : 1939 Mad WN 816 (817).
33. ('39) AIR 1939 Mad 95 (95).
34. ('35) AIR 1935 Pat 266 (267).
35. ('23) AIR 1923 Mad 232 (233, 234).
36. ('72) 9 Bom H C R 398 (401, 402).
37. ('90) 17 Cal 246 (249) (P C).
[See ('90) 17 Cal 246 (249) (P C).]
S. 306, C. P. Code (1882).
there was no bid, no sale, no deposit under (1900) 1900 Pun Re No. 61. (Applicant contended (05) 1905 Pun Re No. 59.
(Special leave to appeal, when granted.)
(01) 24 All 174 (177, 178) : 29 Ind App 40 (P C).
(02) 25 Mad 215 (219, 220) : 29 Ind App 38 (P C).
(91) 18 Cal 23 (30) : 17 Ind App 122 (P C).
(89) 16 Cal 753 (755) : 16 Ind App 125 (P C).
(96) 20 Bom 699 (702, 703).
(01) 28 Cal 190 (194).
No. 64.
38. ('16) AIR 1916 Lah 87 (88) : 1916 Pun Re fact alone—No leave.)
(29) AIR 1929 Nag 85 (87). (Pure questions of 37. ('19) AIR 1919 All 97 (98).

(5) Whether a valid acknowledgment was given for the purpose of Article 1 of Schedule I of the Stamp Act.⁴⁰

(6) Where the discretion of the High Court was properly exercised in refusing to excuse the delay of the appellant.⁴¹

(7) The right of a party to open windows in a loft.⁴²

(8) Whether a suit to set aside a fraudulent decree could be brought by a person not a party to the decree.⁴³

(9) Whether a suit is maintainable to set aside a decree on the ground that it was obtained by perjured evidence.⁴⁴

(10) Whether a certain interpretation of a decree by a Court operates as *res judicata* between the parties.⁴⁵

(11) Whether a receiver should be appointed in a particular case.⁴⁶

(12) Failure to record reasons for granting a review.⁴⁷

(13) The construction of a Section of an Act (the Tenancy Act) not directly affecting persons other than the parties.⁴⁸

(14) An order reversing the decision of the lower Court refusing to set aside a dismissal for default.⁴⁹

(15) The dismissal of an appeal in a suit for defamation.⁵⁰

(16) The interpretation of a document which is not of general or public importance.⁵¹

See also the undermentioned cases⁵² where it was held that the case was not a fit one for appeal to the Privy Council.

In the case of orders suspending advocates from practice, the practice of the Allahabad High Court has been to grant leave to appeal under clause (c).⁵³

11. Form of certificate. — See Order 45 Rule 3.

12. Appeal to the Privy Council in criminal cases. — The Privy Council does not sit as a Court of Criminal Appeal and will not entertain a criminal appeal unless there is disregard of a form of legal procedure or of some violation of the principles

is not permissible under O. 2 R. 3, C. P. C., and whether on a proper construction of O. 1 R. 3 the allegations in a plaint allege the same cause of action or series of acts or transactions.

(36) AIR 1936 Oudh 110 (112, 113): 11 Luck 599. (An order rejecting the memorandum of appeal as being time-barred.)

(35) AIR 1935 All 424 (424, 425). (An order rejecting an application for review of judgment for failure of the applicant to plead that he has discovered new and important matter.)

53. (34) AIR 1934 All 898 (901): 56 All 702. (Applicant filed fee certificate on the strength of promissory note.)

(33) AIR 1933 All 18 (18).

(33) AIR 1933 All 225 (226): 55 All 246.

(37) AIR 1937 All 167 (168). (But leave cannot be granted as a matter of course and the applicant has to satisfy the High Court that the case is otherwise a fit one for appeal to His Majesty in Council.—Where some points of law are raised in the case a certificate can be granted under Section 109 (c).)

52. (39) AIR 1939 Pesh 26 (27). (An order setting aside an execution sale on consideration of facts.)

R. 3, C. P. C., can be so interpreted as to permit of joinder of causes of action when such joinder

(Interpretation was held not to be of general or public importance.)

51. (34) AIR 1934 All 58 (60): 56 All 277. (Suit was against District Council.)

50. (28) AIR 1928 Rang 187 (188): 6 Rang 48. (14) AIR 1914 Oudh 228 (225).

49. (21) AIR 1921 Pat 33 (34): 6 Pat L Jour 135. (1900) 27 Cal 333 (335): 27 Ind App 79 (P.C.).

(38) AIR 1938 Pat 293 (295): 12 Pat 728. (11) 10 Ind Cas 439 (441) (Cal):

46. (11) 8 Ind Cas 485 (485) (All). (12) 14 Ind Cas 626 (626) (Rang).

45. (29) AIR 1929 Bom 841 (843): 58 Bom 552. (21) AIR 1921 Cal 94 (95).

44. (24) AIR 1924 Mad 616 (617).

of natural justice and where by reason thereof substantial and grave injustice is done.¹ See also Notes to Section 112, *infra*.

110. [S. 596.] In each of the cases mentioned in clauses (a) and (b) of section 109, the amount⁶ or value³ of the subject-matter of the suit in the Court of first instance³ must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal⁸ to His Majesty in Council must² be the same sum or upwards, or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,¹¹ and where the decree or final order appealed from affirms¹³ the decision of the Court immediately below¹⁵ the Court passing such decree or final order, the appeal must involve¹⁶ some substantial question of law.¹⁷

[1877, S. 596. See O. 45 Rr. 3, 4 and 5.]

Synopsis

1. Legislative changes.
2. Scope and construction of the Section.
3. Valuation of the subject-matter in the Court of first instance.
4. Date of valuation.
5. Mesne profits, interest and costs after date of suit.
6. Sum actually at stake may not represent the true value.
7. Value as laid in the plaint. See Note 3 above.
8. Valuation of subject-matter in dispute on appeal.
9. Several appeals from a single decree.
10. Effect of abandonment of portion of claim after grant of certificate.
11. "Or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of the like amount or value."
12. Appeal from decree of affirmance must involve a substantial question of law.
13. Affirmance — Meaning of.
14. Cross-appeals.
15. "Immediately below."
16. "Involve."
17. Substantial question of law.
18. Privy Council practice when there are concurrent findings of fact. See Section 112.
19. Review. See Order 45 Rule 3.
20. Appeal. See Order 45 Rule 3.

Other Topics (miscellaneous)

"Claim or question" in *future*. See Note 11.
Consolidation of appeals for valuation. See O. 45 R. 4 Notes.
Costs — Privy Council practice as to. See Section 112, Note 8.

Note 12
1. (1887) 12 App Cas 459 (467), *Re Dillet*.
(198) 9 Moo Ind App 168 (192, 194) (P C).
(198) 22 Bom 528 (532) : 25 Ind App 1 (P C).
(1930) AIR 1930 P C 201 (202) (P C). (A I R 1914 P C 155, *Relied on*.)

(1930) AIR 1930 P C 57 (58, 59) : 11 Lab 192 : 57 Ind App 71 (P C).
(1931) AIR 1931 Sind 120 (120). (Section 109 (c) not applicable to a matter of criminal jurisdiction—Also no point of law and no final order.)
[See also (1935) AIR 1935 Mad 793 (793) (SB).]

Execution matters. See Note 2.
Form of application for leave. See O. 45 Rr. 2 and 3.
Powers of High Court subsequent to granting of leave. See O. 45 and S. 112, Note 11.

Valuation—Mortgage suits—Amount claimed or property involved. See Note 3.
Valuation—Variation pendente lite. See Note 8.
Value—Costs, if part of. See Note 5.
Value—Meaning of. See Notes 3 and 6.
Word "and" in third paragraph—Meaning of. See Note 2.

1. Legislative changes.—Under orders in Council dated 10th April 1838 the only condition enforced with respect to Privy Council appeals was that the value of the subject-matter in dispute in appeal to His Majesty shall amount to Rs. 10,000 at least. The additional conditions about the same value being necessary in the Court of first instance and the existence of a substantial question of law were first introduced by Section 5 of the Privy Council Appeals Act (VI of 1874).¹ This was later incorporated in Section 596 of the Code of Civil Procedure, 1877, corresponding to the present Section.

The words "final order" have been newly added after the word "decree." See Notes to Section 109.

2. Scope and construction of the Section.—It is the object of the Section not to encourage appeals to the Privy Council where the value of the subject-matter in dispute is small¹ or where, though the value is high, the dispute is only about a question of fact about which there has been *concurrent* findings in the Courts below.² The Section accordingly enacts that every appeal under Section 109, clauses (a) and (b) must be of the *appealable value* and, in cases of decrees of affirmance, must also involve a *substantial question of law*.³ No leave to appeal can be granted under this Section when the subject-matter in dispute is incapable of valuation in terms of money.⁴ The subject-matter in dispute must be of the appealable value *both* in the Court of first instance *and* on appeal to His Majesty in Council. The word "and" in the first paragraph of the Section cannot be construed as "or."⁵

The terms of this Section must be strictly construed.⁶ No real mischief can arise from doing so, inasmuch as cases not coming within this Section, if worthy of being tried by a higher tribunal, can always be dealt with under Section 109, clause (c) and under Section 112.⁷

Section 110—Note 1

1. (192) 15 Mad 237 (239) (FB).

Note 2

1. (1900) 23 All 227 (232): 28 Ind App 11 (PC).

2. (01) 28 Cal 190 (194).

(32) AIR 1932 Lah 121 (122): 13 Lah 338.

3. (01) 23 All 227 (231): 28 Ind App 11 (PC).

(01) 23 All 415 (418, 419): 28 Ind App 182 (PC).

(25) AIR 1925 P C 159 (160): 52 Cal 650: 52 Ind App 207 (PC).

(22) AIR 1922 Pat 555 (556).

(33) AIR 1933 All 4 (6, 7): 54 All 459.

4. (91) 18 Cal 378 (381). (Suit for restitution of conjugal rights though the suit was valued at about Rs. 10,000.)

(22) AIR 1922 Lah 131 (132): 2 Lah 297. (Suit for declaration that plaintiff belongs to Rajput caste.)

(70) 14 Suth W R 299 (299). (Order of appointment-)

ment as guardian of person and property—Value of minor's estate does not represent value of guardianship.)

(35) AIR 1935 Rang 113 (114): 13 Rang 128.

5. (01) 24 All 174 (177): 29 Ind App 40 (PC).

(31) AIR 1931 P C 125 (126, 127) (PC).

(29) AIR 1929 Nag 75 (76).

(01) 1901 All W N 19 (19).

6. (25) AIR 1925 P C 159 (160): 52 Cal 650: 52 Ind App 207 (PC).

(32) AIR 1932 Mad 46 (47, 52).

(32) AIR 1932 Rang 189 (190): 10 Rang 499.

(Court should be satisfied that the conditions are fulfilled though petition is not opposed. See Note 10 Point 7 of Section 109.)

(01) 23 All 415 (419): 28 Ind App 182 (PC).

7. (25) AIR 1925 P C 159 (160): 52 Cal 650: 52 Ind App 207 (PC).

(03) 27 Bom 415 (418).

(08) 31 Cal 57 (74): 30 Ind App 238 (PC). (S. 110 does not control S. 109 (c).)

(08) 31 Cal 305 (310): 31 Ind App 24 (PC). (Do.)

(38) AIR 1938 Rang 415 (416).

Though the first paragraph speaks of the "subject-matter of the *suit*" it must be deemed to include proceedings other than suits which may result in an appealable decree or order.⁸

As to *consolidation* of suits, see Order 45 Rule 4.

3. Valuation of the subject-matter in the Court of first instance.—In order that an appeal may lie to the Privy Council under the first paragraph of this Section, it is one of the essential conditions that the value of the subject-matter of the suit in the Court of first instance should be Rs. 10,000 or upwards. Such value must be the value at the *date of the suit* and not a *future* increase or decrease thereof.¹ Thus, it will not include interest or mesne profits or costs *after* the date of the suit.² Nor will it include a subsequent accretion to the property in suit by alluvion, increase in value, etc.³

The value, again, must be the *market value* as ascertained by ordinary commercial standards, of the property or of the detriment to the applicant's interests if the right claimed is negatived.⁴

Illustrations

(1) *A* sues for possession of land from *B*. *B* denies *A*'s title thereto. The value of subject-matter of the suit is the *market value* of the land and not the value as calculated for fiscal purposes under Section 7 of the Court-Fees Act.⁵

(2) *A* sues for *partition* and possession of his one-third share of certain joint property worth Rs. 15,000. The value of the subject-matter of the suit is the market value of the plaintiff's share

[*See* (707) 30 Mad 185 (188, 190) : 34 Ind App 98 (PC).]
8. (81) 8 All 688 (685). (Execution proceedings for mesne profits valued at Rs. 16,000 though value of suit less than Rs. 10,000—Order appeal-able.)
(70) 13 Moo Ind App 490 (496) (PC).

Note 3

1. (16) AIR 1916 Mad 985 (987) : 39 Mad 843.
(31) AIR 1931 P C 125 (127) (PC).
(36) AIR 1936 Lah 31 (32).

2. See Note 5, below.

3. (28) AIR 1928 Mad 448 (449). (Land under cultivation subject-matter of valuation—Value of house sites in its vicinity should not be considered.)

(29) AIR 1929 Nag 75 (79). (New machinery brought on property during pendency of suit for specific performance—Its value cannot be taken into account.)

(19) AIR 1919 Pat 486 (486). (Increase in value *pendente lite*.)

(10) 5 Ind Cas 645 (646) (Cal). (Subsequent accretion.)

4. (18) AIR 1918 Mad 1099 (1100).
(05) 1905 Pun L R No. 150, p. 514 : 1905 Pun Re No. 60.

(24) AIR 1924 Lah 82 (82, 83) : 4 Lah 185.

(92) 15 Mad 237 (239) (PB). (Legislature's intention as to the meaning of the words "value of the subject-matter in the Court of first instance.")

(80) 4 Bom 515 (527) (PB). (Value for court-fees, not value for purposes of appeal to Privy Council.)

(77) 2 Bom 219 (223). (Do.)
(1857) 8 Moo Ind App 193 (196, 197) (PC).

(1860) 7 Moo Ind App 428 (429, 430) (PC).
(04) 6 Bom L R 408 (406).
(19) AIR 1919 Pat 305 (307) : 4 Pat L four 415. (Sale in execution of a mortgage decree for over Rs. 10,000—Application by puisne mortgagee of certain items worth Rs. 4,000 to set aside sale—Value of subject-matter is Rs. 4,000.)
(03) 31 Cal 301 (304). (Suit for injunction in respect of buildings worth Rs. 10,000—Value of suit is the value of buildings.)
(72) 18 Suth W R 21 (22). (Conflicting claims to the waters of a flowing stream—The value was held to be the extent to which plaintiff's interest would be deteriorated if the right could not be established.)
(18) AIR 1918 Mad 632 (633, 634). (Value of irrigation rights—Detriment or injury to the party if the rights are negatived.)
(01) 26 Bom 319 (325). (Question as to the destination of the income of the residue until the residuary attained the age of twenty-five years—The value of subject-matter is value of income and not that of residue.)
(39) AIR 1939 Oudh 1 (1). (Market value usually determined with reference to instances of sale. Multiples prescribed by the U. P. Encumbered Estates Act not applicable as they were fixed for the purposes of that particular Act.)
(37) AIR 1937 Bom 181 (182) : 1 L R (1937) Bom 705.
(35) AIR 1935 Rang 113 (114). (Loss or detriment suffered by passing of decree not capable of being estimated in money—Section does not apply.)
5. (27) AIR 1927 Rang 304 (306) : 5 Rang 499. (Suit for redemption and possession.)
(1859) 8 Moo Ind App 268 (269) (PC).

of the properties, i.e., Rs. 5,000.⁶ But the decree may involve a question relating to the whole property. The second paragraph of the Section will apply in such a case.⁷

(3) A sues B for foreclosure of a mortgage for Rs. 7,000 executed by B to A. The amount due on the date of suit is Rs. 14,000 but the market value of the property is Rs. 9,000. The value of the subject-matter of the suit will be Rs. 9,000. The reason is that, in a foreclosure suit, the value cannot exceed the value of the property to be foreclosed. But if the amount sued for is less than the value of the property, only the value of the subject-matter will be the amount sued for.⁸

(4) A sues B, the mortgagor and C, the puisne mortgagee, of certain items on a mortgage for Rs. 12,000. C contends that the items mortgaged to him, the market value of which is Rs. 2,000, are not liable to satisfy A's mortgage. The value of the subject-matter of the dispute between A and C is the whole mortgage amount of Rs. 12,000. The reason is that the entire liability under the mortgage can be enforced against any of the items mortgaged and that if C wants to redeem the mortgage he will have to pay the whole amount due under the mortgage and not merely the amount proportionate to the value of the items mortgaged to him.⁹ Where, however, C does not claim through B but does so adversely to him under a paramount title, he is not concerned with the mortgage at all and is not bound, like a subsequent mortgagee, to redeem it. The value of the dispute in such a case can be only the value of the property claimed by C under the paramount title.¹⁰

(5) A sues B for enforcement of an annuity of Rs. 125 per annum charged upon certain properties. The value of the subject-matter of the suit is the value of the annuity and not the value of the property upon which the annuity is charged. The value of an annuity of Rs. 125 per annum can be by no reasonable method of valuation be worth Rs. 10,000.¹¹ But a claim for a rent of Rs. 275 per month¹² or a rent of Rs. 1,500 per year¹³ will be worth more than Rs. 10,000. See also the undermentioned case.¹⁴

(6) A is a maintenance holder with a right to reside in a certain house on condition that if she is asked to vacate it she should be paid Rs. 400 a month in lieu of the right of residence. A is sued in ejectment. The subject-matter of the suit is the value of the house and not the difference between the value of the house and Rs. 400 a month which she will get.¹⁵

It follows from what has been said above that the applicant for leave to appeal is not bound by the *fiscal standards* under the Court-Fees and Suits Valuation Acts, by which he has valued the suit, but is entitled to show the actual or market value of the claim made.¹⁶ Where, however, he has once valued the claim at its market

Act—Amount at twenty years purchase was taken as the valuation.]

12. (1923) AIR 1923 Bom 23 (28). (Twenty years purchase.)

13. (1922) AIR 1922 P C 257 (258) : 45 Mad 475; 49 Ind App 211 (PC).

14. (196) 163 Ind Gas 731 (731) : 62 Cal 992. (Royalty of Rs. 3,200 payable per annum being a liability of recurring nature is worth more than Rs. 10,000.)

15. (1932) AIR 1932 Bom 543 (544) : 56 Bom 526. (Relief sought by establishment of title to undivided third share (value Rs. 4,000) and a partition on that basis with mesne profits.)

(31) AIR 1927 Pat 391 (391). (The dispute involves a right on the one hand and a liability on the other in respect of a sum exceeding Rs. 10,000.)

(23) AIR 1923 Cal 387 (388, 389). (See also (1925) AIR 1925 Cal 414 (415). (Suit for rent under Rs. 30 and 52 of the Bengal Tenancy Act.)

11. (1923) AIR 1923 P C 102 (102) : 26 Oudh Gas 216 (PC).

10. (1916) AIR 1916 P C 18 (20) : 38 All 488 (493); 43 Ind App 187 (PC).

(16) AIR 1916 Bom 66 (68) : 40 Bom 477 (481, 482).

(17) AIR 1917 Cal 496 (497) : 44 Cal 119. (The subject-matter in dispute in the suit.)

(27) AIR 1931 Cal 417 (419) : 58 Cal 66. (Fee value represents minimum market value.)

(18) AIR 1918 Mad 1099 (1100). (1937) Bom 402. (See also (1937) AIR 1937 Bom 326 (329) : 1 L R 104) 31 Cal 301 (303).

(1937) Bom 402. (See also (1937) AIR 1937 Bom 326 (329) : 1 L R 104) 31 Cal 301 (303).

value,¹⁷ or where he, having a discretion to value his claim in alternative ways, chooses to value his claim in a particular way,¹⁸ he cannot thereafter be allowed to show that such value did not represent the real value. It has, however, been held in the under-mentioned case¹⁹ that the plaintiff is not absolutely precluded even in such a case from contending that his valuation in the plaint is wrong but that the Court will treat his admission as a strong piece of evidence against him. Where a plaintiff sued for accounts and valued the suit at Rs. 101 for the purpose of court-fees and filed the same in the Court of the Second Class Subordinate Judge whose pecuniary jurisdiction extended only up to Rs. 5,000, it was held by the Bombay High Court²⁰ that the value of the subject-matter could not be shown to be anything beyond Rs. 5,000. The basis of the decision was that the plaintiff having deliberately instituted the suit in the Court of the Second Class Subordinate Judge must be taken to have conceded the subject-matter to be a maximum of Rs. 5,000 and could not be allowed to turn round and say that it was over Rs. 10,000.²¹

A valuation of the property by the plaintiff which is admitted or is not objected to by the defendant, cannot be questioned by him (defendant) subsequently for the purpose of securing admission of an appeal to the Privy Council.²² In considering the value of the subject-matter of the suit, the value of the several reliefs should all be taken into consideration²³ but not *ancillary reliefs*.²⁴ Thus, in a suit for declaration and damages the value of the subject-matter is the value of the damages claimed as well as of the declaration asked for.²⁵ In a suit for specific performance of a contract to sell and for possession, the relief of possession is only ancillary to the specific performance and its value cannot therefore be taken into consideration.²⁶

4. Date of valuation.—The valuation of the subject-matter of the suit in the Court of first instance is the value at the *date of suit*.¹ As to the valuation of the subject-matter in dispute on appeal, see Note 8, *infra*.

5. Mesne profits, interest and costs after date of suit.—Till recently, there was divergence of opinion among the High Courts in India on the following questions:—

(1) Whether in a suit for money the "value of the subject-matter in the Court of first instance" included *interest* from the date of suit to the date of the

(37) AIR 1987 Cal 292 (296). (A mere mistake in stating the value in the plaint where the other side has not been prejudiced by having to resort to a different forum does not amount to estoppel in law so as to prevent the plaintiff from showing that the real value of the subject matter of the suit in the Court of first instance was Rs. 10,000 or upwards.)
See also cases in foot-notes 4 and 5 above.
17. (28) AIR 1928 Mad 125 (126, 128).
(26) AIR 1926 Rang 138 (139) : 4 Rang 92. (1865) 10 Moo Ind App 318 (320, 321) (PC).
(73) 19 Suth W R 191 (191).
(31) 133 Ind Cas 415 (416) (All).
(30) AIR 1930 Cal 737 (738). (Plaintiff knowingly undervaluing claim cannot raise it for Privy Council appeal.)
18. (34) AIR 1934 Cal 809 (810).
19. (27) AIR 1927 Mad 862 (862).
20. (13) 15 Bom L R 1021 (1032, 1033).
21. (27) AIR 1927 Bom 83 (83, 84) : 50 Bom 839.

(31) AIR 1931 Cal 417 (419) : 58 Cal 66.
22. (27) AIR 1927 Mad 862 (862). (Party taking advantage of other party's valuation cannot object to it.)
(27) AIR 1927 Cal 418 (419). (Do.)
(10) 14 Cal W N 872 (873). (Do.)
(15) AIR 1915 Oudh 166 (167, 168).
(70) 14 Suth W R 62 (63).
(17) AIR 1917 P C 66 (68) (PC).
(23) AIR 1923 Oudh 93 (96) : 26 Oudh Cas 24. (25) AIR 1925 Mad 1223 (1224).
(01) 23 All 227 (232) : 28 Ind App 11 (PC).
23. See (19) AIR 1919 Cal 118 (119, 120).
24. See (29) AIR 1929 Nag 75 (79).
25. (19) AIR 1919 Cal 118 (119, 120).
26. (29) AIR 1929 Nag 75 (79).
Note 4

1. See Note 3.
(34) AIR 1934 Rang 55 (65) : 12 Rang 164.
(37) AIR 1937 Pesh 61 (62).

decree or any later date¹ and

(2) whether in a suit for land or other immovable property and *mesne profits*, the "value of the subject-matter in the Court of first instance" included *future mesne profits* after the date of suit; and if so up to what period?"

The conflict has now been set at rest by the decision of the Privy Council in *Maungama v. Mahalakshimamma*² in which it has been held that neither interest nor mesne profits after the date of suit could be included for the purpose of ascertaining the value of the subject-matter of the suit under Section 110. Their Lordships entirely approved of the reasoning and decision of the Madras High Court in *Subramania Aiyar v. Sellammal*.³ See also the undermentioned cases.⁴

The costs of the suit are in no sense the subject-matter of the suit and ought not to be added to the subject-matter in order to bring the valuation up to the appeal-able amount.⁵

6. Sum actually at stake may not represent the true value. — In *Radhakrishna Aiyar v. Sundaraswami*,⁶ their Lordships of the Privy Council said as follows :

Note 5

1. (12) 39 Cal 1037 (1910). (Interest after decree not included.)
- (75) 24 Smith W R 442 (442). (Do.)
- (26) AIR 1926 Rang 45 (46) : 3 Rang 405. (Interest up to date of decree included.)
- (78) AIR 1928 Mad 185 (186). (Do.)
- (18) AIR 1918 Pat 566 (567, 569) : 3 Pat L Jour 317. (Interest after decree not included.)
- (29) AIR 1929 Nag 75 (78). (Interest after suit is in the discretion of the Court and cannot be included.)
- (21) 60 Ind Cas 528 (524) (Pat). (Valuation must be at the date of decree.)
- (21) AIR 1921 Pat 229 (230, 232) : 6 Pat L Jour 596. (Mortgage suit—Interest could be added up to the days of grace but not afterwards.)
- (23) AIR 1928 All 78 (79) : 45 All 133. (Suit amount plus interest up to end of period fixed for payments is the value of the subject-matter.)
- (28) AIR 1928 Nag 239 (240). (Do.)
- (02) 24 All 174 (177) : 29 Ind App 40 (PC). (Interest after decree cannot be considered.)
- (1859) 8 All Ind App 262 (264) (PC). (Subsequent interest cannot be added.)
- (16) AIR 1916 Mad 985 (987) : 39 Mad 843. (Interest after suit cannot be added.)
- (29) AIR 1929 Pat 547 (547). (Includes up to date of decree.)
- (06) 38 Cal 1286 (1288). (Mesne profits subsequent to suit are to be taken into consideration.)
- (10) 14 Cal W N 872 (874). (Mesne profits subsequent to suit are to be allowed for valuation.)
- (21) AIR 1921 Pat 116 (116, 117) : 6 Pat L Jour 246. (Mesne profits from date of suit to delivery of possession or for three years after decree whichever is less are to be included.)
- (28) 107 Ind Cas 828 (829) (Pat). (Also future mesne profits up to the date of the decree of the trial Court.)
- (18) AIR 1918 Pat 377 (377) : 3 Pat L Jour 571. (Mesne profits up to date of appellate decree to be included.)

"In the first place, the sum of money actually at stake may not represent the true value. The proceeding may in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that the question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit."

See also Note II below.

7. Value as laid in the plaint. — See Note 3 above.

8. Valuation of subject-matter in dispute on appeal. — Another essential condition for the applicability of the first paragraph of the Section is that the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must also be Rs. 10,000 or upwards. Such amount or value is the amount or value of the subject-matter in dispute at the date of the decree of the High Court under appeal.¹ It follows that interest or mesne profits subsequent to that decree cannot be added for the purpose of reaching the specified amount of Rs. 10,000.²

The meaning of the words "in dispute" is illustrated by the following example :

Illustration

A sues B on breach of contract for recovery of Rs. 8,000 paid as advance, and of Rs. 7,000 as damages. The Court of first instance passes a decree in A's favour for the recovery of Rs. 5,000 paid as advance and of Rs. 2,000 as damages. On appeal to the High Court, the decree for Rs. 5,000 is upheld but the claim for damages is dismissed. Is A entitled to apply for a certificate for leave to appeal to the Privy Council? No; the decree for Rs. 5,000 having been upheld it can no longer be *dispute in A's appeal*. The subject-matter of the dispute can therefore be only the disallowed claim for damages, namely, for Rs. 7,000, which is less than the appealable value.³

See also undermentioned cases.⁴

9. Several appeals from a single decree. — Where, in a suit to set aside different alienations by a Hindu widow, the plaintiff-reversioner obtained a decree in his favour in the first Court and on separate appeals being filed by the alienees, the High Court drew up one decree under Rule 93 of the Madras Civil Rules of Practice (old R. 105) and the plaintiff applied for leave to appeal to His Majesty in Council, it was held that the application must be considered as if a separate decree had been passed in each appeal, and that, accordingly, leave could be granted only in those

Note 8

1. (1860) 8 Moo Ind App 165 (168, 169) (P C).
- (32) AIR 1932 Lab 526 (527).
- (34) AIR 1934 Rang 65 (66) : 12 Rang 164.
2. (20) AIR 1920 All 202 (203) : 42 All 445.
- (Interest.)
- (18) AIR 1918 Mad 1178 (1178). (Do.)
- (26) AIR 1926 Bom 265 (265) : 50 Bom 160.
- (Mesne profits.)
- (18) AIR 1918 Pat 377 (377) : 3 Pat L Jour 377.
- (Do.)
3. (20) AIR 1920 All 22 (22).
- [See also (19) AIR 1919 All 104 (104). (One defendant alone appeals to High Court—Value of contest becoming reduced.)]
4. (35) 157 Ind Cas 605 (606) (Cal). (Suit for possession of garden on basis of lease and in alternative for refund of premium—Suit valued at Rupees 10,000 — Decree for one-third of the garden — Defendant applying for leave to appeal to Privy Council—Plaintiff objecting that value of appeal would be only one-third of Rs. 10,000 — Held

that as the original claim in the alternative was for refund of Rs. 10,000, the question whether that amount should or should not be refunded to the plaintiffs would also be a question in the contemplated appeal in case the Privy Council should think fit and proper to dismiss the claim for possession and hence the matter involved was of the requisite valuation.) (38) AIR 1938 Mad 352 (353) (SB). (Application for leave to appeal to Privy Council from decision of High Court on effect of proviso 2 to S. 4 (2), Income-tax Act — Assessee as planter carrying on large business in Mysore State — Actual amount of tax involved in appeal Rupees 3500 — Still, leave held should be granted as the question will arise year after year.) (36) AIR 1936 P C 212 (218) (P C). (In this appeal from Ontario, the Privy Council interpreted the words "where the matter in controversy in any case exceeds the sum or value of 4000 dollars" which occurred in S. 1 of the Privy Council Appeals Act of Ontario and held that the true test was what was at stake on the appeal.)

appeals in which the subject-matter was over Rs. 10,000 in value.¹

10. Effect of abandonment of portion of claim after grant of certificate.—Where a would-be appellant, *bona fide* intending to appeal in respect of the whole amount decreed against him, obtains leave to appeal to His Majesty in Council, the appeal will not be rendered incompetent by the mere fact that at the hearing of the appeal he withdraws a part of his appeal thereby reducing the amount in dispute to one below the appealable value.¹

11. "Or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of the like amount or value."—Where the value of the subject-matter of the suit in the Court of first instance or the value of the subject-matter in dispute on appeal to the Privy Council is less than Rs. 10,000, no certificate can be granted, as has been seen already under the first paragraph of the Section. But a certificate can be granted even in such a case under the second paragraph of the Section if the decree or final order involves some claim or question to or respecting property of the amount or value of Rs. 10,000 or upwards.¹

The words "some claim or question to or respecting property" must be interpreted to mean "some claim or question to, or respecting, property additional to, or other than the actual subject-matter in dispute in the appeal."² The leading case on the point is *Subramania Aiyar v. Sellamanna*, A. I. R. 1916 Madras 985. The distinction in the applicability of the first and second paragraphs of the Section has been thus expressed by Srinivasa Aiyangar, J., in the said case: "We have to take both the clauses together so as to give a meaning to both. In my judgment the first clause applies to cases where the decree awards a particular sum, or property of a particular value. In fact the words 'objects in dispute,' are used in the provisions relating to particular value. To cases where the object-matter in dispute is of a particular value, or refuses that relief, i. e., to cases where the object-matter in dispute is of a particular value, beyond awarding relief in respect of the particular object-matter, clause 2 does not apply, and unless the case satisfies the conditions of clause 1, there is no right of appeal. If the decision, beyond awarding relief in respect of the particular object-matter of the suit affects rights in other properties clause 2 would apply."

405. (The condition laid down in the second paragraph is independent and self-sufficient and is not in any way dependent on the fulfilment of both or either of the conditions in the first paragraph.)

(39) AIR 1939 Mad 742 (743) : 1939 Mad W N 607 (608). (Constitution of agreement embodied in compromise decree—Dispute as to—Decision affecting party's interest in property worth over Rs. 10,000—Right to grant of certificate.)

2. (16) AIR 1916 Mad 985 (988) : 39 Mad 843. (21) AIR 1921 Low Bur 48 (48, 49) : 11 Low Bur Rul 152 (153, 154, 155). (Property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order.)

(29) AIR 1929 Nag 75 (77). (13) 21 Ind Cas 617 (617, 618) : 35 All 445. (37) AIR 1937 Bom 326 (329) : 1 L R (1937) Bom 402. [See also (23) AIR 1923 Rang 71 (72, 73) : 11 Low Bur Rul 335.]

1. (19) AIR 1919 Mad 275 (275) : 42 Mad 228. (22) 6 Cal W N 41 (41, 42). (Three separate suits involving same question—Not consolidated—Value of each to be Rs. 10,000.)

(16) AIR 1916 Mad 948 (944). (Batch of suits—Value of each to be Rs. 10,000, though common judgment.)

[See also (36) AIR 1936 All 832 (833) : 11 L R (1937) All 105. (Two separate appeals filed in High Court from same suit by different sets of defendants—Appeals disposed by practically one judgment and on ground common to all defendants—One appeal valued above Rs. 10,000 and other below Rs. 10,000—High Court can certify that latter case is fit one for appeal to Privy Council under S. 109 (c).)]

Note 10
1. (95) 22 Cal 434 (442, 443) : 22 Ind App 68 (P C).

Note 11
1. (37) AIR 1937 All 169 (170) : 1 L R (1937) All

The decision in *Subramania Aiyar v. Sellammal*³ has been recently approved by their Lordships of the Privy Council in *Mangamma v. Mahalakshimamma*.⁴ The contrary view which was apparently taken by Maclean, C. J., in *Dalglish v. Danno-dar*,⁵ was an *obiter dictum* and, in view of the Madras decision above referred to as approved by the Privy Council, is no longer law.

A claim or question to or respecting other property cannot be said to be *involved* under this paragraph unless the decree or order has the effect of *estopping*, either by the rule of *res judicata* or otherwise, a party from claiming rights in, or agitating the same question in respect of such other property.⁶ It follows that the claim or question must be one arising between the *parties* to the suit in which the appeal is taken.⁷ It also follows that a claim or question which is *not essential* or *relevant* for the decision⁸ or is too remote⁹ or is in *germinio futuro* and may never materialise¹⁰ cannot be said to be *involved* directly or indirectly in the decree or order.

Illustrations

(1) *A* sues *B* for recovery of Rs. 230 as rent due to him, in respect of holding *X* basing his claim on the ground that *A* is the zamindar and *B*, the tenant, of holdings *X*, *Y* and *Z* in the zamindari. *B* denies that he is a tenant. A decree is passed by the High Court dismissing *A*'s suit on the ground that there is no relationship of landlord and tenant between the parties. Here the effect of the decree is to bar the plaintiff from recovering any rent from the defendants not only in

Pun Re No. 75. (A simple money decree.)
7. ('13) 21 Ind Cas 624 (624, 625) : 1913 Pun Re No. 90.

('22) AIR 1922 Mad 34 (34).

('02) 24 All 236 (238).

8. ('29) AIR 1929 Nag 85 (86).

('26) AIR 1926 Rang 128 (128).

9. ('23) AIR 1923 Mad 125 (126, 127).

('25) AIR 1925 P C 159 (160) : 52 Cal 650 (654) : 52 Ind App 207 (P C).

('38) 42 Cal W N 298 (300). (Question whether a decree involves indirectly a claim or question

respecting property the value of which is Rupees 10,000 or upwards, must be decided with reference to actual circumstances at the time and

not to circumstances, which are remote, and not in particular to a mere possibility that future suits as to all or part of the larger extent of the property alleged to be concerned may be instituted at some time in the future—AIR 1923

Mad 125, Followed.)

('36) AIR 1936 Lah 31 (33).

10. ('15) AIR 1915 Lah 150 (151).

('02) 24 All 236 (238).

('26) AIR 1926 Rang 128 (128).

('33) AIR 1933 All 8 (10) : 54 All 431. (AIR 1922

Mad 34, Followed.)

('36) AIR 1936 Lah 31 (33). (The phrase 'directly or indirectly' in S. 110 refers to suits in existence and cannot be stretched to cover suits not yet brought. The indirect relation must be decided with reference to actual circumstances at the time and not to circumstances, which are remote, and not in particular to a mere possibility that future suits as to all or part of the larger extent of the property alleged to be concerned may be instituted at some time in the future—AIR 1923

3. ('16) AIR 1916 Mad 985 (989) : 39 Mad 843.

4. ('30) AIR 1930 P C 44 (45) : 53 Mad 167 : 57 Ind App 56 (P.C.).

5. ('06) 38 Cal 1286 (1288).

6. ('18) AIR 1918 Mad 1178 (1179).

('29) AIR 1929 Mad 780 (780).

('32) AIR 1932 Mad 125 (128) : 55 Mad 106.

('22) AIR 1922 Pat 611 (613). (Question relating to portion of decree which is time-barred.)

('28) AIR 1928 Cal 451 (452). (It should govern the decision in other matters — In this case it was held that it was not possible to hold that the decree involved a question respecting such other property.)

('23) AIR 1923 Rang 71 (72, 73) : 11 Low Bur

Rule 385. (A decision regarding validity of alienation by co-heir does not affect a different alienation by other co-heirs to others—Para. 2 has no application.)

('07) 34 Cal 466 (469). (Question affecting claimant's property other than that under reference under the Land Acquisition Act.)

('15) AIR 1915 All 446 (446). (Suit relating to land valued at Rs. 1,000—Other lands were likely to be affected by the decision—*Held* litigation did not involve a claim to property exceeding Rs. 10,000.)

[See ('35) AIR 1935 Pat 266 (267). (The decision on the question of impartibility of the estate raised as a bar to the suit for partition is a decision which possibly affects the whole estate notwithstanding that the judgment can only take effect as res judicata between the parties to the litigation. Hence leave to appeal to the Privy Council should be granted in such a case.)]

[See also ('66) 6 South W R Misc 4 (5).

('37) AIR 1937 Lah 95 (96).]

[But see ('04) 1904 Pun L R No. 137, p. 483 : 1904

('36) AIR 1936 Oudh 181 (182) : 12 Luck 27.

('36) AIR 1936 Lah 31 (33). (The phrase 'directly or indirectly' in S. 110 refers to suits in existence and cannot be stretched to cover suits not yet brought. The indirect relation must be decided with reference to actual circumstances at the time and not to circumstances, which are remote. On the other hand, the possibility of future suits may be taken into consideration if such suits will be affected by the doctrine of res judicata.)

respect of holding X but also in respect of holdings Y and Z. The decree, therefore, involves a claim

and Z.

(2) A sues B for the recovery of a property valued at less than Rs. 10,000 basing his claim under a deed of gift. Other claimants who are donees of other properties under the same deed of gift are also made parties to the suit and the total value of the subject-matter of the deed far exceeds Rs. 10,000. A's suit is dismissed on the ground that the deed of gift is void. Here the decree involves a claim or question to or respecting property other than the property actually claimed in the suit.¹³ But, in the undermentioned case,¹⁴ it was held by the Calcutta High Court that the word "property" in the second paragraph of this Section must be taken to be the property of the applicant for leave and that it is the extent to which the decree has operated to the prejudice of the applicant that determines the value of the property for the purposes of the Section. Hence, it was held in that case that in a suit by some of the heirs of a certain person for maintenance allowances, the plaintiffs were entitled to rely only upon the value of their own share and not upon the value of the entire monthly allowances payable to all the heirs when the other heirs, though made parties, had not made any claim. In such circumstances, it was held that it could not be said that the decision in the suit would involve directly or indirectly the interests of the others who had made no claim.

(3) A is the owner of a *gany* consisting of several grounds occupied by several tenants. A sues B, one of such tenants, for ejectment and for enhancement of rent. The other tenants of the other grounds are not parties to this suit. Here, the decision in the suit, though it may seriously prejudice A in similar suit, which he may have to file against the other tenants of the other sites, cannot be said to involve a question in respect of all the sites.¹⁵

(4) A sues for partition and possession of his share in family property. Does the decision in the suit involve a claim or question to or respecting the *other* share? No, according to the Bombay and Madras High Courts.¹⁶ Yes, according to the High Courts of Calcutta¹⁷ and Allahabad,¹⁷ the reason being that the share of the plaintiff could not be ascertained without determining the value of all the other shares in the estate. The Patna High Court has held that the question depends upon the particular circumstances of each case; where the only question for determination is whether the plaintiff is entitled to a specific share leaving the rest of the property undivided in the hands of the defendants, the decree may not involve any question relating to the other shares; but where the suit is one for *general partition* in which some of the defendants are themselves claimants of shares, and the decree in appeal deprives them equally with the plaintiff of the benefit of the first Court's decree, the decree in appeal will be considered to involve a claim or question to, or respecting the other shares also.¹⁸ The Bombay High Court also has held that where the decree of the High Court pre-judicially affects the interests of both the plaintiff and one of the defendants in the case, the total value of the shares of the plaintiff and such defendant can be taken into consideration in determining the value of the property involved in the decree.¹⁹

Another important point to remember in applying this paragraph is that it is not sufficient that the decree affects property whose value is Rs. 10,000 or upwards. It is necessary that it should involve rights and claims to property which *rights and claims* are themselves worth Rs. 10,000 or upwards.²⁰ In other words, where some subsidiary interest such as an easement of small value attached to property of great

11. (10) 14 Cal WN 651 (653).
[See also (1857) 7-Moo Ind App 261 (262, 263) (PC).]

(17) AIR 1917 Cal 496 (496) : 44 Cal 119 (124, 125). (Suit in ejectment from one property on basis of defendant being tenant-at-will—Defendant's setting up permanent tenancy in suit lands as well as other lands.)

12. (12) 16 Ind Cas 431 (431) (AH).
(33) AIR 1933 Oudh 397 (398). (Maintenance amount less than Rs. 10,000—But charge on property worth more than Rs. 10,000—Adoption and will in respect of such property also disputed—Leave to be granted.)

(23) AIR 1923 Bom 59 (59, 60).
[See also (13) 35 All 445 (448). (Case of award.) (97) 1 Cal WN xiii.]
13. (39) 43 Cal WN 432 (434).

14. (19) 21 Ind Cas 624 (624) : 1913 Pun Re No. 90.
15. (20) AIR 1920 Bom 418 (419) : 44 Bom 104 (107).
(38) AIR 1938 Mad 666 (666, 667) : 1 L R (1938) Mad 928.
16. (06) 3 Cal L Jour 257 (259).
[But see (73) 19 South W R 191 (192).]
17. (38) AIR 1938 All 177 (177) : 54 All 858.
18. (21) AIR 1921 Pat 502 (504).
19. (37) AIR 1937 Bom 181 (182) : 1 L R (1937) Bom 705.
20. (18) AIR 1918 Mad 632 (638, 634). (Rights of irrigation to lands worth more than a lakh of rupees—Subsidiary interest of small value in question—*Held* not of adequate value.)
(38) AIR 1938 Mad 666 (667) : 1 L R (1938) Mad 928.
[See also (28) AIR 1928 Pat 191 (192).]

value is in dispute, it is the value of such *interest in dispute* and not the value of the *property* affected that determines the right of appeal.²¹

Illustrations

(1) A files a suit on a prior mortgage against B, the mortgagor, and C, the puisne mortgagee of a 12 annas share in the property mortgaged to A. A decree is passed for sale, in the first instance of the 12 annas share are insufficient to satisfy the decree amount. The 12 annas share is sold and the proceeds being found insufficient, the 1 annas share is also sold. C applies thereafter to set aside the sale on the ground of irregularity in conducting and publishing the sale, but the petition is dismissed by the High Court. C applies for leave to appeal to the Privy Council. Here there is, no doubt, a dispute as to the whole property but so far as C is concerned *its value to him* cannot be anything more than the market value of his 1 annas share, and if that is under Rs. 10,000, no leave can be granted.²²

(2) A claims a right of way over a piece of land valued at Rs. 1,500, and forming part of a survey number valued at Rs. 10,000, A having a right to fence the way from the remaining land. Here the claim of A cannot be of more value to A than the value of the piece of land over which he claims the right of way, i. e., Rs. 1,500. No leave can therefore be granted.²³

(3) A sues B for ejectment from a site valued at Rs. 300 on the ground that B is a tenant-at-will. B contends that he is a permanent tenant of the land and that he has put up buildings thereon valued at Rs. 23,000. A is willing that B should remove the buildings. In such a case the claim of A cannot (in view of his laying no claim to the buildings) be worth to him more than the value of the site viz., Rs. 300. No leave can therefore be granted.²⁴

The Allahabad High Court has, however, in a recent decision²⁵ dissented from the view that the *right claimed* must itself be worth Rs. 10,000 or upwards. In that case it was held that the second paragraph of this Section gave a right of appeal to the Privy Council from a mortgage decree for the sale of property worth more than Rs. 10,000 although the decree itself was for a sum less than Rs. 10,000.

Where an applicant for leave files an affidavit that the decree or order involves a claim respecting property exceeding Rs. 10,000 in value and there is no counter affidavit by the respondents, the High Court may assume that the petitioner's affidavit is correct.²⁶

12. Appeal from decree of affirmance must involve a substantial question of law.—Where the decree or final order appealed from is one of affirmance, there must exist a substantial question of law *in addition* to the requirements as to value mentioned in the first and second paragraphs of the Section.¹

21. (21) AIR 1921 Bom 266 (267). (Easement.)
 (18) AIR 1918 Mad 682 (683).
 (34) AIR 1934 Rang 292 (294) : 12 Rang 355.
 (26) AIR 1926 Rang 138 (139) : 4 Rang 92. (Right to float logs in stream.)
 (28) AIR 1928 Pat 191 (192). (Right of irrigation of small value in the case of village of considerable value.)
 (29) AIR 1929 Bom 341 (342) : 53 Bom 552. (Easement)—The case in AIR 1923 Bom 176 was dissented from.)
 (15) AIR 1915 All 486 (488). (Question regarding improvements with which applicant is not concerned.)
 22. (19) AIR 1919 Pat 305 (307) : 4 Pat 1409. 415.
 23. (28) AIR 1928 Mad 785 (785).
 24. (23) AIR 1923 Lah 286 (287).
 (30) AIR 1930 Bom 509 (511). (Suit by tenant for renewal of lease—Value of improvements not to be added.)
 25. (37) AIR 1937 All 169 (171) : 1 L R (1937)

- All 405.
 26. (26) AIR 1926 Lah 416 (416).
 Note 12
 1. (16) AIR 1916 Mad 1222 (1223).
 (11) 13 Cal 1 Jour 501 (503).
 (12) 16 Ind Gas 197 (200) : 84 All 455 : 39 Ind App 156 : 15 Oudh Gas 271 (PC).
 (15) AIR 1915 Oudh 158 (159).
 (01) 23 All 227 (231) : 28 Ind App 11 (PC).
 (01) 23 All 415 (418, 419) : 28 Ind App 182 (PC).
 (16) AIR 1916 Lah 87 (88) : 1916 Pun Re No. 64. (14) AIR 1914 Oudh 41 (42) : 16 Oudh Gas 264. (Leave to appeal from an order on an unsuccessful review of an affirming decree of the High Court—Substantial question of law must nevertheless exist.)
 (96) 20 Bom 699 (703).
 (02) 25 Mad 215 (219) : 29 Ind App 38 (PC).
 (36) AIR 1936 Rang 125 (126) : 13 Rang 744.
 (38) AIR 1938 P O 165 (166) : 65 Ind App 182. I L R (1938) All 601 : 32 Sind L R 531 (PC).

proposed appeal to the Privy Council is in respect of a matter in regard to which the lower Court's decree has been affirmed, the case would come within the third paragraph of this Section and no leave for appeal to the Privy Council can be granted unless such appeal involves a substantial question of law.⁶ But where the appeal to the Privy Council involves also the matters in regard to which the lower Court's decree has been reversed or varied, the third paragraph of this Section will not apply and no substantial question of law need be shown to be involved in the appeal.⁶

Suppose the plaintiff sues the defendant for Rs. 20,000 on a promissory note. The lower Court passes a decree in favour of the plaintiff for Rs. 8,000 disallowing his claim for the balance, viz. Rs. 12,000. The High Court on appeal varies the decree by enhancing the amount decreed to Rs. 9,000. The plaintiff wants to appeal to the Privy Council on the ground that he is entitled to the balance of the amount also, viz., Rs. 11,000. Can it be said that inasmuch as the decree of the High Court concurs with that of the lower Court in disallowing the plaintiff's claim for this sum, that the decree of the High Court is one of *affirmance* of the lower Court's decree? It has been held by the Privy Council that in such cases the High Court's decree *cannot* be said

5. (38) AIR 1938 Mad 631 (633). (The term

'decree' used in connection with the High Court and the expression 'the decision' used in regard to the lower Court do not mean exactly the same thing. A single decree may comprise several decisions and each decision may relate to a distinct matter.)

(36) AIR 1936 Mad 881 (883) : 1 L. R. (1937) Mad

121. (Trial Court dismissing suit against two

defendants — High Court on appeal reversing

decree as to one but affirming the decree as to

the other — Plaintiff seeking to appeal to Privy

Council in respect of the latter portion of the

decree — Decree is one of affirmance and no leave

can be granted in absence of substantial question

of law.)

(37) AIR 1937 Lah 761 (763).

(36) AIR 1936 Pat 553 (554, 555) : 15 Pat 637.

(Suit for possession — Trial Court holding that

plaintiff was entitled to recover possession and

defendant's payment of certain sum was forfeited

— High Court, on appeal, affirming judgment as

regards main question but reversing it as regards

sum — Defendant wanting to appeal to Privy

Council — Judgment *held* was judgment of affirm-

ance and applicant must show substantial ques-

tion of law.)

(37) AIR 1937 Lah 761 (764). (It would be

anomalous to grant leave to appeal to His Majesty

in Council to an applicant on matters in which

a High Court has concurred with the trial Court

on the mere ground that on other matters High

Court has modified the decree of the trial Court

but in favour of the applicant.)

(37) AIR 1937 Lah 712 (714) : ILR (1937) Lah

268.

(35) AIR 1935 Cal 146 (146) : 62 Cal 257. (Ap-

pellate Court modifying original decree upon

single point in appellant's favour — He has no

right to appeal on other points simply on such

modification without showing that substantial

question of law is involved.)

(39) AIR 1939 All 322 (323) : 1 L. R. (1939) All

443. (Suit on mortgage decreed by trial Court —

Main question argued in appeal was whether mortgage was valid — High Court holding mortgage to be valid but reducing rate of interest — Amount by which decree was varied less than Rs. 10,000 — Question of validity of mortgage sought to be raised in appeal to Privy Council — Held that leave to appeal could not be granted unless substantial question of law was involved.)

(27) AIR 1927 Cal 543 (546).

(32) AIR 1932 Nag 118 (120) : 28 Nag L. R. 142.

(29) AIR 1929 Bom 359 (360).

(22) AIR 1922 All 89 (90) : 44 All 200.

(16) AIR 1916 Lah 113 (114, 115) : 1915 Pun

Re No. 22.

[See (37) AIR 1937 Mad 964 (965). (Held on

the facts of the case that the judgment of the

High Court was a reversing judgment in res-

pect of the whole case.)]

[See also (21) AIR 1921 Cal 81 (82).

(80) AIR 1930 Lah 102 (103) : 10 Lah 688.

(26) AIR 1926 Nag 245 (245).

(29) AIR 1929 Nag 85 (87).

(27) AIR 1927 Pat 379 (381).]

[But see (35) AIR 1935 Oudh 489 (490) : 11

Luck 320. (Decision of trial Court relating to

question of adoption and also value of move-

ables — On appeal decision relating to adoption

against defendant upheld but value regarding

moveables modified in his favour — Defendant

wishing to appeal on the question of validity

of adoption — Decree of Appellate Court is not

one of affirmance.)]

6. (23) AIR 1923 Cal 215 (216).

(28) AIR 1928 Pat 609 (611, 612).

(29) AIR 1929 Pat 561 (564) : 9 Pat 558. (Part

limited to part varied.)

(19) AIR 1919 Cal 118 (119, 120). (Lower Court

granting declaration but refusing damages. The

High Court granting damages also.)

(11) 9 Ind Cas 1040 (1040) (Oudh).

(21) AIR 1921 All 270 (271, 272) : 43 All 220.

to be one of affirmance of the lower Court's decree, and this view has been followed in the undenominated decisions.⁸

The contrary view taken by the Calcutta High Court in *Raja Sree Nuth Roy v. Secretary of State*⁹ must be treated as overruled by the above decision of the Privy

It will be seen that such cases are clearly distinguishable from the cases above referred to in which the lower Court's decree covers *different* matters and the High Court affirms such decree in regard to some of them and varies or reverses the decree in regard to others.¹¹

See also Note 12 above.

14. Cross-appeals.

14. Cross-appeals.—A obtains a decree against B for a portion of the amount claimed. A and B both prefer separate appeals against the decree in respect of the portion which is against them. A's appeal is dismissed but B's appeal is allowed in part. Can A obtain leave to appeal to the Privy Council on the ground that the decree has been modified in the cross-appeal of B? The Patna High Court has held that the appeal and the cross-appeal must be considered together and both the decrees must be regarded as one for the purpose of determining the question of affirmance.⁷ The Calcutta High Court also seems to be of the same view.⁸ The Allahabad and Lahore High Courts have held a contrary view, namely, that it is only the decree in A's appeal that must be considered.⁹ The Madras High Court has held that where the cross-appeal or the memorandum of cross-objections relates to a matter *distinct* from the subject-matter of the appeal, the Allahabad view is to be followed⁴ but that, where it is not possible to say whether the decree in the appeal and the memorandum of objections really consists of separate decrees in respect of separate subject-matter, they should be considered together for the purpose of determining whether the decree is one of affirmance.⁵

(32) AIR 1982 All 65 (67, 68) : 54 All 146 (SB).
(37) 41 Cal W N 494 (494). (Suit on mortgage—
Trial Court decreeing suit in respect of certain
items of properties and dismissing it with regard
to others—High Court on appeal by both par-
ties dismissing entire suit—High Court's decree
is not one of affirmation with regard to the part
of the claim dismissed by the trial Court.)

7. (125) AIR 1926 P O 60 (60): 61 Ind App 819:
Rs. 8000 per year—Trial Court awarding rupees
800 a year—High Court on appeal increasing
the amount to Rs. 1200 a year—High Court's
decree is not one of affirmance in regard to the
11. (138) AIR 1938 Lah 886 (887).
(132) AIR 1932 Mad 46 (51).
10. See (130) AIR 1930 Lah 554 (555): 11 Lah 465.
9. (104) 8 Cal W N 294 (295, 296).
(137) 41 Cal W N 494 (494).
—Section 110.

Rs. 1800 a year disallowed by both the Courts.)
8. (32) AIR 1932 Nag 118 (120) : 28 Nag LR 142.
(16) AIR 1916 Mad 670 (670). (Claim for Rupees
15,000 wholly dismissed by lower Court—High
Court decreeing Rs. 5000.)
(35) AIR 1935 All 374 (377) : 57 All 873 (PB).
3. (18) AIR 1918 All 245 (246).
2. (37) 41 Cal WN 494 (494).
1. (29) AIR 1929 Pat 561 (565) : 9 Pat 558.

(38) AIR 1938 Lah 886 (837); (35) AIR 1935 Cal 250 (251): 62 Cal 175. (Where the High Court, on appeal, modifies the decree of the lower Court, in favour of the applicant for leave to appeal, the decree is not one affirming the decree of the Court below; and the ap-
(37) AIR 1937 Lah 916 (917). (Fact that a com-
positive decree is prepared in both appeals does not make any difference.)
[See (32) AIR 1932 All 65 (67, 68) : 54 All 146 (S B). (Case of appeal and cross-objections.)]
4. (26) AIR 1926 Mad 1024 (1025). (See the expla-

5. (129) AIR 1929 Mad 429 (431): 52 Mad 521.

- (3) The words 'substantial question of law' mean a substantial question of law as between the parties in the case involved, and not merely a question of general importance.¹¹
- (4) Orders passed in the exercise of the discretion of the Court do not involve substantial questions of law¹² but a question whether a Court could, in law, exercise any discretion at all in a given case is a substantial question of law.¹³
- (5) Objections on the ground of defects in form¹⁴ or procedure¹⁵ are not substantial questions of law, though a question as to limitation¹⁶ or jurisdiction may be one.¹⁷
- (6) A question of law taken up for the first time at the hearing of the application for leave to appeal cannot be a substantial question of law.¹⁸
- (7) Whether the construction of documents is or is not a substantial question of law, depends upon the facts of each case.¹⁹ But the mere appreciation of the effect

ing deficient court-fee.)

[See (139) AIR 1939 Cal 85 (88) : 1 L R (1938), 1 Cal 18. (Rejection of affidavit filed by debtor under R. 79, Calcutta Insolvency Rules — No substantial question of law.)]

14. (187) 9 All 98 (96, 97). (High Court judgment not complying with terms of O. 41 R. 31.)

15. (98) 20 All 118 (119, 120). (Objection to High Court allowing production in appeal of succession certificate without which lower Court had ordered execution.)

(172) 9 Bom H C R 398 (401). (Inspection of documents.)

(103) 1908 Pun W R No. 62 p. 284.

(23) AIR 1923 All 468 (461). (Refusal by High Court to allow point to be raised at a late stage.)

(26) AIR 1926 Cal 711 (712). (The question as to whether a Hindu widow qua executrix can compromise is not a substantial question.)

(24) AIR 1924 Pat 468 (470). (Re-opening an issue given up in trial Court.)

(35) AIR 1935 Lab 91 (91). (Appellate Court allowing amendment and converting suit for declaration into one for possession — No substantial question of law.)

(37) AIR 1937 Lab 761 (768). (Administration suit — Non-joinder of all creditors is not substantial question of law.)

16. (27) AIR 1927 Rang 20 (27) : 4 Rang 268.

17. (25) AIR 1925 Oudh 728 (729). (Decree transferred for execution — Application for substitution made to second Court — Whether application is according to law is a substantial question of law.)

(34) AIR 1934 Oudh 291 (292, 293). (Jurisdiction in executing Court to go behind the orders of Sale Officer accepting pre-emption price.)

(31) AIR 1931 Cal 174 (175). (Jurisdiction of High Court to appoint receiver in execution giving directions to him — No substantial question of law.)

18. (20) AIR 1920 All 241 (241).

[See (81) AIR 1925 Oudh 219 (220).

11. (25) AIR 1925 Nag 114 (115).

(33) AIR 1933 Mad 221 (223, 221).

(37) AIR 1937 P C 110 (110) : 2 Luck 93 : 51 Ind App 126 (P C). (The following cases must be deemed to be overruled by this decision : — 11 Cal W N 262; 10 Oudh Cas 318; A I R 1922 Oudh 214; 3 Oudh W N 811; AIR 1926 Oudh 381; A I R 1924 All 559 and AIR 1920 All 161.)

(25) AIR 1928 P C 172 (173) : 55 Cal 911 : 55 Ind App 295 (P C).

(29) AIR 1929 Nag 85 (87). (Findings on questions of law quite immaterial to decision of suit — No point of law for decision of suit itself — No appeal lies.)

(23) AIR 1923 Lah 560 (561).

(25) AIR 1925 Nag 76 (76, 77) : 23 Nag L R 156.

(A question of general importance would also be a substantial question of law when it is also a question between the parties.)

[See (28) AIR 1928 Rang 182 (183, 184) : 6 Rang 169.

(25) AIR 1925 Oudh 545 (545).

(38) 178 Ind Cas 203 (201) (Pat). (Where both the Judges of the High Court agree on the merits with the judgment of the Court below, but differ as between themselves on a question of mere academic interest, leave should not on that ground be granted to appeal to His Majesty in Council.)

12. (22) AIR 1922 Bom 11 (12). (Refusal of leave under O. 12 of the Letters Patent to file additional statement.)

(1837) 5 South W R 59 (60) : 1 Moo Ind App 470 (P C). (Order as to costs.)

(34) 21 Cal 484 (487). (Rejection of additional evidence under O. 41 R. 37.)

(21) AIR 1921 Cal 94 (95). (Dismissal for laches in filing paper-book.)

(21) AIR 1921 Oudh 30 (31).

(21) AIR 1921 Pat 83 (85) : 5 Pat L Jour 719. (Dismissal for default in filing paper-book in time.)

(12) 28 Mad L Jour 219 (221).

(14) AIR 1914 All 54 (54) : 36 All 825.

(19) AIR 1919 Lab 65 (65) : 1 Lab 220.

(21) 68 Ind Cas 222 (222) (Lab). (Discretion exercised in refusing time under S. 148 for furnishing documents, held substantial question of law.)

of documentary evidence²⁰ or the meaning of entries and terms in a document²¹ do not raise substantial questions of law.

(8) The existence of a *custom*²² or the nature of a *tenure*²³ may under proper conditions involve substantial questions of law.

(9) Questions as to the *status* of parties²⁴ or of the applicability of any point of law or provision of a statute²⁵ may raise substantial questions of law.

(10) Questions regarding the validity of presentation of a document for registration²⁶ or fraud in procuring registration²⁷ are substantial questions of law.

(11) Cases between riparian owners as to rights of water in a channel give rise to questions of law or, at all events, to mixed questions of law and fact.²⁸ See also the undermentioned cases.²⁹ As to what are questions of law, see Section 100 and the commentary thereon.

- (788) AIR 1938 All 561 (561).
 (789) AIR 1938 All 8 (10): 54 All 481. (Construction of reference and award.)
 (790) AIR 1937 All 443 (444). (Construction of documents incidentally arising—No.)
 (791) AIR 1936 Rang 125 (126): 18 Rang 744. (Question depending upon construction of memorandum and articles of association of a company which are plain—*Held*, no substantial question of law.)
 (792) AIR 1938 All 681 (682). (Question whether property belongs to God or archaka service inasmuch as upon construction of inam papers—No substantial question of law.)
 (793) AIR 1938 Lab 554 (555): 11 Lab 465.
 (794) AIR 1938 Lab 554 (555): 11 Lab 465.
 (795) 22 Cal 609 (617, 618): 22 Ind App 59 (PC).
 (796) AIR 1916 Mad 1222 (1223).
 (797) AIR 1917 Lab 381 (382).
 (798) AIR 1917 PC 38 (39): 40 Mad 709 (721): 44 Ind App 147 (PC).
 (799) AIR 1924 Lab 473 (473, 474): 5 Lab 260.
 (800) AIR 1926 Nag 245 (245).
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18. Privy Council practice when there are concurrent findings of fact.—
See Section 112.

19. Review.—See Order 45 Rule 3.

20. Appeal.—See Order 45 Rule 3.

1.11. [S. 597.] Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—
Bar of certain appeals.

(a) from the decree or order of one Judge of a High Court constituted by His Majesty by Letters Patent, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or
(b) from any decree from which under section 102 no second appeal lies.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "established under the Indian High Courts Act, 1901, or the Government of India Act, 1915."

Synopsis

1. Legislative changes.
2. Amendments after 1908.
3. Scope and object of the Section.
4. "Decree or order," meaning of. See Notes 8, 1 and 10 to Section 109.

4. Legislative changes.—The words "decree or order" have been substituted for the word "judgment." See Section 109 Note 1.

2. Amendments after 1908.—See footnote (a) under the text of the Section.

(139) AIR 1939 Cal 85 (37): 1 L.R. (1933) 1 Cal 18. (Petition for insolvency—At date of hearing regarding creditor making sworn statement as regards existence of debt—Court relying on presumptions under S. 114, Evidence Act, holding debt as existing and adjusting debtor as insolvent—Decision *valid* on question of fact and no question of law arose.)

(135) AIR 1935 Lah 91 (91). (Plaintiff changing allegations—High Court finding them true and decreeing suit—No substantial question of law.) (37) AIR 1937 Oudh 132 (133): 12 Luck 15. (Where the whole object of the appeal which is sought to be argued before the Privy Council is

to challenge the act of the Executive Government in taking the estate of the applicant under the management and superintendence of the Court of Wards, a matter which is settled by statute law contained in the U. P. Court of Wards Act, the appeal does not involve a substantial question of law such as would justify the High Court in granting leave to the applicant to appeal to His Majesty in Council.) (135) 157 Ind Cas 605 (607) (Cal). (Where the law as to constructive res judicata has been applied (and correctly applied) to a set of facts commonly found of two Courts in India, there is no such "substantial question of law" involved in the case.)

3. Scope and object of the Section.—This Section definitely prohibits an appeal to the Privy Council from a decree made by a single Judge of a High Court and to this extent overrides Clause 39 of the Letters Patent by virtue of Clause 44 thereof. See note 2 to Section 109. The object is to allow an appeal to the Privy Council only after all the remedies are exhausted in the Indian Courts.²

The prohibition, however, only applies to the decree or order of a Judge or Judges of a Chartered High Court and not to other High Courts.³

4. "Decree or order," meaning of.—See Notes 3, 4 and 10 to Section 109.

111A. Where a certificate has been given under section 205 (1) Appeals to Federal Court. last preceding sections shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council, and accordingly references to His Majesty shall be construed as references to the Federal Court :

Provided that —

(a) so much of the said sections as delimits the cases in which an appeal will be construed as delimiting the cases in which an appeal will be without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said Act, or any Order in Council made thereunder, has been wrongly decided ;

(b) in determining under clause (c) of section 109 whether the case is a fit one for appeal, and, under section 110, whether the appeal involves a substantial question of law, any question of law as to the interpretation of the

Section 111 — Note 3

1. (24) AIR 1924 Mad 399 (399) : 46 Mad 958. (Appeal from single Judge acting in revision.)
- (28) AIR 1928 Cal 640 (642) : 56 Cal 512 (FB).
- (31) AIR 1931 Bom 503 (504, 505).
- (36) AIR 1936 Pat 106 (107). (Decision of single Judge of High Court—Application for leave to appeal to Division Bench rejected — Decision remains that of a single Judge and appeal to Privy Council is prohibited.)
2. (02) 25 Mad 555 (558). (Appeal from single Judge acting in revision.)
- (84) 10 Cal 814 (817) (FB). (Clause 15 of Letters Patent.)
- [See (39) AIR 1939 P C 122 (127) : I L R (1939) Kar 234 : 14 Luck 252: 66 Ind App 160 (P C). (Sections 109 and 110 seem to be intended to provide for an appeal to His Majesty on the foot-

ing that no further appeal in India is provided.]

3. (39) AIR 1939 P C 122 (126); I L R (1939) Kar 234: 14 Luck 252: 66 Ind App 160 (PC). (Decree by a single Judge of Oudh Chief Court in exercise of original civil jurisdiction—Privy Council refused special leave to appeal in view of the fact that such decree was appealable under the Oudh Courts Act to a Bench of the Chief Court.)
- (17) AIR 1917 Lah 448 (448). (Appeal from the decision of a single Judge of the Chief Court of Punjab. See the definition of "High Court" in the General Clauses Act, 1897.)
- (32) AIR 1932 Oudh 163 (163, 164). (Oudh Chief Court—Not a High Court for this Section.)
- [See (1856) 6 Moo Ind App 448 (455) (P C). (Decision of single Judge of the Bombay Sudder Court as to admissibility of special appeal.)]

said Act, or any Order in Council made thereunder, shall be left out of account.

a. Section 111A was inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

112. [S. 616.] (1) Nothing contained in this

Code shall be deemed—

- (a) to bar the full and unqualified exercise² of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or
- (b) to interfere with any rules³ made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct⁴ before the said Judicial Committee.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

[1877, S. 616. See O. 45.]

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 8. Order as to costs. 9. Rehearing of appeals. 10. Remand, reception of additional evidence, etc. 11. Powers of the High Courts after special leave is granted. 12. Contents of the application for special leave. 13. Proceedings for contempt of Court—Whether appeal to Privy Council lies. | <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and object of the Section. 3. Prerogative of the Crown—Clause (a). See Note 2. 4. Grounds for the exercise of the prerogative. 5. Practice of the Privy Council. 6. Findings of fact. 7. New point before the Privy Council. |
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1. Legislative changes. — The words "herein contained" have been substituted for the words "in this chapter" occurring in the old Section.

2. Scope and object of the Section. — This Section does not confer a right upon the subject to prefer an appeal to His Majesty in Council. It merely declares that nothing in the Code will affect the exercise of the appellate jurisdiction which the Sovereign in Council undoubtedly possesses by virtue of the Royal Prerogative.¹ His Majesty in Council can therefore receive or reject an appeal notwithstanding anything

Section 112—Note 2

1. (109) 10 Cal L. Jour 326 (328).
[See also (1862) 8 Moo Ind App 270 (274) (PC).
(1935) AIR 1935 P C 158 (163) (P C). (King's
Prerogative cannot be restricted or qualified
save by express words or necessary intendment
—If such limitation is by Dominion or Colonial

Act, Act must deal with it expressly and such
Act must have been passed by Legislature
endowed with requisite power.)
(1939) AIR 1939 P C 122 (127) : 66 Ind App 160 :
ILR (1939) Kar 234 : 14 Luck 252 (PC). (Privy
Council cannot be asked at appellant's option to
function as concurrent Court of first appeal.)]

contained in Sections 109 and 110 and notwithstanding the High Courts in India have refused leave to appeal on the ground that the requirements of the Code have not been satisfied.

3. Prerogative of the Crown. — Clause (a). — See Note 2 above.

NOTE.

4. **Grounds for the exercise of the prerogative.**—Special leave under this Section will not be granted as a matter of course.¹ It will be refused where the question involved is merely one of practice or of form or of costs² or where the refusal of the High Court to grant leave is not shown to be wrong.³ Again, the Judicial Committee will not entertain an application for leave to appeal against an act of State.⁴ But leave will be granted where the question involved is an important or substantial question of law of general interest, even though the value of the subject-matter of the appeal is below Rs. 10,000 or the application to the High Court is time-barred.⁵

2. (1843) 3 Mco Ind App 220 (224) (PC).
(1841) 2 Mco Ind App 428 (434) (PC).
(1847) 4 Mco Ind App 220 (222) (PC).
(1850) 4 Mco Ind App 353 (361) (PC).
(1852) 5 Mco Ind App 196 (198, 199) (PC).
(1859) 7 Mco Ind App 555 (570) (PC).
(1860) 8 Mco Ind App 265 (267) (PC).
(1862) 9 Mco Ind App 270 (274) (PC).
(1862) 9 Mco Ind App 168 (194) (PC). (In this case the Judicial Committee declined to determine the question of the Royal Prerogative to admit an appeal in a criminal matter.)
(1868) 12 Mco Ind App 107 (111, 112) (PC).
(1870) 13 Mco Ind App 582 (641) (PC).
(1873) 1 Ind App 72 (75) (PC).
(1890) 15 Bom 155 (158) : 18 Ind App 6 (PC).
(1899) 21 All 496 (496, 497) : 26 Ind App 58 (PC).
(1947) 17 All 112 (116) : 22 App Ind 1 (PC).
(1911) 18 Cal L Jour 507 (509).
(1918) AIR 1918 PC 812 (812) (PC).
(1865) 10 Mco Ind App 313 (321) (PC). (Special leave to appeal granted notwithstanding that no application had been made for such leave to the Court below.)
(1891) AIR 1939 P C 122 (127) : I L R (1939) Kar discretion which S. 112 affirms and maintains applies to the rejecting as well as to the receiving of appeals and the prerogative is not wholly or finally concluded by the provisions of S. 109.) [See (1927) AIR 1927 P C 264 (265) (PC). (The first consideration of the Privy Council is to secure if possible substantial justice.)]
Note 4
1. (170) 13 Mco Ind App 438 (437) (PC). (Subject-matter of the suit under the appealable value—Grounds of appeal peculiar to the particular case—Leave to appeal refused.)
(1911) 1911 Pun L R No. 11, p. 31 (105, 108) : 1910 Pun Re No. 97.
(175) 2 Ind App 205 (206, 209) (PC). (Preliminary objection before Privy Council—Leave of High Court *ultra vires*—Other proceedings in India more satisfactory—Special leave refused.)
2. (172) 9 Bom H R 398 (401). (Practice.)
(1932) AIR 1932 P C 13 (21) : 59 Ind App 1 : 6 Luck 556 (PC). (Costs.)
(1992) 27 Cal 338 (338) : 27 Ind App 79 (PC). (Form.)

5. **Practice of the Privy Council.**—The provisions of the Code do not apply to the procedure of the Privy Council in hearing appeals from India but the Privy Council may follow the rules contained in such provisions where it considers them to be based on sound principles.¹ See also Notes 6 to 10 and 12 below and the under-mentioned cases.²

6. **Findings of fact.**—It is a long established rule of practice of the Board that it will not as a general rule disturb *concurrent findings of fact* by two Courts in India,¹ though such findings do not always or necessarily prevent their Lordships from

(70) 18 Moo Ind App 532 (540, 541) (PC). (Special circumstances of the case.)
 (15) 19 Cal W N cxxv. (Question of jurisdiction to try suit or appeal.)
 [See also (13) 21 Ind Cas 369 (371, 372) : 36 Mad 501 : 40 Ind App 193 (PC). (Wholly inadmissible evidence used to the grave prejudice of accused.)]
 (38) 57 Cal I Jour 335 (371). (Important question of law sufficient—Construction of R. 86, Chapter 10 of Calcutta High Court Original Side Rules.)
 (70) 18 Moo Ind App 532 (540, 541) (PC). (Special circumstances of the case.)
 (15) 19 Cal W N cxxv. (Question of jurisdiction to try suit or appeal.)
 [See also (13) 21 Ind Cas 369 (371, 372) : 36 Mad 501 : 40 Ind App 193 (PC). (Wholly inadmissible evidence used to the grave prejudice of accused.)]
 (38) 57 Cal I Jour 335 (371). (Important question of law sufficient—Construction of R. 86, Chapter 10 of Calcutta High Court Original Side Rules.)

Note 5

1. (37) AIR 1937 P C 233 (234) : 64 Ind App 250 : 31 Sind L R 590 : 1 L R (1937) All 655 (P C). (Rule in Section 99 applied.)
 2. (16) AIR 1916 P C 227 (229) : 44 Cal 578 : 44 Ind App 39 (PC). (Where an appeal is heard ex parte it is the duty of the counsel to place before the Board adverse as well as favourable authorities.)
 (32) AIR 1932 P C 36 (38, 39, 40) (PC). (It is not Board's duty to act as draftsman of foreign Acts.)
 (32) AIR 1932 P C 251 (251, 252) (PC). (Judicial Commission of Central Provinces reporting that decree is a consent decree—Appeal is incompetent and other statements as to sufficiency of consent need not be considered.)
 (34) AIR 1934 P C 29 (30) : 61 Cal 221 : 61 Ind App 29 (PC). (High Court not proceeding on inadmissible evidence or inapplicable principles—No interference.)
 (14) AIR 1914 P C 65 (66) : 36 All 284 : 41 Ind App 104 (PC). (Appellant guilty of non-prosecution of appeal before the Privy Council—Appeal automatically stands dismissed—No need for order of dismissal.)
 (89) 17 Cal 693 (694) (PC). (Appellant after transmission of appeal to England obtained leave of High Court to withdraw it. Interests of a minor party affected by withdrawal. The Privy Council ordered substitution of minor's guardian as appellant for costs.)
 (1856) 6 Moo Ind App 346 (347) (PC). (Admission of appeal to Privy Council—No further steps taken by the appellant. Judicial Committee on a petition by respondent and upon a certificate of non-prosecution by the Registrar of the High Court dismissed the appeal.)
 (24) AIR 1924 P C 208 (208, 209) (PC). (In a case where the lower Appellate Court reversed a finding of fact such as adoption, the Privy Council simply expressed its agreement with the lower Appellate Court without giving any reasons.)

Note 6

1. (1854) 6 Moo Ind App 27 (49) (P C). (Credibility of witnesses.)
 (32) AIR 1932 P C 50 (51) (P C).
 (32) AIR 1932 P C 89 (90) : 59 Ind App 147 : 7 Luck 64 (P C). (Unless there has been a miscarriage of justice or violation of some principle of law.)
 (32) AIR 1932 P C 231 (234) (P C). (Importance of the rule is to discourage consideration of facts found by two Courts concurrently.)
 (33) AIR 1933 P C 120 (121) (P C).
 (1861) 8 Moo Ind App 477 (489) (P C).
 (67) 7 South W R 27 (27) : 11 Moo Ind App 213 (P C).
 (68) 10 South W R 10 (10) : 11 Moo Ind App 19 (P C).
 (69) 11 South W R 1(1) : 12 Moo Ind App 145 (P C).

examining the whole evidence and acting upon their own independent judgment.² The rule is based upon the special advantages which the Judges in India possess for appreciation of evidence, viz., familiarity with the habits and practices of the country, its manners and customs and local conditions and also the opportunity of judging the parol evidence by seeing the witnesses under examination and by inspecting the original documents.³ The weight to be attached to concurrent findings of the Courts in India

- error of method or neglect of any aspect of evidence—Findings would not be disturbed. (35) AIR 1935 P C 71 (72) (P C). (Question whether by custom women are excluded from inheritance is one of fact, and the Privy Council will not interfere with the concurrent findings of the Courts in India negating such a custom.) (35) AIR 1935 P C 92 (93) (P C). (35) AIR 1935 P C 146 (149) (P C). (Appellant cannot go behind concurrent findings of fact of lower Courts.) (36) AIR 1936 P C 198 (198) : 63 Ind App 295 : 58 All 397 (PC). (36) AIR 1936 P C 332 (333) : 63 Ind App 441 : 16 Pat 1 (P C). (37) AIR 1937 P C 157 (160) (P C). (Concurrent findings of fact of the lower Courts on the question of navigability of a certain river based on documentary or historical writing cannot be interfered with as it does not involve a question of law as to the construction of the documents or the writings produced in evidence but only a question as to the effect to be given as evidence to the historical writings which referred to the state and the use of the river in the past.) (37) AIR 1937 P C 810 (811) : 31 Sind L R 702 (P C). (38) AIR 1938 P C 183 (183) : 32 Sind L R 545 (P C). (39) 182 Ind Cas 416 (416) (PC). (No interference unless finding is shown to be erroneous beyond shadow of doubt.) 2. (1849) 4 Moo Ind App 431 (433) (P C). (1865) 10 Moo Ind App 429 (436) (P C). (709) 31 All 457 (474) (P C). (36 Ind App 15 : 12 Oudh Cas 304 (P C). (Concurrent finding though not binding is entitled to greatest weight.) 3. (94) 21 Cal 997 (1002) : 21 Ind App 168 (P C). (32) AIR 1932 P C 152 (153) : 10 Rang 261 : 59 Ind App 216 (P C). (32) AIR 1932 P C 69 (73) (P C). (32) AIR 1932 P C 13 (19) : 59 Ind App 1 : 6 Luck 556 (P C). (Evidence on commission—Witness not seen by any Court—Opinion of Appellate Court preferred.) (33) AIR 1933 P C 46 (47) (P C). (33) 20 Cal 560 (572) : 20 Ind App 38 (P C). (18) AIR 1918 P C 10 (11) : 21 Oudh Cas 104 (P C). (Trial Court's judgment based not on appreciation of witnesses but on probabilities—Appellate Court's judgment though contrary to that of the trial Court will not be disturbed.) (96) 28 All 215 (218, 219) : 33 Ind App 53 (P C). (99) 22 Mad 515 (518) : 26 Ind App 55 (P C). (67) 11 Moo Ind App 194 (208) (P C). (1854) 6 Moo Ind App 27 (49, 50) (P C). (1861) 9 Moo Ind App 66 (87) (P C). (1863) 9 Moo Ind App 456 (478) (P C). (No proof that findings were arrived at by (39) AIR 1939 P C 152 (156) : ILR (1939) Kar 258 (P C). (35) 156 Ind Cas 843 (843) (P C). (36) 161 Ind Cas 589 (589) (P C). (37) 168 Ind Cas 737 (738) (P C). (31) AIR 1931 P C 68 (69) (P C). (29) AIR 1929 P C 38 (39) (P C). (27) AIR 1927 P C 27 (30) (P C). (25) AIR 1925 P C 174 (174) (P C). (26) 99 Ind Cas 427 (428) (P C). (26) 97 Ind Cas 287 (288) (P C). (25) AIR 1925 P C 31 (32) (P C). (24) AIR 1924 P C 232 (232) (P C). App 58 (P C). (23) AIR 1923 P C 21 (22) : 2 Pat 280 : 50 Ind App 67 (P C). (22) AIR 1922 P C 105 (105) : 45 Mad 207 : 49 Ind App 67 (P C). (20) AIR 1920 P C 87 (87) (P C). (20) AIR 1920 P C 88 (90) (P C). (20) AIR 1920 P C 87 (87) (P C). was examined.) Reasons for finding not consistent—Evidence App 99 (P C). (Concurrent finding of fact—(20) AIR 1920 P C 4 (6) : 48 Mad 650 : 47 Ind (18) AIR 1918 P C 225 (226) (P C). (14) AIR 1914 P C 82 (84) (P C). (71) 15 Subh W R 37 (37) (P C). (13) 40 Cal 288 (296) : 1918 Pun Re No. 26 (P C). (13) 18 Ind Cas 91 (92) (P C). App 156 (P C). (13) 18 Cal L Jour 70 (73) : 40 Cal 879 : 40 Ind (13) 17 Cal W N 389 (393) (P C). (13) 41 Ind App 51 (62) (P C). (13) 15 Bom L R 468 (466) (P C). (12) 17 Ind Cas 733 (733) (P C). (12) 188 (P C). (Existence of custom.) (709) 31 All 557 (570) : 36 Ind App 210 : 13 Oudh (108) 35 Cal 271 (274) : 35 Ind App 67 (P C). (102) 25 Mad 215 (219) : 29 Ind App 38 (P C). damages for malicious prosecution.) (101) 25 Bom 332 (336) (P C). (Question of malice and reasonable and probable cause in a suit for (101) 28 Cal 190 (193, 194) (P C). (101) 28 Cal 1 (4) : 27 Ind App 166 (P C). or another.) the defendants held upon one kind of tenure (99) 8 Cal W N 249 (249) (P C). (Question whether full age at the time he executed mortgages.) (98) 25 Cal 189 (194) : 24 Ind App 188 (P C). (Question whether the defendant had attained full age at the time he executed mortgages.) (96) 23 Cal 918 (921, 922) : 23 Ind App 102 (P C). (Question of adoption.) (92) 19 Cal 452 (461) : 19 Ind App 101 (P C). (89) 12 Mad 512 (515) (P C). (74) 21 Subh W R 21 (21) : 1 Ind App 144 (P C). (73) 19 Subh W R 275 (276) (P C). (72) 14 Moo Ind App 401 (410, 411) (P C). (71) 16 Subh W R 16 (17, 18) (P C). (69) 11 Subh W R 35 (38) (P C).

- is not detracted in any way by any of the following circumstances —
- (1) that the two Courts differ in their *reasons* in arriving at the finding;⁴
 - (2) that the Courts differ in their view of the weight to be given to any *particular* piece of evidence;⁵
 - (3) that the Judges composing the Bench which concurred in the finding of the lower Court are not unanimous in their finding;⁶
 - (4) that the materials before the two Courts were not entirely the same, owing to the admission of additional evidence by the Appellate Court;⁷
 - (5) that the lower Court had not considered part of the evidence though coming to the same conclusion;⁸
 - (6) that the judgments of the Courts are not exhaustive enough to show that every minute and elementary consideration was present to the minds of the Judges;⁹
 - (7) that the nature of the question discussed and the character of the evidence on record justify either view of the matter.¹⁰
- In exceptional circumstances and for very strong reasons, the Privy Council will interfere even with the concurrent findings of fact in order to avoid injustice being done.¹¹ The following circumstances have been held to justify interference by the Privy Council with concurrent findings of fact —
- (1) plain *miscarriage of justice* in the conduct of the trial or the decision of the Court;¹²
 - (2) *violation* or improper application of *any principle of law*, evidence, or procedure or the fact of the Court having clearly *fallen into an error* apparent on the documents;¹³
 - (3) inadmissible evidence forming the basis of the finding.¹⁴

- (1865) 2 Subh W R 1 (4) (P C).
 ('80) 5 Cal L Rep 430 (434, 435, 436) (P C).
 ('66) 5 Subh W R 8 (8, 7) : 7 Moo Ind App 207 (P C).
 ('21) AIR 1921 P C 231 (233) (P C).
 ('72) 17 Subh W R 185 (187) (P C).
 (1849) 4 Moo Ind App 431 (433) (P C).
 ('04) 26 All 581 (586) : 31 Ind App 217 : 7 Oudh Cas 290 (P C).
 ('89) 182 Ind Cas 416 (417) (P C).
 ('67) 11 Moo Ind App 177 (187, 188) (P C).
 4. ('93) 20 Cal 847 (852) : 20 Ind App 95 (P C).
 ('27) AIR 1927 Mad 448 (444).
 ('24) AIR 1924 P C 118 (115) : 5 Lah 200 : 51 Ind App 182 (P C).
 ('08) 25 All 1 (17) : 29 Ind App 208 (P C).
 ('38) AIR 1938 P C 67 (69) : 65 Ind App 66 : 32 Sind L R 374 : 1 L R (1938) 2 Cal 72 (P C).
 5. ('03) 30 Cal 303 (308) : 30 Ind App 41 (P C).
 6. ('22) AIR 1922 P C 159 (160) : 48 Cal 856 : 48 Ind App 114 (P C).
 7. ('97) 24 Cal 1 (6) : 28 Ind App 97 (P C).
 [See also ('72) 9 Beng L R 364 (369, 371) (P C). (Some evidence wrongly admitted—Rest will be considered.)
 ('71) 15 Subh W R 8 (9) (P C). (Do.)
 ('09) 36 Cal 833 (839, 840) : 36 Ind App 221 (P C).
 (Finding by the trial Court—Separate finding given by the High Court on additional evidence—Privy Council refused to disturb the finding of the High Court.)
 8. ('90) 17 Cal 882 (884) : 17 Ind App 70 (P C). ('81) 3 Mad 384 (392) : 8 Ind App 149 (P C).
 ('35) AIR 1935 P C 146 (149) (P C).
 ('39) AIR 1939 P C 175 (179) (P C). (Fact that trial Court has seen witnesses is not important if decision is based on inadmissible evidence.)
- (35) AIR 1935 P C 146 (149) (P C).
 9. ('12) 34 All 455 (463) : 39 Ind App 156 : 15 Oudh Cas 271 (P C).
 10. ('08) 35 Cal 271 (274) : 35 Ind App 67 (P C).
 ('66) 5 Subh W R 79 (80) (P C).
 ('71) 16 Subh W R 9 (11) (P C).
 11. ('14) AIR 1914 P C 184 (188) (P C).
 ('33) AIR 1933 P C 26 (27) (P C).
 ('29) AIR 1929 P C 24 (24) : 52 Mad 175 : 56 Ind App 21 (P C).
 ('22) AIR 1922 P C 356 (357) : 1 Pat 741 : 49 Ind App 342 (P C).
 ('89) 16 Cal 753 (755) : 16 Ind App 125 (P C).
 ('69) 11 Subh W R 35 (38) (P C).
 ('06) 28 All 219 (222, 223) (P C). (Mere fact that the Courts below do not agree on all the steps which lead to one and the same conclusion is no reason for disturbing concurrent finding of fact.)
 See also the cases in foot-notes 12 to 23 below.
12. ('72) 14 Moo Ind App 453 (460) (P C).
 ('38) AIR 1938 P C 183 (183) : 32 Sind L R 545 (P C).
 13. ('71) 15 Subh W R 5 (5) (P C).
 ('04) 31 Cal 871 (884) : 31 Ind App 127 (P C).
 ('87) 14 Cal 296 (306, 307) : 14 Ind App 7 (P C).
 (1849) 4 Moo Ind App 414 (430) (P C).
 14. ('72) 10 Beng L R 301 (311) (P C).

considered by the Courts in India.² Mere technical objections taken for the first time before the Privy Council are always disallowed.³

(11) 33 All 344 (355, 356) : 38 Ind App 104 : 14 Oudh Gas 133 (PC). (A new interpretation of a document.)
 (68) 9 South W R 9 (10) (PC).
 (34) AIR 1934 P C 218 (216) : 61 Ind App 378 : 56 All 634 (P C). (One of the grounds in appeal before High Court not argued — It can be considered by Privy Council, where the point was one of law and required no fresh evidence.)
 (85) AIR 1935 P C 108 (114) (PC). (Where a party has not raised certain defence in the High Court or has abandoned it, the Privy Council grants leave to raise such defence before it only in exceptional cases, and there is no distinction in principle between the position of an appellant who abandons in the High Court a ground of appeal of which he had given notice and the position of a respondent in the High Court who does not raise a point in his favour which was open to him without notice. It is quite true that it would be open to the Board on proper terms to refer to the High Court this question for their consideration. But even that the Board would not do except under special circumstances.)
 2. (12) 34 All 57 (62) (PC).
 (32) AIR 1932 P C 118 (121) : 59 Ind App 161 : 10 Rang 242 (PC). (Invalidity of document owing to non-registration—Not raised in Court below—Circumstances and facts not admitted—Not allowed to be raised.)
 (33) AIR 1933 P C 117 (117) (PC).
 (38) AIR 1933 P C 164 (166, 167) (PC). (Plea of genuine sale sought to be converted for the first time in Privy Council to one of gift.)
 (84) AIR 1934 P C 108 (111) : 58 Bom 306 : 61 Ind App 190 (PC). (New defence—Not raised in written statement not considered by Courts below—Disallowed.)
 (1843) 3 Moo Ind App 229 (242) (PC). (Objection that proper parties were not before the Court—Disallowed.)
 (13) 35 All 227 (238) : 40 Ind App 74 (PC).
 (28) AIR 1928 P C 106 (107) (PC). (Question of writ being public or private not raised in the lower Courts—Privy Council refused to entertain.)
 (69) 11 South W R 27 (28) : 12 Moo Ind App 470 (PC). (A new ground of defence not in issues.)
 (28) AIR 1928 P C 39 (43) : 24 Nag L R 40 (PC). (New defence.)
 (28) AIR 1928 P C 47 (48) (PC). (New plea of limitation based on new facts.)
 (16) AIR 1916 P C 166 (168) (PC). (A question abandoned in the appeal Court in India.)
 (07) 34 Cal 709 (710) : 34 Ind App 164 (PC). (Question of fact decided against appellant, and not raised in High Court.)
 (18) AIR 1918 P C 53 (55) : 40 All 497 (PC).
 (18) AIR 1918 P C 173 (177) : 43 Mad 174 : 45 Ind App 195 (PC).
 (86) 12 Cal 239 (245) : 12 Ind App 166 (PC). (Point not in issue or before the lower Court.)
 (71) 14 Moo Ind App 176 (196) (PC). (Do.)

(98) 25 Cal 187 (189) : 24 Ind App 191 (PC). (Point not raised in plaint or Courts below.)
 (14) AIR 1914 P C 137 (140) : 37 Mad 227 (PC). (Point not raised in Courts below.)
 (17) AIR 1917 P C 197 (200) (PC). (New plea not raised in lower Courts.)
 (24) AIR 1924 P C 123 (123) (PC). (Subsidiary points not raised or canvassed in Courts below.)
 (25) AIR 1925 P C 118 (122) : 52 Cal 482 : 21 Nag L R 50 : 52 Ind App 231 (PC). (Objections to frame of decree.)
 (26) AIR 1926 P C 41 (43, 46) : 53 Cal 538 : 53 Ind App 100 (PC). (Argument which has not been sifted in the Courts below cannot be entertained.)
 (99) 22 Mad 515 (518) : 26 Ind App 55 (PC). (Objection taken for the first time before the Privy Council.)
 (94) 21 Cal 997 (1004, 1005) : 21 Ind App 163 (PC).
 (39) AIR 1939 P C 114 (116) : 1 L R (1939) Kar 160 (P C). (Contention not put forward before the trial Court or High Court.)
 (39) AIR 1939 P C 143 (145) (P C). (Parties not taking objection to reception of certain evidence in Court of Appeal when professionally represented — Such objection cannot prevail for first time in Privy Council appeal.)
 (39) AIR 1939 P C 159 (161) : 1 L R (1939) Kar 249 (PC). (Plea as to validity of lease not raised in written statement—Plea not allowed.)
 (35) AIR 1935 P C 212 (214) (P C). (Case based on specific alleged negligence — Case not made out — New plea that negligence is presumed in circumstances of case—Plea not taken in pleadings nor at trial—Plea held not allowable.)
 (36) AIR 1936 P C 89 (90) (P C). (Appellant cannot be allowed to maintain contention abandoned by him in lower Court.)
 (36) AIR 1936 P C 139 (141) (PC). (Plea not pressed in lower Courts and no issue framed.)
 (36) AIR 1936 P C 179 (183) (PC). (Issue abandoned or not raised in lower Courts—Privy Council will be reluctant to consider such issue.)
 (37) AIR 1937 P C 260 (261) : 31 Sind L R 652 (P C). (Question of fact not raised in India—Cannot be raised for first time before Privy Council.)
 (38) AIR 1938 P C 4 (6, 7) : 32 Sind L R 235 (PC). (Plea not raised in pleading nor in issue.)
 (38) AIR 1938 P C 20 (22) : 65 Ind App 45 : 17 Pat 69 : 32 Sind L R 276 (P C). (New plea not raised in High Court or in application for leave or in grounds of appeal to Board—Plea depending on proof of facts not allowed.)
 3. (1849) 5 Moo Ind App 1 (26) (P C).
 (1859) 7 Moo Ind App 441 (474, 475) (P C).
 (78) 1 All 688 (708) : 5 Ind App 87 (P C). (Special leave granted on question of law of importance to the plain sect in argument — Technical objections disallowed.)

exercised, see the undermentioned cases.² In any view the restoration will only be ordered on terms as to costs, security, etc.³

10. Remand, reception of additional evidence, etc.—For the practice of the Privy Council in regard to remand, reception of additional evidence and matters within the discretion of the Courts in India, see the cases noted below.⁴

11. Powers of the High Courts after special leave is granted.—See the undermentioned cases.⁵

12. Contents of the application for special leave.—The application must contain a full statement of all the material facts and legal grounds showing that there is a good case for appeal on facts and law. A petition which is too vague and is not in conformity with the above requirement is liable to be dismissed, if liberty to amend is not granted.⁶ It is the duty of the petitioner to send to his agents or legal advisers in England material papers with instructions to make an application in due form.⁷ As special leave is invariably granted *ex parte*, the Privy Council on finding any material mis-statement or concealment in the application so granted will ordinarily discharge the appeal with costs.⁸ If, however the mis-statements were not made in bad faith, it

- (25) AIR 1925 P C 111 (112) : 52 Ind App 115 : 49 Bom 211 (P C). (Petition for interpretation of orders in council allowed only in rare cases.) (97) 19 All 209 (211) : 21 Ind App 49 (P C). (Allowed want of notice to respondent—Appeal heard *ex parte*—No rehearing allowed.) (69) 2 P 60 (61) (P C). (Confirmation and neglect of petitioner him self no ground.) (91) 14 All 189 (111) (P C). (No rehearing that new evidence is forthcoming.) (21) 59 Ind C.A. 7 (5) (P C). (Confirmation to notify respondent of the admission of an appeal is not a sufficient ground.) (69) 12 All 251 (250, 251) (P C). (Ex parte—Defiant due to agents—No ground.) 2. (1851) 6 All 201 (205) (P C). (Non-prosecution due to ignorance of new rule.) (1860) 8 All 160 (162) (P C). (Dismissal for non-prosecution seriously affecting infant.) (97) 21 Bom 723 (724) : 24 Ind App 125 (P C). (Delay in non-prosecution duly explained.) (1839) 2 All 181 (223) (P C). (Ex parte—Infant under the Court of Wards—Defendant due to guardian *ad litem* absenting and abandoning appeal.) (16) AIR 1916 P C 119 (119) : 44 Cal 388 : 44 Ind App 87 (P C). (Defiant and non-prosecution due to fraud of another.) (16) AIR 1916 P C 121 (122) : 40 Mad 112 : 44 Ind App 6 (P C). (Arguments closed by junior—Important questions involved—Leader allowed to re-argue.) 3. (97) 21 Bom 723 (724) : 24 Ind App 125 (P C). (1857) 7 All 16 (17, 18) (P C). (Extension of time for performance of terms also granted.)

Note 10

1. (1865) 2 South W R 13 (13) : 10 All 100 Ind App 492 (P C). (Remand.) (1865) 3 South W R 19 (30) : 10 All 100 Ind App 81 (P C). (Do.) (19) AIR 1919 P C 85 (88) (P C). (Do.) (18) AIR 1918 P C 3 (4) : 45 Cal 748 : 45 Ind App 45 (P C). (Mis-statement of facts.) (1859) 7 All 100 Ind App 261 (263) (P C). (1861) 8 All 100 Ind App 193 (197) (P C). (1861) 8 All 100 Ind App 192 (196, 197) (P C). (82) 4 All 500 (507, 508) : 9 Ind App 70 (P C). (Mis-statement in petition.)

Note 12

1. (1861) 8 All 100 Ind App 193 (195, 197) (P C). (66) 11 All 100 Ind App 1 (2, 3-6) (P C). (20) AIR 1920 P C 169 (169, 170) (P C). (1855) 6 All 100 Ind App 207 (207, 209) (P C). (Mis-statement of facts.) (1859) 7 All 100 Ind App 261 (263) (P C). (1861) 8 All 100 Ind App 193 (197) (P C). (1861) 8 All 100 Ind App 192 (196, 197) (P C). (82) 4 All 500 (507, 508) : 9 Ind App 70 (P C). (Mis-statement in petition.)

Note 11

1. (709) 4 Ind C.A. 452 (451) (Cal). (High Court has no jurisdiction to appoint receiver under O. 45 Rule 13.) (25) AIR 1925 Oudh 99 (100). (High Court cannot demand security.) (93) AIR 1933 Bom 214 (245). (Compromise after grant of leave to appeal to Privy Council—High Court cannot substitute a new decree.) (89) 16 Cal 184 (185) : 15 Ind App 200 (P C). (Party dying pending appeal to the Privy Council—Practice relating to substitution of parties on review—Representative character to be ascertained by High Court.) (27) AIR 1927 Bom 217 (220) : 51 Bom 480 (P B). (High Court can extend time prescribed for security by O. 45 R. 7.) (31) AIR 1931 Bom 278 (279, 280). (High Court can also change form of security.) (1900) 27 Cal 1 (4) : 26 Ind App 281 (P C).

Note 11

1. (709) 4 Ind C.A. 452 (451) (Cal). (High Court has no jurisdiction to appoint receiver under O. 45 Rule 13.) (25) AIR 1925 Oudh 99 (100). (High Court cannot demand security.) (93) AIR 1933 Bom 214 (245). (Compromise after grant of leave to appeal to Privy Council—High Court cannot substitute a new decree.) (89) 16 Cal 184 (185) : 15 Ind App 200 (P C). (Party dying pending appeal to the Privy Council—Practice relating to substitution of parties on review—Representative character to be ascertained by High Court.) (27) AIR 1927 Bom 217 (220) : 51 Bom 480 (P B). (High Court can extend time prescribed for security by O. 45 R. 7.) (31) AIR 1931 Bom 278 (279, 280). (High Court can also change form of security.) (1900) 27 Cal 1 (4) : 26 Ind App 281 (P C). (Do.) (36) AIR 1936 P C 139 (141) (P C). (Regard being had to sum at stake and protected character of litigation case was not remitted for inquiry.)

is within the discretion of their Lordships of the Privy Council to allow the appeal to be heard.⁴

13. Proceedings for contempt of Court—Whether appeal to Privy Council lies.—In *Kapildas Malaviya v. Chief Justice and Judges of the High Court, Allahabad* certain persons were fined by the High Court for contempt of the High Court in having published an article in a newspaper which contained an "unwarranted and defamatory aspersions on the character and ability of a number of Judges of the High Court." On an application by such persons for leave to appeal to the Privy Council it was held by the Allahabad High Court that no leave could be granted. The decision was based on two grounds : 1. The proceedings were of a *criminal* nature and as such not within the provisions of the Code relating to appeals to the Privy Council. 2. The matter was of an *exclusive* jurisdiction and the order of the High Court was 'final.' But in *S. N. Banerjee v. Kuchhar Lime and Stone Co. Ltd.*² it was held by the Privy Council that a finding of contempt for a finding of contempt for breach of an *injunction* is not criminal in its nature and is properly dealt with under the Civil Procedure Code and hence, there could be an appeal to the Privy Council in such cases under the Civil Procedure Code.

- (30) AIR 1930 P C 196 (197) : 57 Ind App 186 : 52 All 277 (P C). (Application from respondent to rescind special leave not necessary.)
(31) AIR 1931 P C 22 (22) : 57 Ind App 279 : 10 Pat 86 (P C).
4. (92) 4 All 500 (508, 509) : 9 Ind App 70 (P C).
v. Scott, Followed.)
(1939) Kar 42 (P C). (1913 App Cas 417, Scott
2. (38) AIR 1938 P C 295 (298) : 17 Pat 770: ILR
1. (35) AIR 1935 All 811 (813) : 57 All 910.
Note 13
(74) 2 Ind App 71 (81, 82) (P C).

PART VIII.

REFERENCE, REVIEW AND REVISION

113. [S. 617.] Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit. [1877, S. 617; 1861, S. 28; See Order 46.]

Synopsis

1. "Court," meaning of.
2. "Subject to such conditions . . . prescribed."

1. "Court," meaning of. — The Deputy Commissioner of Oudh¹ or a Collector hearing an application under the Bombay Mamladars' Courts Act² is not a "Court" within the meaning of this Section and cannot state a case for the opinion of the High Court. Applications which had been submitted to the Alahabad High Court for its opinion.³ cases from the Benares State Court cannot be referred under this Section to the

2. "Subject to such conditions . . . prescribed." — For such conditions and limitations, see Order 46. This part of the Code does not apply to suits and proceedings under the Agra Tenancy Act (III of 1926), Section 264, Second Schedule.

Review.

114. [S. 623.] Subject as aforesaid, any person considering himself aggrieved —

- (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed by this Code, or
- (c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the

Section 113 — Note 1
1. (128) AIR 1928 Oudh 485 (485).
2. (112) 14 Ind Cas 782 (783) (Bom).

(196) 1896 Bom F J 217 (217). (Or the Registrar acting under Indian Registration Act.)
3. (125) AIR 1925 All 293 (293) : 47 All 322.

Synopsis

1. History of the Section.
 2. Scope and object of the Section.
 3. "May call for the record."
 4. "Any case which has been decided."
 5. Interlocutory orders.
 6. "Subordinate Court."
 7. "And in which no appeal lies thereto."
 8. Other remedy open.
 9. Jurisdiction.
 10. "Exercise of jurisdiction not vested in it by law."
 11. "Failed" to exercise a jurisdiction so vested.
 12. Exercise of jurisdiction illegally or with material irregularity.
 13. Error of law or fact.
 14. Error of procedure.
 15. Wrong decision of lower Appellate Court as to the jurisdiction of the trial Court.
 16. "May make such order in the case as it thinks fit."
 - 16a. Nature of order made in revision against a decree.
17. Laches in making the application.
 18. Application in revision treated as appeal.
 19. Appeal treated as application in revision.
 20. Revision in cases of discretionary and final orders.
 21. Orders under Sections 152 and 153.
 22. Orders under Section 73.
 23. Orders in claim cases.
 24. Orders setting aside or refusing to set aside sales.
 25. Order permitting withdrawal of suit.
 26. Orders under Order 33.
 27. Orders under Order 47.
 - 27a. Orders under Order 45.
 - 27b. Decision as to court-fee, whether reversible.
 28. High Court's power of superintendence.
 29. High Court's revisional powers under other Acts.
 30. Sanction to prosecute.
 31. Orders under the Provincial Small Cause Courts Act. See Note 29.
 32. Appeal and review.

Other Topics (miscellaneous)

- Appeal against an order of a single Judge of the High Court on revision. See Note 92.
- Distinction between revisional and appellate powers. See Note 2.
- Evidence — Insufficiency, inadmissibility or absence of — As a ground of revision. See Note 12.
- High Court can interfere *suo motu*. See Note 3.
- High Court's revisional powers: —
- Bengal Rent Recovery Act, X of 1859. See Note 6.
- The Chota Nagpur Tenancy Act. See Note 6.
- The Land Acquisition Act. See Notes 6 and 10.
- The Madras Rent Recovery Act. See Note 6.
- The Religious Endowments Act. See Note 6.
- Jurisdiction — High Court to interfere in orders relating to court-fee. See Note 5.
1. History of the Section. — The Code of 1859 did not contain any provision for the exercise of revisional powers by the High Court. When the Charter Act of 1861 was passed establishing the High Courts in the several Presidencies (Bengal, Bombay and Madras), a power of superintendence was conferred on them over subordinate Courts subject to their appellate jurisdiction by Section 15 of that Act. But before the actual constitution of the High Courts, the Sudder Courts were empowered by Section 35 of Act XXIII of 1861 to call for the records of any case decided in appeal by the Subordinate Court and in which no further appeal lay when the subordinate Court appeared to have exercised a jurisdiction not vested in it. That Section is the foundation of the present Section.¹
- The North-West Provinces Rent Act. See Note 6.
- The Bombay High Court's powers of revision under Regulation II of 1827. See Note 2.
- Questions of limitation. See Note 13.
- Issuing writs of certiorari. See Note 2.
- Powers of the High Courts in the matter of landlards' Courts Act. See Notes 6, 8 and 10.
- Powers of revision under the Bombay Madras Courts Act. See Note 5.
- Orders granting or refusing addition of parties.
- Objections to jurisdiction depending on disputed facts and not raised in revision. See Note 2.
- No interference on merely technical grounds. See Notes 8 and 16.

The Section is not exhaustive and the jurisdiction which the High Courts have

be said to have been taken away by this Section.¹⁰ High Courts have also, in addition

COPIES UNDER SECTION 223 OF THE GOVERNMENT OF INDIA ACT OF 1935. SEE NOTES TO SECTION 94 OF THE GOVERNMENT OF INDIA ACT OF 1935 IN THE APPENDICES II

The Bombay High Court was also given power to appoint and remove judges in its extraordinary jurisdiction for all the subordinate courts in its jurisdiction.

JOHN DOE, FURTHER COMES OUT ON WITNESS; OPENS UP AND SAYS: "MY OTHER BROTHER"

[illegible]

so.² As to whether the High Court would exercise its discretion in favour of inter-

where the conditions of the Section are satisfied and interference in any particular case

the necessary orders. It is not necessary that an application by a party should be

8. ('37) AIR 1937 Mad 614 (645);
[See ('36) AIR 1936 All 659 (661).]
[See ('31) AIR 1931 Jb 617 (618) / Dissent.]

jurisdiction — Case under S. 25, Small Cause Court—Interference on his behalf. (1937) AIR 1937 All 154 (155) 1

[See also (36) AIR 1936 Lah 442 (442).]
(1933) AIR 1933 Mad 5 (6).
(1935) AIR 1935 Lah 190 (191).
9. [Sg (36) AIR 1936 Pesh 97 (100) (A question)]

(35) AIR 1935 Mad 89 (89).
10- (79) AIR 1919 P C 31 (85) : 46 Ind App 176 :
rejecting prayer for trying preliminary issue on
point of law—No opinion expressed as to whether

(27) AIR 1927 Mad 130 (130) : 50 Mad 130.

S. 224 of the Government of India Act of 1935. [See (95) 22 Cal 729 (1934) : 22 Ind App 90 (PC).] 12. (28) AIR 1928 Bom 5 (7. 8) : 52 Bom 37. [See also (35) AIR 1985 Pesh 38 (37). (Decision

(34) ALB 1934 Rom 299 (300) : 88 Rom 391.
Note 3
Law and Justice Regulation — same principles held to apply.]

(32) AIR 1952 Quid 156 (158) : 1 LUCK 642.
(34) AIR 1934 All 4 (6) : 53 All 828.
(34) AIR 1934 All 368 (369) : 56 All 721. (High
(Exercise of revisional jurisdiction is matter of

(733) AIR 1933 AM 118 (120).
 Let where the order is just.
 (06) 28 AM 72 (74).
 or material irregularity is brought to its notice.)

(32) AIR 1952 Mad 114 (10);
with an award even though reference to arbitra-
(73) AIR 1933 Sind 200 (202) : 28 Sind L R 167.

(92) 14 Apr 226 (232).

(25) AIR 1925 Bom 341 (342) : 49 Bom 535.

of interference, under Regulation II of 1827, unless a party applies.⁴ Where a party applies for a revision, the mere fact that a non-party has also joined in the application is no bar to the High Court entertaining and disposing of the application.⁵ It has also been held that a person who is not aggrieved by an order cannot apply for revision against the order.⁶

4. "Any case which has been decided."—The word 'case' has nowhere been defined.⁷ It has, however, been held to have a wider meaning than the words 'suit' or 'appeal'.⁸ In *Chatterpal Singh v. Rajaram*, I. L. R. 7 Allahabad 661, Mr. Justice Mahmood observed as follows :

"The word 'case,' as used in Section 622 of the Code, is nowhere defined ; but adopting the general rule of construing statutes, I hold that the word should be understood in its broadest and most ordinary sense, unless there were specific reasons for narrowing its meaning."

And in *Balakrishna Udayar v. Vasudeva Aiyar*, A. I. R. 1917 Privy Council 71, where the question was whether an *ex parte* proceeding under the Religious Endowments Act, 1863, constituted a 'case' within the meaning of this Section, their Lordships of the Privy Council observed as follows :

"It cannot, in their Lordships' view be contended to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an *ex parte* application such as that made in this case praying that persons in the position of trustees or officials should perform their trust or discharge their official duties."

So also where a scheme had been framed for the management of a public temple and under such scheme the Devasthan Committee of the taluka was given power to audit the accounts of the managing committee of the temple and where on the report of the Devasthan Committee pointing out irregularities in the management the District Judge passed orders interfering in the management and threatening action in case of disobedience, it was held by the Bombay High Court that the proceeding was a 'case' within the meaning of this Section.⁹

So also it has been held that a 'case' includes proceedings under the Guardians and Wards Act, 1890, the Provincial Insolvency Act, 1920, and the Succession Certificate Act.¹⁰ Similarly, the proceedings of a District Judge under the Charitable and Religious Trusts Act (14 of 1920) are open to revision by the High Court under this Section.¹¹ Where the whole case was over and the only thing that remained to be done was the

- revision.)
(01) 28 Cal 574 (579).
6. (38) 177 Ind Cas 138 (139) (Pat). (Where one of many decree-holders applies for stay of execution proceedings against the judgment-debtor, and it is not granted, the person aggrieved by such an order is that decree-holder and if he does not choose to agitate it further the judgment-debtor has no *locus standi* to prefer a revision under S. 115 against that order.)
Note 4
1. (17) AIR 1917 P C 71 (74) : 40 Mad 798 : 44 Ind App 261 (PC).
2. (21) AIR 1921 All 1 (2) : 43 All 564 (FB). (15) AIR 1915 Bom 269 (271) : 40 Bom 86. (36) AIR 1936 Sind 205 (205).
3. (39) AIR 1939 Bom 279 (283) : 41 Bom L R 490 (495).
4. (21) AIR 1921 All 1 (4) : 43 All 564. (24) AIR 1924 Lah 425 (425) : 5 Lah 288. 5. (29) AIR 1929 All 581 (583, 584) : 51 All 957. (36) AIR 1936 All 411 (411).
(14) AIR 1914 Mad 675 (676) : 38 Mad 256. (28) AIR 1928 Mad 528 (529) : 51 Mad 672. (24) AIR 1924 Nag 154 (155). (Decree in favour of plaintiff against one of two defendants—High Court can vary decree by passing decree against others.)
(09) 2 Ind Cas 237 (238) : 12 Oudh Cas 78. (22) AIR 1922 Pat 525 (526) : 1 Pat 232. (14) AIR 1914 Bom 123 (124) : 38 Bom 638. (On a reference by a District Judge.)
(36) AIR 1936 Pat 591 (593) : 15 Pat 738. (36) AIR 1936 Sind 1 (1).
(38) AIR 1938 All 456 (458) : 1 L R (1938) All 702 (F B).
(38) AIR 1938 Pesh 81 (82).
(36) AIR 1936 Pat 402 (402) : 15 Pat 626. [But see (81) 7 Cal L Rep 191 (192).]
4. (94) 1894 Bom P J 52 (52).
(96) 21 Bom 806 (807). (Reference by a Collector with a magistrate's decision in a possessory suit.)
(89) 14 Bom 371 (371). (Do.)
5. (03) 27 Bom 140 (143). (Directing refund of court-fees paid for getting letters of adminis-

'case' was synonymous with 'suit.' The High Court of Bombay² and a Full Bench of the Lahore High Court³ have also accepted the same view as that of the Allahabad

2. ('32) AIR 1932 Bom 81 (82). (Finding on an

issue of res judicata.)

('27) AIR 1927 Bom 664 (665). (Interlocutory

order rejecting certain evidence as inadmissible.)

('32) AIR 1932 Bom 232 (233). (Order setting aside

award and directing suit to proceed.)

('02) 26 Bom 551 (552). (Do.)

('94) 18 Bom 35 (37).

[But see ('35) AIR 1935 Bom 222 (225) : 59 Bom

430. (7 Bom 341, followed.)

('37) AIR 1937 Bom 167 (168) : 1 L R (1937)

Bom 628. (The High Court, while it should be

very slow to interfere in its revisional jurisdic-

tion with orders which are merely interlocutory,

has certainly jurisdiction to do so, and the

jurisdiction can be exercised in a proper case.

A revision application is therefore competent

in respect of a preliminary order passed by a

subordinate Court, where that preliminary order

goes to the jurisdiction of the Court.)]

3. ('24) AIR 1924 Lah 425 (426) : 5 Lah 288 (P B).

'The following cases have followed the Full

Bench view :

('38) 172 Ind Cas 497 (498) (Lah). (Order to pay

additional court-fee is an interlocutory order—

Revision does not lie as no case is decided.)

('37) 39 Pun L R 819 (820) : 18 Lah 430. (An order

to pay additional court-fee is an interlocutory

order and cannot be the subject of a revision.)

('39) 41 Pun L R 146 (147). (No revision lies

against an order allowing an amendment of the

plaint.)

('38) AIR 1938 Lah 548 (549) : 1 L R (1938) Lah

289. (Order giving leave to defend conditionally

under O. 37 R. 3 is not case decided.)

('38) AIR 1938 Lah 80 (81) : 1 L R (1938) Lah

377. (Order calling upon plaintiff to make good

deficiency in court-fee is an interlocutory order.)

('36) AIR 1936 Lah 466 (468). (Arbitration pro-

ceedings referred by a Court during the pendency

of a suit are merely a ramification of the main

suit which is still pending and which would be

disposed of on the termination of these proceed-

ings.)

('36) AIR 1936 Lah 538 (540). (Order superseding

arbitration is an interlocutory order and not

open to revision.)

('38) AIR 1938 Lah 191 (192).

('33) AIR 1933 Lah 692 (693, 694) : 14 Lah 715.

(No revision lies against order refusing objection

to an award as it is interlocutory.)

('34) AIR 1934 Lah 165 (166). (Order refusing

amendment is interlocutory order and no revi-

sion lies.)

('34) AIR 1934 Lah 281 (281). (Order allowing

amendment of application to sue in forma pau-

peris is interlocutory.)

('34) AIR 1934 Lah 401 (402). (A mere admission

of a pauper petition is not a case decided.)

('34) 147 Ind Cas 347 (347) (Lah). (Demanding

additional court-fee—Kennedy is to appeal when

In the following cases before the Full Bench

the right to interfere was assumed to exist but

interference was refused for various reasons :

('05) 1905 Pun Re No. 64, p. 217.

('11) 11 Ind Cas 840 (842) (Lah). (Order directing

fresh court-fee—Stamps to be applied for those

split.)

('11) 1911 Pun Re No. 82, p. 303.

('16) AIR 1916 Lah 346 (347).

('18) AIR 1918 Lah 334 (335). (As to res judicata.)

('02) 1902 Pun Re No. 31, p. 118.

('11) 11 Ind Cas 831 (832) (Lah).

('11) 11 Ind Cas 880 (880) (Lah). (Order as to

valuation of plaint and court-fee.)

('15) AIR 1915 Lah 306 (307). (Order relating

to issues.)

('16) AIR 1916 Lah 128 (129). (Order rejecting

an application to condemn the evidence on one

issue only.)

('17) AIR 1917 Lah 59 (59, 60) : 1917 Pun Re

No. 26. (Order refusing leave to amend plaint.)

('17) AIR 1917 Lah 57 (59). (Court's refusal to

remove an unfit commissioner appointed to take

accounts.)

('19) AIR 1919 Lah 249 (250).

('19) AIR 1919 Lah 308 (309).

('19) AIR 1919 Lah 381 (382) : 1919 Pun Re No. 77.

('20) AIR 1920 Lah 85 (86). (Erroneous decision

as to jurisdiction to try a suit.)

('21) 59 Ind Cas 450 (451) (Lah). (Order allowing

a party to produce fresh evidence on an issue

after closing the case.)

('20) AIR 1920 Lah 413 (413).

('21) AIR 1921 Lah 213 (213). (On a question of

jurisdiction as to whether the suit lay for breach

of contract.)

('21) AIR 1921 Lah 265 (266).

('21) AIR 1921 Lah 367 (368). (Refusing to allow

amendment of pleadings and raise additional

issues.)

('21) AIR 1921 Lah 370 (371). (Where the order

of remand remitting the case back for framing

proper issues was wholly unnecessary—High

Court interfered.)

('23) AIR 1923 Lah 394 (394). (When lower Court

refused leave to amend plaint originally brought

on insufficiently stamped handi as an original

consideration without giving reasons.)

('23) AIR 1923 Lah 301 (301). (When the lower

Court in supersession of its previous orders to

High Court on the ground that 'case' does not include a branch of a case such as an interlocutory order. The Sind Judicial Commissioner's Court, and the Chief Court of Oudh have also held the same view. The Peshwar Judicial Commissioner's Court has also held that the expression 'case decided' will not include an interlocutory order. All these Courts have, however, held that proceedings before a suit is commenced, or after a suit has ended and proceedings for which the Legislature has provided an independent remedy or a different procedure, are not interlocutory proceedings and will therefore be open to interference in revision. Thus, an application examining a person on commission issued summons

- (723) AIR 1923 Lah 555 (566).
 (721) AIR 1921 Lah 181 (181).
 In the following earlier cases the decisions as to jurisdiction held not to be :
 (728) AIR 1923 Lah 414 (411).
 (10) 7 Ind Cas 710 (710) : 1910 Pan Re No. 70.
 [But see (225) AIR 1925 Lah 72 (73). (Interlocutory order as to place of trial is a "case".)
 (732) AIR 1932 Lah 51 (52). (If the order is manifestly illegal, it could be revised.)
 (30) AIR 1930 Sind 265 (269) : 24 Sind L R 277 (F.B.).
 (33) AIR 1933 Sind 82 (83, 84) : 26 Sind L R 191. (Order refusing leave to sue in forma pauperis.)
 In the following earlier cases the right was assumed :
 (108) 2 Sind L R 22 (23).
 (25) AIR 1925 Sind 260 (261). (Where the Court refused an amendment of a suit for injunction into one for possession.)
 (20) AIR 1920 Sind 1 (2, 5) : 14 Sind L R 25. (Order refusing to issue a commission to examine certain witnesses.)
 (29) AIR 1929 Sind 92 (93) : 23 Sind L R 403.
 (36) AIR 1936 Sind 205 (205). (Application under S. 19 of Arbitration Act is not an interlocutory proceeding; AIR 1931 Lah 611, Followed.)
 (39) AIR 1939 Sind 211 (212) (F.B.). (An order of the Court setting aside an award under para. 15 of Sch. 2, C. P. Code, and fixing the suit for final hearing does not decide a case within the meaning of Section 115.)
 (36) AIR 1936 Sind 160 (163) : 30 Sind L R 226. (Order held not interlocutory and hence revision competent.)
 5. (732) AIR 1932 Oudh 271 (272). (Decision as to maintainability of claim for mesne profits is not a "case decided" is an interlocutory order.)
 (50) 2 Oudh Cas 67 (71).
 (33) AIR 1933 Oudh 345 (345). (Order of refusal to receive documentary evidence is not open to revision.)
 (703) 4 Ind Cas 578 (552) : 12 Oudh Cas 405.
 (17) AIR 1917 Oudh 67 (67). (An order issuing a warrant of attachment against the properties of plaintiff.)
 (15) AIR 1915 Oudh 430 (431). (Refusal to amend plaint.)
 (21) AIR 1921 Oudh 176 (176) : 24 Oudh Cas 231.
 (A decision on an issue as to jurisdiction is not a case.)
 (24) AIR 1921 Oudh 313 (319). (Order fixing the fee of a Commissioner.)
 (25) AIR 1925 Oudh 179 (180). (The refusal to try a preliminary issue of res judicata is not a case.)
 (25) AIR 1925 Oudh 159 (159) : 23 Oudh Cas 78. (Fixing an issue and sending the case to the lower Court.)
 (25) AIR 1925 Oudh 251 (251). (Refusal to amend plaint.)
 (26) AIR 1926 Oudh 155 (156). (An order in support of a previous order directing certain issues to be tried and decided preliminarily, not a case.)
 (21) AIR 1921 Oudh 23 (23) : 21 Oudh Cas 215. (Order granting adjournment on condition of payment of the cost of the other side.)
 (18) AIR 1918 Oudh 130 (131). (Order directing an amendment of pleading from counting the validity of a will to a denial of a execution.)
 (36) AIR 1936 Oudh 22 (23) : 11 Luck 529 (F.B.). (No revision lies to High Court from order of lower Court calling upon plaintiff to make good deficiency of court-fee as no case is decided and no question of jurisdiction arises; A I R 1931 Oudh 219, Overruled.)
 (39) AIR 1939 Oudh 238 (238, 239) : 1939 Oudh W N 716 (718). (Order in pending suit setting aside award and superseding the arbitration is not open to revision.)
 (33) AIR 1933 Oudh 333 (334). (An order remitting issues for decision under O. 41 R. 25, Civil P. C., is not a case decided" within the meaning of S. 115.)
 [But see (17) AIR 1917 Oudh 359 (390). (Order directing plaintiff to elect one of two allegations in the plaint—Interfered with in revision to secure unimpaired trial.)
 6. (33) AIR 1933 Pesh 33 (36). (Case under S. 84 of N. W. P. Law and Justice Regulation.)
 (37) AIR 1937 Pesh 21 (22). (Case under S. 34 of the N. W. P. Courts Regulation.)
 (33) AIR 1933 Pesh 43 (43). (Suit dismissed on the ground of res judicata—On appeal suit remanded for trial on merits—Order of remand is not case decided.)
 7. (26) AIR 1926 Lah 642 (643).
 (33) AIR 1933 Ah 106 (107) : 31 Ah 1043. (Order returning plaint under S. 23 of the Provincial Small Cause Courts Act—Terminates the proceedings in that Court and is therefore a "case decided.")
 (31) AIR 1931 Ah 620 (622, 623) (F.B.). (Test as to whether a proceeding is or not laid down.)

Court is of a contrary opinion.¹³ As to an application under O. 1 R. 10 the Allahabad High Court holds that it is an interlocutory order and not a case,¹⁴ while the Oudh Chief Court holds that it is a *separate and independent* proceeding.¹⁵ The Lahore High Court¹⁶ has held that where the plaintiff dies during the pendency of a suit and two parties, each claiming to be his legal representative, apply to be brought on the record, and the Court decides in favour of one party, the proceedings, so far as the other party is concerned, do not raise in the suit itself but are rather collateral proceedings and final *qua* that party, and hence the order amounts to a 'case decided'.

A suit was instituted against A, B, C and D on the basis of a promissory note executed by them. The Court ordered that the suit could not proceed against A as the promissory note was signed by him at a place which was beyond the jurisdiction of the Court. It was held by the Lahore High Court that a revision would be competent as the proceedings terminated so far as A was concerned and therefore there was a 'case decided'.¹⁷

The proceeding started by the filing of an application under Section 7 (1) (a) of the U. P. Encumbered Estates Act is a fresh proceeding and therefore a 'case'.¹⁸

An order allowing an amendment of the plaint, being of an interlocutory nature would not be open to revision, according to the Allahabad view.¹⁹ But, it was held in certain earlier decisions of the Allahabad High Court that an order refusing to allow an amendment of the plaint was a 'case decided' and may be revised under this Section.²⁰ But this view has been overruled by a later Full Bench decision of the Allahabad High Court which has held that there is no difference in this respect between an order *allowing* an amendment of the plaint and one *refusing* such amendment.²¹

An order refusing to file an award and directing the suit to proceed is interlocutory in its nature and as such not open to revision.²²

(122) AIR 1922 Lah 54 (55).
(123) AIR 1923 Lah 69 (69, 70).
(123) AIR 1923 Lah 615 (617).
(136) AIR 1936 Lah 569 (569). (Order refusing to stay proceedings under Section 10.)
(139) 41 Pun L R 55 (55).
[See (138) AIR 1938 Lah 605 (606). (In this case the High Court interfered under S. 107 of the Government of India Act.)]
[But see (138) AIR 1938 Lah 34 (34).
(138) AIR 1938 Lah 50 (51). (Distinguishing the cases holding a contrary view on the ground that in this case the application for stay was under inherent powers and not under S. 10.)]
13. (128) AIR 1928 Oudh 355 (358) : 3 Luck 650. (119) AIR 1919 Oudh 178 (179).
14. (128) AIR 1928 AH 97 (97) : 50 AH 276. (112) 14 Ind Cas 263 (264) (AH).
[But see (134) AIR 1934 AH 25 (27).]
15. (10) 6 Ind Cas 977 (978) : 13 Oudh Gas 109. (112) 16 Ind Cas 592 (594) : 15 Oudh Gas 304. (114) AIR 1914 Oudh 184 (185). (Stranger to a mortgage ordered to be impeded.)
(129) AIR 1929 Oudh 148 (148). (Where A sued B for arrears of rent in respect of a house, and C, who had obtained a decree against A and B declaring that he is the owner of the house, applied for being impended as a party to the suit, held refusal, to be bad.)
(135) AIR 1935 All 519 (519, 520).
(135) AIR 1935 All 519 (519, 520).
(136) 164 Ind Gas 722 (724) (AH).
(137) AH 17 (17B).
21. (136) AIR 1936 AH 686 (688, 689) : 1 L R (133) AIR 1933 AH 374 (375) : 55 AH 256. (135) AIR 1935 AH 661 (662).
20. (135) AIR 1935 AH 353 (356) : 57 AH 459. (134) AIR 1934 AH 785 (785).
19. (134) AIR 1934 AH 785 (785).
18. (138) AIR 1938 AH 6 (7) : 1 L R (1938) AH 22. (138) AIR 1938 AH 6 (7) : 1 L R (1938) AH 22. such order is also not an interlocutory order.]
of the defendants is not an interlocutory order and order by successor of Judge setting aside Kar 330. (Order dismissing suit as against one (139) AIR 1939 Sind 137 (140) : 1 L R (1939) by him is a case decided to that extent.)
order by Court holding the suit of a plaintiff time-barred in respect of certain reliefs claimed [See also (138) AIR 1938 Lah 507 (508). (An (137) AIR 1937 Lah 800 (801).
17. (137) AIR 1937 Lah 800 (801).
16. (135) AIR 1935 Lah 934 (934).
merely an interlocutory order.)]
not appealable nor one open to revision. It is 447. (Order adding person as party to suit is [But see (139) AIR 1939 Oudh 102 (103) : 14 Luck and a revision petition lies against such an order.)
R. 1, though interlocutory, has decided a case partly to be made a party to a suit under O. 34 order of a Court dismissing the application of a (138) AIR 1938 Oudh 10 (10) : 13 Luck 625. (The

On the other hand, the general trend of the decisions of the Calcutta, Madras, &

- (138) AIR 1938 All 557 (559, 560) : I L R (1938) All 805 (FB). (AIR 1931 All 721 and AIR 1929 All 743, Overruled.)
 [See also (132) AIR 1932 All 452 (453); 53 All 1006.]
 23. (187) 14 Cal 763 (780).
 (129) AIR 1929 Cal 159 (159). (Interlocutory order deciding question of jurisdiction — Wrong assumption of jurisdiction.)
 (110) 6 Ind Cas 570 (572) (Cal).
 (112) 12 Ind Cas 46 (48) (Cal).
In the following cases the right to interfere was assumed:
 (129) AIR 1929 Cal 831 (831).
 (118) 21 Ind Cas 913 (914) (Cal).
 (183) 12 Cal L Rep 421 (123) : 8 Cal 897 (811).
 (110) 6 Ind Cas 549 (552) (Cal).
 (101) 6 Ind Cas 516 (519) (Cal).
 (191) 21 Cal 539 (541).
 (118) AIR 1918 Cal 909 (909).
 (110) 8 Ind Cas 87 (90) (Cal).
 (112) 17 Ind Cas 361 (362) (Cal).
 (122) AIR 1922 Cal 42 (44).
 (113) 21 Ind Cas 771 (772) (Cal).
 (110) 7 Ind Cas 92 (93) (Cal). (Court-fee.)
 (125) AIR 1925 Cal 204 (206).
 (110) 7 Ind Cas 436 (442) (Cal).
 (110) 6 Ind Cas 574 (575) (Cal).
 (110) 8 Ind Cas 107 (114) : 33 Cal 230.
 (135) AIR 1935 Cal 102 (106). (High Court will not interfere with interlocutory orders unless irreparable injury and inevitable miscarriage of justice will result.)
 (135) AIR 1935 Cal 279 (280).
 (138) AIR 1938 Cal 161 (162). (Lower Court accepting valuation in plaint and acting wrongly in not exercising its powers under Section 8(c) Court-fees (Bengal Amendment) Act — High Court can interfere under Sec. 115 as the lower Court will be exercising its jurisdiction wrongly if its decision is wrong.)
 24. (129) AIR 1929 Cal 121 (124). (See observations of Odgers, J.)
 (122) AIR 1922 Cal 392 (394) : 45 Cal 194.
 (131) AIR 1931 Cal 1 (2, 5).
 (127) AIR 1927 Cal 212 (213).
 (130) AIR 1930 Cal 216 (216).
 (123) AIR 1928 Cal 270 (270). (Court-fee.)
 (125) AIR 1925 Cal 713 (714). (Do.)
 (126) AIR 1926 Cal 678 (679). (Do.)
 (129) AIR 1929 Cal 396 (397). (Do.)
 (128) AIR 1928 Cal 821 (822) : 46 Cal 574. (Order refusing to issue commission to examine witness.)
 (108) 31 Cal 60 (61). (Order issuing commission.)
In the following cases the right to interfere was assumed to exist :
 (122) AIR 1922 Cal 321 (323). (An amendment of the plaint.)
- (17) AIR 1917 Cal 134 (135). (Court-fee.)
 (118) AIR 1918 Cal 1060 (1061). (Setting aside review order.)
 (118) AIR 1918 Cal 1137 (1139).
 (123) AIR 1923 Cal 144 (147) : 47 Cal 47.
 (126) AIR 1926 Cal 135 (136).
 (129) AIR 1929 Cal 403 (403).
 (113) 19 Ind Cas 672 (672) (Cal).
 (111) 12 Ind Cas 101 (105) (Cal).
 (111) 12 Ind Cas 173 (174) (Cal).
 (114) AIR 1914 Cal 203 (203).
 (130) AIR 1930 Cal 72 (74).
 (125) AIR 1925 Cal 188 (189).
 (130) AIR 1930 Cal 322 (325).
 (103) 18 Cal L Jour 302 (304).
 (126) AIR 1926 Cal 166 (168).
 (121) AIR 1924 Cal 541 (541).
 (131) AIR 1931 Cal 8 (10).
 (114) AIR 1914 Cal 17 (17). (Erroneous order refusing to allow the amendment.)
 (114) AIR 1914 Cal 271 (272). (Amendment of pleading.)
 (126) AIR 1926 Cal 1017 (1048) (FB).
 (129) AIR 1928 Cal 416 (418) : 51 Cal 664. (Though appeal lies against order rejecting plaint for non-payment of court-fee.)
 (131) AIR 1931 Cal 716 (717). (Do.)
 (129) AIR 1928 Cal 690 (692).
 (126) AIR 1926 Cal 1124 (1125).
 (121) AIR 1924 Cal 846 (847) : 47 Cal 934.
 (112) 13 Ind Cas 903 (904) (Cal).
 (123) AIR 1923 Cal 88 (88). (Order under S. 10.)
 (127) AIR 1927 Cal 524 (525).
 (137) AIR 1937 Cal 338 (339). (Order under O. 1 R. 10 can be revised under Section 115, C. P. C. when the Court fails to exercise a discretion vested in it and when its failure is due to error.)
 (138) AIR 1938 Cal 646 (648). (Order refusing issue of commission is reversible.)
 (136) AIR 1936 Cal 526 (526). (A Court in trans-acting issues or refusing to trans-act issues is, in the language of S. 115, deciding a case, if the onus of proof is involved in the form of the issues.)
 (135) AIR 1935 Cal 282 (283) : 58 Cal 771. (Decision on preliminary issue as to maintainability of suit—High Court has power to, but will not interfere unless the point can be shortly and conveniently disposed of by way of a civil revision petition.)
 (132) AIR 1932 Cal 603 (604). (Order refusing to amend plaint can be set aside in revision.)
 (138) AIR 1938 Cal 506 (507, 508) : 56 Cal 744. (But High Court will not interfere if order as to court-fee is favourable to plaintiff.)
 [See also (134) AIR 1934 Cal 669 (669). (Revision lies against order passed on petition under O. 9 R. 9 for restoration of dismissed petition.)]

Nagpur,²⁵ Patna²⁶ and Rangoon²⁷ Courts with few exceptions²⁸ is to hold that the

- raising question of jurisdiction—Revision lies.)
 27. (17) AIR 1917 Low Bur 35 (36). (Order permitting three separate suits to be brought in respect of different parts of the estate of a deceased by the administrator.)
 (33) AIR 1938 Rang 49 (50) : 11 Rang 36. (Though High Court has got such power, it should not interfere unless there would be miscarriage of justice.)
 (21) AIR 1921 Low Bur 6 (8) : 11 Low Bur 65. (Order refusing permission to examine witness on commission.)
 (24) AIR 1924 Rang 2 (3) : 1 Rang 281.
 (18) AIR 1918 Low Bur 25 (26). (Right assumed.)
 (31) AIR 1931 Rang 136 (137) : 9 Rang 71.
 (39) AIR 1939 Rang 92 (94). (The Court will not however interfere unless it seems that there has been a gross and culpable error likely to inflict grave injustice and cause irreparable injury.)
 (33) AIR 1933 Rang 49 (50) : 11 Rang 36. (But High Court should not interfere unless there would be miscarriage of justice.)
 (35) AIR 1935 Rang 122 (123). (Interlocutory order of Court refusing to admit oral admissions evidence—Revision is competent.)
 (35) AIR 1935 Rang 466 (466).
 (35) AIR 1935 Rang 225 (226). (The Rangoon High Court has always entertained applications in revision with a certain amount of freedom, even when the cases are not complete, if to allow a case to proceed would result in waste of time, trouble and money.)
 [See also (33) AIR 1938 Rang 263 (264). (Interlocutory orders—Revision lies more under Sec. 107 than under Section 115.)]
 28. (20) AIR 1920 Bom 141 (141) : 44 Bom 619. (Disputed and disapproved in AIR 1924 Bom 65.)
 (34) AIR 1934 Pat 550 (551). (Order setting aside an award in an arbitration.)
 (26) AIR 1926 Cal 1149 (1150) : 53 Cal 1767. (Per Cunniff, J.)
 (28) AIR 1928 Cal 114 (114) : 54 Cal 1038. (Order in a divorce suit.)
 (82) 12 Cal 1 Rep 148 (151).
 (19) AIR 1919 Cal 840 (841).
 (12) 16 Ind Cas 3 (5) (Cal). (Doubted.)
 (11) 10 Ind Cas 308 (309) (Cal).
 (86) 9 Mad 256 (257).
 (95) 5 Mad 1 Jour 75 (76).
 (11) 9 Ind Cas 672 (672) (Mad). (Doubted.)
 (14) AIR 1914 Mad 116 (116). (Order setting aside an abatement.)
 (14) AIR 1914 Mad 685 (685). (Ex parte decree, setting aside.)
 (23) AIR 1923 Mad 43 (43). (Order directing a commissioner to ascertain mesne profits.)
 (25) AIR 1925 Mad 985 (986). (Wrong order under Order 1 Rule 8.)
 (28) 110 Ind Cas 78 (78) (Nag).
 (29) AIR 1929 Rang 270 (271). (An erroneous decision on an issue.)
 (14) AIR 1914 Low Bur 207 (208) : 8 Low Bur 77. (An order declining to frame an issue.)
 (35) 18 Nag 1 Jour 132 (134) : 160 Ind Cas 519 (519). (A decision in a pending suit that certain
25. (31) AIR 1931 Nag 17 (19) : 27 Nag L R 251. (Hypothetically allowing a time-barred suit to continue.)
 (25) AIR 1925 Nag 195 (196). (Refusal to allow amendment.)
 (11) 12 Ind Cas 357 (359) : 7 Nag L R 130.
 (24) AIR 1924 Nag 292 (293).
 (28) AIR 1928 Nag 131 (131).
 (27) AIR 1927 Nag 256 (258).
 In the following cases the right to interfere was assumed to exist : (26) AIR 1926 Nag 409 (409).
 (25) AIR 1925 Nag 62 (63). (Amendment of plaint claiming alternative reliefs.)
 (25) AIR 1925 Nag 108 (109). (An order allowing amendment of plaint ex parte without notice.)
 (30) AIR 1930 Nag 51 (51).
 (19) AIR 1919 Nag 150 (152) : 15 Nag L R 21.
 (30) AIR 1930 Nag 10 (11) : 15 Nag L R 21.
 (28) AIR 1928 Nag 222 (222).
 (25) AIR 1925 Nag 373 (374).
 (38) AIR 1938 Nag 210 (210). (Order allowing a person to sue as pauper.)
 (38) AIR 1938 Nag 358 (359). (The High Court would not ordinarily exercise its revisional jurisdiction in a purely interlocutory matter, namely, about the admission of a certain piece of evidence—It may however do so when the question is one of general importance and no objection is taken by the opposite party as to the competency of the Court to entertain the petition—But such cases must not be regarded as a precedent for interference in purely interlocutory matters of procedure which do not affect jurisdiction, and do not inflict irreparable injury.)
 26. (18) AIR 1918 Pat 100 (103) : 4 Pat L Jour 20. (Order dismissing application for leave to sue a receiver without enquiring into the allegations.)
 (37) AIR 1937 Pat 550 (552) : 16 Pat 600 (S B). (Interlocutory order allowing deficit court-fee to be made up.)
 (24) AIR 1924 Pat 176 (179).
 See also the following cases :
 (30) AIR 1930 Pat 592 (592).
 (28) AIR 1928 Pat 411 (412).
 (20) AIR 1920 Pat 789 (789, 790). (Court-fee.)
 (21) AIR 1921 Pat 180 (180) : 5 Pat L Jour 400. (Do.)
 (21) AIR 1921 Pat 828 (828).
 (30) AIR 1930 Pat 277 (278). (Court-fee.)
 (24) AIR 1924 Pat 673 (675) : 3 Pat 930.
 (22) AIR 1922 Pat 359 (360) : 4 Pat L Jour 195.
 (18) AIR 1918 Pat 131 (131) : 4 Pat L Jour 191.
 (25) AIR 1925 Pat 488 (489).
 (25) AIR 1925 Pat 703 (704).
 (26) AIR 1926 Pat 334 (335).
 (35) AIR 1935 Pat 90 (91).
 (36) AIR 1936 Pat 85 (86) : 15 Pat 340. (Decision as to court-fee.)
 (38) AIR 1938 Pat 22 (25, 26) : 16 Pat 766 (R B). (Do.)
 (38) AIR 1938 Pat 209 (209). (Order under O. 38 R. 8, C. P. C.)
 (35) AIR 1935 Pat 90 (91).
 (35) AIR 1935 Pat 186 (187). (Interlocutory order

High Court is not powerless to interfere under Section 115, with interlocutory orders. The Calcutta, Madras and Patna High Courts have also interfered with such orders in the exercise of their powers of superintendence under Section 107 of the Government of India Act, 1915 (corresponding to Section 15 of the Charter Act, 1861).²⁸ It must, however, be noted in this connexion that under sub-section 2 to Section 224 of the Government of India Act of 1935 the High Court has no power of revision in respect of the judicial proceedings in lower Courts except in so far as such power may be otherwise conferred. See Notes to Section 224 of the Government of India Act of 1935 given as an Appendix to this work. The High Court of Bombay has also acted under Regulation II of 1827, Section 5 and interfered with such orders.³⁰

It is submitted with respect that the Allahabad and Lahore view stated above is not correct. A judgment, under O. 20 R. 4, must contain a concise statement of the 'case' and under Section 2 clause 9, a 'judgment' means the statement given by the Judge of the grounds of a decree or order. A judgment in support of an order which will, of course, include an interlocutory order must, therefore, contain a concise statement of the 'case' which can only mean the matter in dispute in the *particular proceeding*. This view is also supported by Section 113 of the Code which enacts that any Court may state a 'case' and refer the same for the opinion of the High Court. A reference to the Report of Select Committee in 1879 for amending Section 622 of the Code of 1877 by introducing words therein corresponding to clause (c) of this Section makes the matter still more clear. It was there stated that the object of the amendment was to extend Section 115 (now Section 115) to cases in which the High Court of Bombay was then acting in the exercise of its powers under Regulation II of 1827, Section 5. This power extended under the said regulation, to call for the *proceedings* of any Subordinate Court and to pass such order thereon as the case may require.

As has been seen already in Note 3 ante, the exercise of revisional powers, even in cases where Section 115 is held to apply, is a matter of *discretion*, and in the case of interlocutory orders, the High Court will not interfere except where the

- evidence is inadmissible does not amount to a 'case' decided.
(1935) AIR 1935 Rang 158 (158). (Interlocutory order on question of res judicata—No revision lies.)
29. (11) 10 Ind Cas 308 (309) (Cal). (Order refusing permission to amend pleadings.)
(1938) AIR 1938 Pat 161 (164) : 12 Pat 77. (It is the privilege and prerogative of High Court to exercise power of superintendence to revise order which is so erroneous as manifestly to amount to injustice.)
(109) 4 Ind Cas 364 (367) (Cal). (Delegation to a Commissioner by a Court of the power to call for production of documents under O. 11 R. 14.)
(16) AIR 1916 Cal 318 (319) : 42 Cal 926.
(15) AIR 1915 Cal 87 (91).
(25) AIR 1925 Cal 1118 (1119).
(12) 16 Ind Cas 963 (965) (Cal).
(12) 15 Ind Cas 621 (622) (Cal).
(20) AIR 1920 Cal 204 (205).
(19) AIR 1919 Pat 270 (275, 276) : 4 Pat L. Jour 57.
(16) AIR 1916 Mad 903 (906).
(11) 12 Ind Cas 719 (719) (Mad).
(11) 9 Ind Cas 672 (672) (Mad).
- (25) AIR 1925 Mad 585 (586).
(108) 31 Mad 60 (61).
(16) AIR 1916 Mad 740 (742).
(24) AIR 1924 Pat 673 (675) : 3 Pat 930. (Order demanding additional court-fee.)
(20) AIR 1920 Pat 131 (137) : 5 Pat L. Jour 550.
(29) AIR 1929 Pat 427 (428).
(35) AIR 1935 Cal 102 (107).
(34) AIR 1934 Pat 641 (642) : 14 Pat 220.
(36) AIR 1936 Mad 187 (187) : 59 Mad 356 (FB). (Agency District Munsif's Court at Rayagada is a Civil Court subject to powers of superintendence of the Madras High Court under S. 107, Government of India Act.)
[See also (24) AIR 1924 Pat 761 (764).]
30. (86) 10 Bom 610 (616) (FB).
(15) AIR 1915 Bom 269 (270, 271) : 40 Bom 86.
(24) AIR 1924 Bom 65 (68) : 48 Bom 43.
(31) AIR 1931 Bom 234 (235).
[See also (37) AIR 1937 Bom 167 (168) : 1 L. R. (1937) Bom 623. (High Court has jurisdiction to interfere in revision in respect of interlocutory orders in proper cases, though High Court should be slow to interfere.)]

- (4) Where the order passed is perverse or such that unless set aside irreparable harm is likely to be caused to one of the litigants.³⁵
 - (5) Where the effect of the order is to make the trial take an illegal course.³⁶
 - (6) Where the order works manifest injustice.³⁷
- As to whether the High Court will interfere with an interlocutory order in the exercise of its discretion under this Section where another remedy is open to the party either under Section 105 or otherwise, see *Nolo 8 infra*.
- An interlocutory order *which is appealable* as an order under Section 104 or O. 43 R. 1, is not revisable under Section 115 which applies only to cases in which no appeal lies to the High Court.³⁸
6. "Subordinate Court." — See also Section 3, *ante*.
- This Section does not apply unless —
- (1) the decision sought to be revised is that of a Court, and
 - (2) such Court is subordinate to the High Court.

(11) AIR 1914 Low Bur 207 (203) : 8 Low Bur
 (12) AIR 1918 Low Bur 25 (26).
 (13) AIR 1918 Low Bur 25 (26).
 (31) AIR 1931 Rang 193 (194). (Order impound-
 ing a document.)
 (12) 17 Ind Cas 361 (362) (Cal). (Where Court
 required applicant to whom injunction was
 granted to furnish security—*Held* it was passed
 to prevent a failure of justice, so no revision.)
 (10) 8 Ind Cas 107 (114) : 38 Cal 230.
 (25) AIR 1925 Cal 118 (119). (Order refusing
 to examine a witness on commission amounting
 to a denial of justice.)
 (03) 31 Mad 60 (61). (Order issuing commission
 as being beyond the scope of Section 856.)
 (27) AIR 1937 Mad 524 (525).
 (21) AIR 1934 Cal 971 (974). (Issue of commis-
 sion is a question of jurisdiction and not one of
 mere discretion—Grounds alleged for issue of
 commission should be carefully examined.)
 (24) AIR 1924 Mad 846 (846) : 47 Mad 984.
 (Court not properly understanding provisions of
 Order 11 Rule 14.)
 (20) AIR 1920 All 191 (192).
 (26) AIR 1926 Mad 166 (168). (Refusing injunc-
 tion on Judge's own private opinion.)
 (22) AIR 1922 Cal 43 (44). (Wrong refusal to
 grant commission and examine witnesses.)
 (24) AIR 1924 Mad 541 (541). (Refusal to allow
 defendant to examine himself on commission
 when plaintiff was so examined.)
 (21) AIR 1921 Nag 9 (10). (Order directing plain-
 tiff to elect as to which of them is to remain on
 record when both can remain.)
 (92) AIR 1932 Pat 9 (11) : 11 Pat 161. (Court
 fixing arbitrary valuation and returning plaint.)
 36. (23) AIR 1923 Mad 321 (322) : 46 Mad 574.
 (Refusal to issue commission.)
 (14) AIR 1914 Bom 42 (45) : 38 Bom 381.
 [See (93) AIR 1933 All 528 (525) : 55 All 719.
 (Decision that defendant is not entitled to take
 part in the case amounts to a case decided.)]
 37. (18) AIR 1918 Mad 1137 (1139).
 38. (25) AIR 1925 Cal 510 (511). (Dismissal of
 an application under O. 21 R. 90 for default.)
 (32) 1932 Mad W N 290 (293).
 (25) AIR 1925 Mad 707 (707). (If an election
 petition is not maintainable at all an order
 holding the same to be maintainable will be set
 aside.)
 (30) AIR 1930 Mad 216 (217). (Decision upon
 preliminary issue relating to jurisdiction is open
 to revision.)
 (25) AIR 1925 Mad 820 (821). (Suit not main-
 tainable at all — High Court can interfere and
 thus prevent further waste of time and money.)
 (19) AIR 1919 Nag 150 (152) : 15 Nag L R 21.
 (Order going to the root of the case and allow-
 ing the continuance of a litigation which the
 lower Court had no jurisdiction to allow to con-
 tinue.)
 (31) AIR 1931 Nag 17 (20) : 27 Nag L R 251.
 (Erroneous decision that a suit which was time-
 barred was not so barred.)
 (36) AIR 1936 Pat 250 (252).
 [See (25) AIR 1925 Mad 188 (189). (Refusal to
 amend plaint for setting aside sale for fraud
 into one that plaintiff was a minor at the
 time.)]
 Ordinarily however the discretion of the Court
 in granting amendment will not be interfered
 with : See (11) 12 Ind Cas 104 (105) (Mad) :
 (14) AIR 1914 Mad 298 (298) : (25) AIR 1925
 Nag 62 (63).
 35. (22) AIR 1922 Mad 321 (324). (Where the
 lower Court posted a case for final hearing on
 preliminary issue of law, settled long before the
 High Court's refusal to interfere.)
 (23) AIR 1923 Mad 690 (692).
 (15) AIR 1915 Mad 1132 (1128).
 (10) 6 Ind Cas 574 (576) (Cal).
 (27) AIR 1927 Mad 188 (189). (Grant of injunc-
 tion without a prima facie case.)
 (08) 18 Mad L Jour 302 (303). (Grant of injunc-
 tion to party out of possession.)
 (23) AIR 1923 Pat 411 (413).
 (28) AIR 1928 Nag 222 (222).
 (24) AIR 1924 Pat 176 (179). (Will not interfere
 unless for avoiding irreparable loss.)

The word 'Court' does not include any person acting in an administrative capacity nor a person acting as a *persona designata*. It has been held by the High Court of Madras that a Subordinate Judge holding an enquiry in an election petition under the Madras District Municipalities Act, 1920, or a District Judge trying the

(102) 1902 Pun Re No. 31, p. 118.

Note 6

1. (82) 1882 All W N 143 (143) : 5 All 40. (Ap

order refusing to discharge a surety.)

(32) AIR 1932 All 568 (569) : 54 All 1085 (SB).

(Collector acting under S. 18 of the Land Acqui-

sition Act acts as an administrative officer.)

(11) 9 Ind Cas 943 (944) (Bom). (Order of a Taluk-

dary Settlement Officer.)

(90) 1890 Pun Re No. 107, p. 314. (Proceedings

under Reg. I of 1798 are ministerial.)

(24) AIR 1924 Lah 55 (57, 58) : 4 Lah 1. (Order

of District Magistrate under Part 2 of the Lunacy

Act with respect to reception, care and treatment

of the lunatic.)

(10) 8 Ind Cas 1160 (1160); 1910 Pun Re No. 104.

(Order under S. 92, Civil P. C., granting permis-

sion to sue.)

(22) AIR 1922 Mad 337 (339). (Order punishing a

Village munsif for misconduct under S. 7, Madras

Hereditary Village Officers' Act.)

(20) AIR 1920 Sind 70 (71) : 13 Sind L R 212.

(Proceedings under S. 36 of the Legal Practi-

tioners' Act.)

(32) AIR 1932 Nag 50 (51) : 28 Nag L R 4. (Do—

But Court can interfere under general powers of

superintendence.)

(87) AIR 1987 Cal 705 (708) : 1 L R (1988) 1 Cal

400. (A Collector acting under S. 18 of the Land

Acquisition Act is not functioning as a Court

but is acting in a purely ministerial or adminis-

trative capacity.)

(39) AIR 1939 Rang 6 (8) : 1938 Rang L R 628.

(Order of Collector refusing to make reference

under S. 49, Land Acquisition Act, is adminis-

trative and hence is not subject to revision.)

2. (26) AIR 1926 Bom 344 (345) : 50 Bom 357.

(A District Judge acting under S. 22 of the

Bombay District Municipal Act, 3 of 1901.)

(33) AIR 1933 All 764 (766, 772) : 55 All 1008. (Dis-

trict Judge acting under U. P. District Boards

Act.)

(33) AIR 1933 Bom 105 (106).

(32) AIR 1932 Mad 560 (560). (Sub-judge passing

order in capacity of Election Commissioner—No

revision lies.)

(33) AIR 1933 Rang 41 (41) : 11 Rang L. (Dis-

trict Judge acting under the Mandalay Election

Rules.)

(34) AIR 1934 Sind 110 (111). (Judge acting

under S. 19, Bombay Local Boards Act, is per-

sona designata—His order is not open to revision.)

(97) 21 Bom 279 (281). (District Judge acting

under S. 23 of the Bombay District Municipal

Act (Amendment Act), 2 of 1884.)

(23) AIR 1923 Bom 421 (423). (Chief Judge act-

ing under the powers given to him by S. 33 of

the Bombay City Municipal Act.)

(30) AIR 1930 Bom 231 (231) : 54 Bom 224. (Chief

Judge, Small Cause Court, Bombay, acting under

S. 219 of the Bombay City Municipal Act, 3 of

1888.)

(27) AIR 1927 Mad 93 (95) : 50 Mad 121 (FB).

(Chief Judge of the Presidency Small Cause Court

of Madras acting under R. 2 of the Rules framed

under the Madras City Municipal Act.)

(26) AIR 1926 Rang 25 (31) : 3 Rang 560 (FB).

(Chief Judge, Rangoon, Small Cause Court, per-

forming the functions assigned to him by S. 14,

Rangoon Municipal Act.)

(27) AIR 1927 Rang 1 (3) : 4 Rang 304 (FB). (Chief

Judge of the Rangoon Small Cause Court, when

exercising the powers vested in him by Section

18, Rangoon Rent Act (1920), acts as *persona*

designata—Overruling AIR 1923 Rang 94 (FB)

also AIR 1925 Rang 367.)

(16) AIR 1916 Bom 196 (196) : 40 Bom 509. (Dis-

trict Judge acting under the Bombay District

Municipalities Act, S. 160.)

(17) AIR 1917 Bom 31 (32) : 42 Bom 119. (Dis-

trict Judge, acting under S. 4 of Act 12 of 1850.)

(29) AIR 1929 Rang 852 (854). (District Judge

trying an election dispute as *persona designata*.)

(37) AIR 1937 Sind 6 (6) : 30 Sind L R 351.

(Judge of Civil Court acting as Commissioner

under Workmen's Compensation Act is not a

subordinate Court but *persona designata*.)

(39) AIR 1939 Sind 165 (167) : 1 L R (1939)

Kar 131. (City of Karachi Municipal Act, 1938,

Ss. 16, 17 — Tribunals constituted by and for

purposes of new Act are special—Small Cause

Judge passing orders under Ss. 16 and 17 does

not act as Court but as *persona designata*.)

(38) AIR 1938 Sind 153 (157) : 1 L R (1939)

Kar 121. (District Judge acting under Section

22, Bombay District Municipal Act, acts as

persona designata.)

(39) AIR 1939 Bom 279 (281) : 41 Bom L R 490 (494).

(Where a Judge or presiding officer of a Court,

as distinguished from the Court itself is per-

forming any function as vested in him, such a

Judge may be considered as a *persona designata*,

and cannot be regarded as a Civil "Court sub-

ordinate" to the High Court, within the mean-

ing of Section 115, C. P. C.—In considering

whether the Judge acts as a Court or as a

persona designata, the important point to be

investigated is what is the source of his autho-

riety—The nature of the proceedings and the

action taken therein may also be relevant and

may be considered.)

(See (34) AIR 1934 All 260 (263) : 55 All 656

(FB). (District Judge acting under the Land

Acquisition Act is not a *persona designata*, but

a Court.)

(07) 31 Bom 604 (609). (Chief Judge, Small

Cause Court, acting under S. 33 of the said Act.)

(35) AIR 1935 Nag 5 (7, 8) : 31 Nag L R 1. (See

S. 58, C. P. Municipalities Act—Local Gov-

ernment reversing decision on election petition

—Civil Court cannot enquire into facts of case.)

validity of an election under the Madras Local Boards Act, 1902, is not a *persona designata* and his orders are therefore capable of being revised under this Section.³ The mere fact that a person exercises *judicial* functions is not sufficient to constitute him a 'Court'.⁴ It has accordingly been held that the following persons are not 'Courts'—

(1) A District Registrar.⁵

(2) The Rent Controller of Rangoon.⁶ The High Court of Calcutta has, however, assumed in the undermentioned case⁷ that the Rent Controller of Calcutta is a Court:

(3) It has been held by the High Courts of Allahabad,⁸ Bombay,⁹ Lahore,¹⁰ Madras¹¹ and Rangoon¹² and the Nagpur Judicial Commissioner's Court¹³ that a Collector dealing with an application under Section 18 of the Land Acquisition Act, 1894, is not a 'Court'. The decisions of the High Court of Calcutta are conflicting.¹⁴ The Oudh Judicial Commissioner's Court has held that the Collector in such cases is a Court.¹⁵ The Calcutta¹⁶ and Patna¹⁷ High Courts have also held that a Collector acting under Section 49, proviso 2 of the said Act is a Court. The High Court of Calcutta has also held that the Calcutta Improvement Trust Tribunal is acting under Section 32 of the Land Acquisition Act is acting as a Court.¹⁸

7. ('26) AIR 1926 Cal 708 (709).
8. ('32) AIR 1932 All 568 (569); 54 All 1085 (SB).
9. ('23) AIR 1923 Bom 290 (292) : 47 Bom 699.
10. ('30) AIR 1930 Lah 242 (242).
11. ('24) AIR 1924 Mad 442 (445); 47 Mad 857 (FB). (Overruling AIR 1919 Mad 583; 42 Mad 281.)
12. ('17) AIR 1917 Mad 824 (825). (Proceedings before Land Acquisition Officer were held to be administrative.)
13. ('34) AIR 1934 Rang 118 (120); 12 Rang 275. (1900-02) 1 Low Bur Rul 132 (133).
14. ('34) AIR 1934 Rang 118 (118) : 12 Rang 275. (Collector refusing to make a reference is not a Court.)
15. ('72-92) 1872-92 Low Bur Rul 509.]]
16. ('30) AIR 1930 Nag 271 (271); 26 Nag LR 309.
17. ('37) AIR 1937 Nag 12 (12); ILR (1938) Nag 149.
18. ('08) 12 Cal W N 241 (245). (Collector is Court.)
19. ('34) AIR 1934 Cal 758 (759) : 61 Cal 1041. (Act of Collector in refusing to make reference under S. 18 is judicial act though he is not Court.)
20. ('38) AIR 1938 Cal 250 (252). (Land Acquisition Collector, assuming that he is a Court while dealing with applications under S. 18 of the Land Acquisition Act, is not a Court subordinate to the High Court, and the High Court has therefore no jurisdiction to interfere with his order under that Section in revision under S. 115, C. P. C.)
21. ('37) AIR 1937 Cal 705 (709) : 1 L R (1938) 1 Cal 400. (Collector not Court and order not subject to revisional jurisdiction of High Court.)
22. ('13) 22 Ind Cas 652 (654) : 16 Oudh Cas 374.
23. ('32) AIR 1932 Oudh 180 (181) : 7 Luck 578.
24. ('12) 13 Ind Cas 470 (471) (Cal).
25. ('17) AIR 1917 Pat 176 (176) : 2 Pat LJour 204.
26. ('32) AIR 1932 Cal 660 (661).
27. ('26) AIR 1926 Rang 143 (144). (District Judge exceeding his authority and sending case for disposal to Additional District Judge— Latter purporting to pass judgment as Court— Order is open to revision in the peculiar circumstances of the case.)
28. ('33) AIR 1933 Rang 2 (3) : 10 Rang 517 (SB). (District Judge's decision as to validity of election under Burma Rural Self-Government Act—District Judge is subordinate to High Court.)
29. ('31) AIR 1931 Bom 582 (586, 587); 55 Bom 544. (District Court exercising judicial functions under S. 198, Bombay City Municipalities Act of 1925 according to the procedure laid down in the Land Acquisition Act, is a subordinate Court.)
30. ('23) AIR 1923 Mad 254 (256) : 46 Mad 123. (Sub-Court holding an enquiry into election under the Madras District Municipalities Act.)
31. ('23) AIR 1923 Mad 192 (194, 195) : 46 Mad 586. (A District Judge trying the validity of an election under the Madras Local Boards Act, 1902.)
32. ('23) AIR 1923 Mad 360 (360).
33. ('24) AIR 1924 Mad 561 (562) : 47 Mad 369 (FB).
34. (Election under the Local Boards Act.)
35. ('29) AIR 1929 Nag 282 (283).
36. [But see ('32) AIR 1932 Mad 560 (560). (Under the new election rules the election commissioner is a *persona designata*.)
37. ('07) 30 Mad 326 (327).
38. ('23) AIR 1923 Mad 475 (475) : 51 Mad 245.
39. [See also ('88) 12 Bom 36 (43). (Sub-Registrar not a 'Court' within S. 195 of the Criminal Procedure Code.)
40. ('26) AIR 1926 Rang 33 (41, 43); 3 Rang 410 (FB).

Agriculturists' Relief Act,²⁹ a District or Deputy Collector acting under the Bombay Mamladars' Courts Act,³⁰ are all Courts subordinate to the High Court of Bombay.

(2) The Madras Village Courts,³¹ and the Agent to the Governor of Madras at Vizagapatam acting under the Agency Rules³² are Courts subordinate to the High Court of Madras.

- (3) Civil Courts purporting to act under the Religious Endowments Act, 1863.³³
- (4) Courts acting on a reference under Section 55 of the Land Registration Act.³⁴
- (5) Presidency Small Cause Courts.³⁵
- (6) Deputy Commissioner acting under the Punjab Court of Wards Act.³⁶
- (7) The Sub-divisional Officer acting under Section 2 of the Santhal Parganas Act.³⁷

The mere fact that a Court has *exclusive* jurisdiction over a matter under a certain Act does not affect the revisional jurisdiction of the High Court unless such revisional jurisdiction has otherwise been expressly or impliedly ousted.³⁸

- (29. See (94) 19 Bom 286 (288).
 30. (12) 17 Ind Cas 676 (677) : 97 Bom 114.
 (15) AIR 1915 Bom 17 (18) : 99 Bom 552.
 [See (98) AIR 1998 Bom 159 (160) : 1 L R (1998) Bom 259.]
 31. (27) AIR 1927 Mad 786 (787).
 (17) AIR 1917 Mad 726 (726). (But under S. 107, Government of India Act.)
 32. (11) 12 Ind Cas 73 (74) (Mad).
 [See however (99) 16 Mad 229 (229).]
 33. (17) AIR 1917 P C 71 (74) : 40 Mad 798 (801) : 44 Ind App 261 (P C). (Purporting to act under the provisions of S. 10 of the Religious Endowments Act.)
 (93) 26 Mad 85 (98).
 (15) AIR 1915 Mad 827 (829, 830) : 38 Mad 594. (Recognizing the validity of an election in a temple committee.)
 34. (08) 85 Cal 120 (131).
 (08) 35 Cal 571 (573).
 35. (08) 31 Mad 490 (491).
 (11) 21 Mad L Jour 525 (526).
 (93-1900) 1893-1900 Low Bur Rul 61.
 (16) AIR 1916 Mad 387 (389).
 36. (09) 4 Ind Cas 949 (951) : 1910 Purn Re No. 6.
 37. (14) 23 Ind Cas 876 (877) (Cal). (Assumed.)
 38. (98) AIR 1998 Bom 301 (302). (Sessions Judge acting under S. 111 of the Bombay Municipal Boroughs Act in revision from a decision of the Magistrate under S. 110 of that Act, is a Court subordinate to the High Court within the meaning of S. 115, and a revision application would therefore lie to the High Court under Sec. 115, against an order passed by the Sessions Judge under S. 111 of the Municipal Boroughs Act but such an application being a second application in revision, the High Court would not interfere unless it appears that there has been some grave abuse of its power by the Sessions Court, or the decision is manifestly erroneous or unjust.)
 (36) AIR 1936 Mad 187 (187) : 59 Mad 356 (P B). (Agency District Munsifs Court of Rayagada is a Civil Court — High Court can exercise powers of superintendence under S. 107, Government of India Act of 1919.)

- (98) AIR 1998 Mad 634 (637) : 1 L R (1998) Mad 988. (S. 36 of the Legal Practitioners' Act confers a special jurisdiction on a Subordinate Court; and an order passed by a District Judge under S. 36 High Court has power to revise under Section 115, Civil P. Code, being a case decided by Court subordinate to the High Court. Section 439, Cr. P. Code, does not apply to such a case. Nor can it be revised under the Government of India Act, 1935. The jurisdiction to revise is, however, of an exceptional character and cannot be invoked except in furtherance of justice. If the Judge in passing the order had no clear conception of the law on the subject or if he has failed to apply the law to the facts of the case and bases his finding on mere suspicion or conjecture, the High Court would interfere with the order.)
 (98) AIR 1938 Lah 855 (855). (A Commissioner appointed under the Workmen's Compensation Act and adjudicating a claim made under the Act is a "Court subordinate to the High Court" within the meaning of S. 115.)
 (38) AIR 1938 All 456 (458) : 1 L R (1938) All 702 (P B). (The Court exercising jurisdiction under S. 5 of the U. P. Agriculturists Relief Act is a Civil Court, and as such subordinate to the High Court.)
 (97) AIR 1987 Oudh 143 (143). (Oudh Rent Act — Assistant Collector of the second class is not a Court subordinate to the Chief Court within the meaning of S. 115.)
 (39) AIR 1939 Oudh 177 (178). (Collector executing decree for under-proprietary rent is not subordinate to High Court and latter Court cannot act in revision.)
 39. (35) AIR 1935 All 810 (815, 816) : 57 All 810. (Local Government conferring power on District Court has exclusive or original jurisdiction — That Court does not oust revisional jurisdiction of High Court — District Court acting under Companies Act is subordinate to High Court.)

An appellate officer appointed by the Local Government under Section 40 of the Bengal Agricultural Debtors Act is not a Court *subordinate* to the High Court.⁴⁰ Even where the decision sought to be revised is that of a 'Court' and such Court is 'subordinate' to the High Court, a revision will not necessarily lie under Section 115 of the Code. Under Section 4 of the Code "nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force." Thus, under the Rent Acts of the various Provinces, the right of revision to the High Court has been either expressly or impliedly excluded. In all such cases, there will be no right of revision under this Section.⁴¹ Where, however, there is no such exclusion, Section 115 will, of course, apply.⁴²

7. "And in which no appeal lies thereto."—The powers of the High Court under this Section can be invoked in respect of any case decided by a subordinate Court only in cases in which no appeal lies to the High Court. The word 'appeal' is

40. ('38) AIR 1938 Cal 688 (688).
 41. ('90) 12 All 198 (199). (Order of Collector under S. 18, N. W. P. Provinces Rent Act.) ('32) AIR 1932 All 689 (590). (Agra Tenancy Act.) ('16) AIR 1916 All 266 (268, 269). ('18) AIR 1918 All 14 (15) : 41 All 28. (Matters under the Agra Tenancy Act.) ('19) AIR 1919 All 146 (147) : 41 All 226. ('19) AIR 1919 All 96 (97) : 42 All 83. ('23) AIR 1923 All 580 (581) : 45 All 567. ('25) AIR 1925 All 800 (800). (Under the Agra Tenancy Act; see also Agra Tenancy Act III of 1926, Sch. 2, List I.) ('26) AIR 1926 All 398 (399) (F B). (Practically overruling AIR 1926 All 113, under the Agra Tenancy Act.) ('29) AIR 1929 All 735 (736) : 51 All 1020. (Agra Tenancy Act.) ('29) AIR 1929 All 735 (736) : 51 All 1020. (Agra Tenancy Act.) ('32) AIR 1932 All 273 (277) : 54 All 573 (F B). (Do.) ('29) AIR 1929 Oudh 889 (390) : 4 Luck 539 (F B). ('29) AIR 1929 Oudh 114, Approved; AIR 1928 Oudh 18 : 14 Oudh Cas 38 must be taken to be overruled.) ('14) AIR 1914 Cal 890 (892). (Revenue Officer under the Chota Nagpur Tenancy Act.) ('17) AIR 1917 Pat 61 (62) : 3 Pat L Jour 143. (Chota Nagpur Tenancy Act.) ('86) 9 Mad 332 (333). (Proceedings of the Deputy Collector.) ('93) 16 Mad 451 (452). (Collector acting under Madras Rent Recovery Act.) ('94) 17 Mad 298 (299). (Do.) ('24) AIR 1924 Mad 119 (121) : 47 Mad 250. (Order of the Board of Revenue under Estates Land Act.) ('28) AIR 1928 Mad 1032 (1037, 1038) (F B). (High Court cannot revise orders of the Board of Revenue — Overruling 49 Mad 499 : AIR 1919 Mad 672.) ('32) AIR 1932 Mad 529 (531) : 55 Mad 942. (Do.) ('35) AIR 1935 Pat 417 (418). (Chota Nagpur Tenancy Act (VI of 1908), S. 218—Rent suit for Rs. 100 or less—No revision lies—Deputy Commissioner's order is final.) ('35) AIR 1935 All 514 (515). (Agra Tenancy Act.) [See also Section 84 (8) of Reg VII of 1901, ('35) AIR 1935 All 514 (515). (Agra Tenancy Act.) ('29) AIR 1929 All 793 (793) : 51 All 1023. ('33) AIR 1933 Lah 327 (327).]
- Note 7**
1. ('29) AIR 1929 All 793 (793) : 51 All 1023. [See also ('06) 11 Cal W N 112 (114). (Bengal Rent Recovery Act.)] High Court.) ('38) AIR 1938 Lah 753 (753) : 11 LR (1938) Lah 196. (There is nothing in S. 192, Succession Act, which takes away the right of revision by the table and Religious Trusts Act, is revisable.) an order of the District Judge under S. 3, Charitable provisions of S. 115, O. P. C., are very wide and ('36) AIR 1936 Lah 695 (696) : 17 Lah 768. (The Court.) not affect the revisional powers of the High S. 93, Bengal Village Self-Government Act, does ('34) AIR 1934 Cal 666 (667). (The provision in under S. 9, Specific Relief Act—Revision lies.) ('38) AIR 1938 All 685 (686). (Decree or order in exercise of revisionary powers under Madras Estates Land Act—Order by—Revision lies.) ('35) AIR 1935 Mad 367 (367). (Collector acting in exercise of revisionary powers under Madras Estates Land Act—Order by—Revision lies.) Ss. 115 and 107, Government of India Act.) ('26) AIR 1926 Pat 25 (25, 27). (When acting as a Revenue Court preferring complaint under S. 200, I. P. C.—Interference was both under ('26) AIR 1926 Pat 25 (25, 27). (When acting as the Chota Nagpur Tenancy Act.) ('13) 20 Ind Cas 420 (421) : 40 Cal 518. (Under 42. ('19) AIR 1919 Mad 510 (511) : 42 Mad 76. Revenue Officer—Overruling 16 Cal 596.)] any Act, in regard to settlement of rent by Judge acting under S. 108, cl. 2, Bengal Tenancy Act ('96) 23 Cal 723 (728) (F B). (Special [But see ('96) 23 Cal 723 (728) (F B). (Special Court under S. 115.)] S. 18 of the Bengal Municipal Act are sufficient-ly wide to exclude interference by the High ('36) 163 Ind Cas 735 (736) : 63 Cal 186. (Terms of ordering prosecution acting as a Revenue Court.) ('17) AIR 1917 All 59 (60) : 39 All 91. (Collector Madras.) ('17) AIR 1917 Mad 576 (577). (Board of Revenue, under Bombay Act III of 1874.) ('26) AIR 1926 Bom 308 (309). (Collector acting cases:— N. W. P. F. P. Law and Justice, and the following

not restricted to a first appeal. It includes a second appeal.² Where, therefore, a first appeal or second appeal lies to the High Court from the case sought to be revised the High Court has no jurisdiction to interfere in revision.³ Thus, orders and decisions amounting to *decrees* and which are open to a second appeal to the High Court, cannot be revised under this Section.⁴ If no first or second appeal lies to the High

- (72) AIR 1929 Oudh 91 (91) : 4 Luck 347.
 (73) AIR 1936 Cal 267 (268). (Order directing execution to be dismissed for non-prosecution is not appealable—It is open to revision.)
 (78) AIR 1938 Pat 447 (449). (Order made by a lower Court under Sec. 151, C. P. C., is not appealable and hence the remedy of the aggrieved party is by way of revision.)
 (86) AIR 1936 All 479 (480). (Decision that certain persons are representatives of judgment-debtor is one under S. 47—No appeal filed from it—Revision does not lie.)
 (85) AIR 1935 All 873 (875). (Order under S. 144 C. P. Code—No revision lies.)
 (87) AIR 1937 All 65 (75) : 1 L R (1937) All 317 (F B). (The mere fact that a decree is unappealable is no ground for holding that it cannot be challenged by an application in revision.)
 (88) AIR 1938 All 456 (458) : 1 L R (1938) All 702 (F B). (The mere fact that a right of appeal is denied to a litigant is no ground for holding that he is debarred from invoking the revisional jurisdiction of the High Court.)
 [See also (87) AIR 1937 All 691 (693). (Order refusing to set aside ex parte decree—No revision is maintainable as party aggrieved can appeal from ex parte decree.)]
 2. (81) AIR 1931 All 294 (296) : 53 All 612 (F B).
 (80) AIR 1930 All 604 (605).
 (28) AIR 1928 Mad 794 (795).
 (13) 20 Ind Cas 51 (52) (Cal).
 (24) AIR 1924 Lab 487 (487).
 (97) 20 All 155 (156).
 (90) 3 C P L R 177 (178).
 (29) AIR 1929 Cal 226 (227).
 (12) 17 Ind Cas 391 (391) (Mad). (Suit for maintenance where vakil consented to an order, at a special rate with no power.)
 (90) 12 All 681 (687).
 (36) AIR 1936 Lab 968 (965). (Second appeal held did not lie—Revision entertained.)
 [But see (83) AIR 1933 Rang 64 (67) : 11 Rang 134.]
 3. (81) 1881 Pun Re No. 13, page 22.
 (84) 1884 Pun Re No. 71, page 194.
 (30) AIR 1930 All 604 (605).
 (93) 6 C P L R 17 (18).
 (11) 12 Ind Cas 73 (74) : 36 Mad 128.
 (24) AIR 1924 Oudh 16 (16).
 (17) AIR 1917 Mad 659 (660).
 (26) 96 Ind Cas 173 (173) (Lab).
 (81) 1881 All W N 24 (25).
 (85) 7 All 276 (281).
 (85) 7 All 914 (916).
 (92) 1892 Pun Re No. 125, page 420.
 (14) AIR 1914 Mad 143 (143). (Order of District Court—Appeal lay to High Court—No revision lies.)

- (12) 15 Ind Cas 34 (34) (All). (Appealable order of District Judge.)
 (06) 9 Oudh Cas 354 (356). (Order of Subordinate Judge appealable to High Court.)
 (87) 1887 Pun Re No. 36, page 76. (Order of District Judge appealable to High Court.)
 (91) 14 Mad 462 (464). (Order appealable to High Court.)
 (27) AIR 1927 Cal 844 (844) : 54 Cal 716. (Order of Sub-Judge appealable to High Court under O. 43 R. 1.)
 (15) AIR 1915 All 171 (171).
 (25) AIR 1925 Oudh 70 (71). (Appellate order itself appealable to High Court.)
 (90) 3 C P L R 166 (167). (Do.)
 (85) 7 All 681 (687). (Order of Sub-Judge under Section 372 of the old Code appealable to High Court.)
 (35) AIR 1935 Pat 121 (121). (Order dismissing appeal as abated—No revision as second appeal lies.)
 4. (86) 8 All 109 (111). (Order dismissing a suit for failure to furnish security for costs is a decree and so appealable.)
 (33) AIR 1933 Bom 185 (186). (Decision under Sec. 47, Civil Procedure Code—Remedy of appeal open.)
 (12) 19 Ind Cas 736 (736) (All). (Suit for declaration dismissed on the ground that it is not maintainable.)
 (17) AIR 1917 Mad 285 (286). (Order declaring a suit to have abated being a decree is appealable.)
 (25) AIR 1925 Mad 886 (887). (Final decree—Appeal for mesne profits in a partition suit.)
 (31) AIR 1931 Mad 471 (474) : 54 Mad 337.
 (11) 12 Ind Cas 608 (604) : 84 All 123. (When case is decided under O. 17 R. 3.)
 (12) 14 Ind Cas 119 (120) (All). (Do.)
 (12) 17 Ind Cas 836 (837) (All). (Do.)
 (18) AIR 1918 Mad 143 (146, 147) : 41 Mad 286. (292) (F B). (Do.)
 (23) AIR 1923 Pat 223 (223). (Do.)
 (20) AIR 1920 Oudh 41 (42). (The intervenor in a rent suit under Sec. 138, Oudh Rent Act, cannot question the order of the Rent Court.)
 (85) 7 All 42 (43, 44). (Order rejecting memorandum of appeal as time-barred is a decree.)
 (81) 1881 All W N 51 (51).
 (86) 8 All 191 (194).
 (99) 1899 Pun Re No. 5, page 23.
 (14) AIR 1914 Lab 153 (154) : 1914 Pun Re No. 80.
 (25) AIR 1925 Lab 191 (192).
 (25) AIR 1925 Rang 199 (199).
 (82) 1882 All W N 53 (53).
 (82) 1882 All W N 55 (55).
 (83) 1883 Pun Re No. 114.

Court from the decision it *can* interfere in revision⁵ and the mere fact that the decision is appealable to a Court *other* than the High Court or that it has been appealed against, is no bar to the exercise of the power under Section 115,⁶ though it will be a matter for the High Court to consider whether it will exercise its *discretion* in favour of interferences where another remedy open to a party is not pursued by him. See Note 8 below.

8. Other remedy open.—It has been seen already in Note 3 *ante* that in cases in which Section 115 applies the High Court has a *discretion* to interfere or not according to the circumstances of the case. The general rule, however, is, that the special and extraordinary powers under this Section will not be exercised in favour of interference where the applicant has *another remedy* open to him which he has not pursued.⁷

ferred in revision, as there is remedy by way of appeal against decree.) ('33) AIR 1933 Nag 221 (221) : 30 Nag L R 183. (Determination of jurisdiction—Remedy held to be under O. 46 R. 7.) ('33) AIR 1933 Pat 158 (158, 159). ('33) AIR 1933 Pat 625 (625). (Dismissal of appeal for non-appearance—Since remedy is by way of application for restoration revision does not lie.) ('33) AIR 1933 Rang 259 (260). ('33) AIR 1933 Sind 329 (330) : 27 Sind L R 190. ('88) 10 All 119 (122, 123). ('22) AIR 1922 Pat 315 (316) : 1 Pat 68. ('29) AIR 1929 Nag 66 (67). ('28) 113 Ind Gas 409 (410) (Mad). ('81) 1881 Pun Re No. 13, p. 22. (Appeal dismissed for default—No steps to have it restored—No interference.) ('29) 118 Ind Gas 198 (193) (Sind). (Order return-ing plaint—It may be presented in proper Court.) ('28) 108 Ind Gas 804 (805) (Pat). ('23) AIR 1923 Bom 395 (395). (Review.) ('31) AIR 1931 Bom 284 (285) : 55 Bom 411. (In Act where the revisional powers of the District Judges suffice.) ('14) AIR 1914 Bom 245 (245) : 39 Bom 165. (Do.) ('31) 134 Ind Gas 160 (160) (Pat). ('22) AIR 1922 Sind 1 (3) : 15 Sind L R 165. ('08) 4 Mad L Tm 325 (326). (By an application under S. 38 of the Presidency Small Cause Courts Act.) ('89) 11 All 383 (384). ('93) 15 All 405 (407). ('16) AIR 1916 Mad 1014 (1015) : 38 Mad 15. ('22) AIR 1922 Mad 3 (4). ('36) AIR 1936 Tab 761 (762). (Notice for attachment of salary of Government servant—Object-ion raised by Secretary of State—Court holding salary to be attachable—No appeal filed by the Secretary of State—Revision is not competent.) ('36) AIR 1936 Tab 521 (523). (Custody Court deciding question of priority under O. 21 R. 52—Aggrieved party has remedy by suit.) ('35) AIR 1935 Tab 934 (934). ('35) AIR 1935 Pat 385 (390) : 14 Pat 488. ('36) AIR 1936 Cal 812 (812). (Order rejecting application for restitution under S. 144 on ground of limitation amounts to decree and is appealable—High Court cannot interfere under Section 115.)

(Order striking off the name of a party.) ('32) AIR 1932 Bom 511 (513). ('32) AIR 1932 Pat 319 (321). (Interlocutory order demanding additional court-fee will not be inter-fered.)

Note 8

appeal lies to District Judge.) by Sub-judge—High Court can interfere though ('35) AIR 1935 Pat 86 (88). (Order rejecting plaint ('36) AIR 1936 Cal 786 (787). ('38) AIR 1938 All 6 (6) : 1 L R (1938) All 22. order was disposed of.) granting review even after an appeal against the High Court interfered with an order of a Munsif ('34) AIR 1934 All 250 (251). (In this case No. 77.] ('09) 3 Ind Gas 607 (608) : 1909 Pun Re [See ('09) 3 Ind Gas 607 (608) : 1909 Pun Re lies as it is not appealable.) (Conditional decree in pre-emption suit—Subse-quent order dismissing suit for default—Revision ('39) AIR 1939 Tab 376 (378). (1 Pun L R 381 (383). ('15) AIR 1915 Bom 269 (271) : 40 Bom 86. ('97) 1 Cal W N 626 (631). ('25) AIR 1925 Cal 1237 (1237). ('09) 3 Ind Gas 724 (724) (Mad). ('20) AIR 1920 Tab 290 (290, 291). ed to be "final" by Sec. 104 (2). will lie even though the appellate order is declar-atory.) ('02) 1902 Pun Re No. 72, page 261. (Revision ('17) AIR 1917 All 397 (397). ('29) AIR 1929 Mad 84 (84). Subordinate Judge on the Small Cause Side.) ('16) AIR 1916 Mad 1088 (1089). (Decision of ('16) AIR 1916 Mad 809 (810). ('01) 1901 Pun Re No. 48, page 157. ('82) 8 Cal 887 (841). ('83) 5 All 42 (43). ('93) 16 Mad 20 (22). (Decree under Sec. 47.) ('25) AIR 1925 Pat 16 (17) : 3 Pat 344. bond. See however 15 All 183.) rejecting an application for forfeiture of security ('17) AIR 1917 Upp Bur 16 (17) : 11 Upp Bur ('29) AIR 1929 Pat 141 (144) : 8 Pat 717. money.) Act, extending time for payment of mortgage ('92) 14 All 520 (521). (Order under S. 87, T. P. ('02) 5 Oudh Gas 377 (378, 379). (Do.) ('09) 3 Low Bur Rui 181 (132). (Order under Sec- tion 47, Civil Procedure Code.)

Thus, where the applicant could have *appealed* against the decision complained against and has not done so, a revision will not ordinarily be entertained.² Similarly, where an interlocutory order can be questioned in an appeal against the final decree in the suit under Section 105 of the Code, the High Court will not ordinarily interfere in revision.³ Similarly, where the aggrieved party could bring a *separate suit* to challenge the order sought to be revised, the High Court will not, as a rule, interfere in revision.⁴ Thus, an order under Section 73 of the

- (1935) AIR 1935 Cal 157 (157). (Dismissal of suit under O. 7 R. 11 (b) and (c)—Appeal and second appeal competent—Revision from Appellate Court's order does not lie.)
- (1938) AIR 1938 Mad 217 (218). (Where a decree is passed after declaring certain persons as ex parte the proper procedure for those persons is to have preferred an appeal against the decree and not to come by way of revision under S. 115 against the order declaring them ex parte.)
- (1936) AIR 1936 Pat 190 (191). (Order directing court-fees to be paid under S. 7 (iv) (c), Court-fees Act—Remedy by way of appeal open to plaintiff—No likelihood of irreparable loss if order is not set aside—High Court will not interfere.)
- (1934) AIR 1934 Rang 248 (248). (Petitioner must satisfy the Court that he has no other remedy open.)
- (1936) AIR 1936 Rang 12 (14). (He must satisfy the Court that he has no other remedy open to him to set right what he alleges to have been done illegally, irregularly or without jurisdiction by a Subordinate Court.)
- (1939) 41 Pun L R 102 (104). (No revision lies against an order dismissing a suit under O. 9 R. 8, Civil P. C., as another remedy is open to the plaintiff by way of an application for restoration of the suit with an appeal against the order, if that application is dismissed.)
- (1935) AIR 1935 Mad 196 (198). (No other remedy open except revision—Revision entered—[See also (1937) AIR 1937 Mad 948 (950). (Application under S. 32, Land Acquisition Act, for investment of money in purchase of lands—Dismissal—Applications for review and for opportunity to adduce fresh evidence—Refutation—Revision against latter orders not competent as the proper procedure was to have the order dismissing the petition corrected.)]
2. (18) AIR 1918 Nag 51 (51). (A decision under S. 47, C. P. C., which is appealable as a decree) (1938) AIR 1938 Mad 217 (218). (Order granting review.)
- (1934) AIR 1934 Pat 281 (282). (Order under S. 47 which is appealable as a decree.)
- (1933) AIR 1933 Rang 64 (67) : 11 Rang 134. (1934) AIR 1934 Rang 188 (189).
- (1935) AIR 1935 Pat 121 (121) : 148 Ind Cas 333 (338). (Dismissal in effect of appeal for abatement—No revision as there is remedy by appeal.)
- (1926) 91 Ind Cas 334 (334) (Oudh). (Order under O. 47 R. 1.)
- (1933) 12 Cal L Rep 449 (450). (An order setting aside an ex parte decree is appealable under S. 588, Civil P. C. of 1882.)
- (1928) AIR 1928 Mad 124 (124).
- (1929) AIR 1929 Mad 489 (489).
- (1916) AIR 1916 Mad 1014 (1015) : 38 Mad 15. (1913) 19 Ind Cas 450 (450) : 6 Sind L R 166. (1939) AIR 1939 Pat 570 (571) : 1939 Pat N 580. (582) : 18 Pat 694. (Order under S. 47, C. P. C., not appealed against—No revision.)
- (1935) AIR 1935 Pat 121 (121). (Dismissal of appeal as abated—No revision as second appeal lies.)
- (1935) AIR 1935 Pat 186 (188). (Order deciding the amount of court-fees payable by plaintiff.)
- (1937) 18 Pat L T 374 (376). (Order refusing to set aside ex parte decree—No revision as order is appealable.)
- (1935) 18 Nag L Jour 72 (75) : 158 Ind Cas 998 (999). (Party not appealing from final decree.)
- (1935) AIR 1935 All 873 (875). (Order under S. 144, Civil P. C., which is subject to appeal.)
- (1934) AIR 1934 Rang 188 (189).
- (1937) AIR 1937 All 691 (693, 694). (Order refusing to set aside ex parte decree—No revision lies as ex parte decree is appealable.)
3. (1938) 7 Bom 841 (872).
- (1938) AIR 1938 Oudh 381 (333). (Order under O. 9 R. 9 restoring suit.)
- (1938) AIR 1938 Rang 263 (264). (Issues in a suit decided separately—No revision will be entertained against interlocutory decision on each issue as there is remedy of appeal against the first decree.)
- (1932) AIR 1932 Bom 81 (83).
- (1939) 11 All 383 (385). (Order granting review.)
- (1935) AIR 1935 Pat 90 (91).
- [See also (1932) AIR 1932 Cal 881 (832).]
4. (1938) 10 All 119 (122).
- (1935) 7 All 407 (410). (Suit.)
- (1936) 6 Bom H C R AC 174 (176).
- (1906) 31 Bom 138 (140).
- (1909) 3 Ind Cas 780 (782) (Bom).
- (1920) AIR 1920 Bom 67 (67) : 44 Bom 595. (1910) 14 Suth W R 212 (213).
- (1911) 15 Suth W R 170 (170).
- (1917) 3 Cal 243 (248).
- (1938) 1898 Pun Re No. 21, p. 58. (1901) 1901 Pun Re No. 15, p. 52. (1903) 1903 Pun Re No. 8, p. 28. (Action against surety—Separate suit will lie.)
- (1916) AIR 1916 Lab 201 (202) : 1915 Pun Re No. 99. (Suit to set aside a decree by minors on coming of age as being contrary to law.)
- (1915) AIR 1915 Lab 105 (105) : 1915 Pun Re No. 66. (Suit to enforce an arbitration award.)
- (1924) AIR 1924 Lab 471 (473).

Code⁵ or under O. 21 Rules 58, 60, 61 or 62⁶ or under O. 21 Rules 98, 99 or 101⁷ or a decision under Section 9 of the Specific Relief Act, 1877,⁸ or a decision of a Mamladar in Bombay⁹ can be challenged by a separate suit, and will not, therefore, be interfered

- (29) AIR 1929 Lah 777 (777). (When a suit was decreed against the surety and dismissed against the principal debtor because he was not served.) (24) AIR 1924 Mad 119 (123) : 47 Mad 250. (25) AIR 1925 Nag 31 (31). (Where a suit was dismissed for default under O. 9 R. 3 a fresh suit lies under O. 9 R. 4.) (24) AIR 1924 Pat 184 (135). (Order of Collector in mutation proceedings can be challenged in separate suit.) (29) AIR 1929 Nag 317 (318). (Order under S. 209, Succession Act, is a summary one and could be set aside by a suit.) (95) 20 Bom 680 (632). (36) AIR 1936 Pat 167 (169). (Party losing on reference under S. 55, Bengal Land Registration Act, entitled to bring suit under S. 59 of the Act—High Court will not interfere in revision.) [See also (08) 18 Mad 149 (567). (Remedy by application under S. 38, Small Cause Courts Act.)] 5. (05) 2 All 370 (371). (33) AIR 1938 Sind 229 (231) : 27 Sind L R 261. (38) AIR 1938 Sind 329 (330) : 27 Sind L R 190. (97) 1 Cal W N 638 (636). (06) 1906 Pun Re No. 128, p. 481. (05) 1905 Pun Re No. 65, p. 218. (05) 1905 Pun Re No. 82, p. 256. (12) 17 Ind Cas 254 (254) (Lah). (32) AIR 1932 Lah 96 (97). (86) 9 Mad 508 (510). (94) 4 Mad L Jour 87 (88). (The mere fact of the decision being erroneous would not justify its revision.) (12) 17 Ind Cas 389 (389) (Mad). (15) AIR 1915 Mad 547 (548). (27) AIR 1927 Mad 1030 (1030). (25) AIR 1925 Oudh 666 (666). (35) AIR 1935 Lah 971 (971). (36) AIR 1936 Pesh 52 (53). (36) AIR 1936 Oudh 185 (187) : 12 Luck 52. (36) AIR 1936 Oudh 132 (133) : 12 Luck 19. (35) AIR 1935 Mad 399 (400). (Unless the case is perfectly clear.) 6. (26) 98 Ind Cas 868 (869) (Lah). (38) AIR 1938 Lah 317 (318) : 14 Lah 51. (34) AIR 1934 Rang 230 (230). (17) AIR 1917 All 177 (178). (21) 64 Ind Cas 469 (469) (All). (73) 20 South W R 202 (202). (19) AIR 1919 Cal 857 (858). (26) AIR 1926 Cal 1149 (1151) : 53 Cal 767. (97) 1897 Pun Re No. 8, p. 35. (18) AIR 1918 Mad 914 (915). (Suit under Order 21 Rule 63.) (30) AIR 1930 Pat 394 (395). (07) 1 Sind L R 226 (226, 227). (38) 10 All 119 (122). (93) 15 All 405 (407). (17) AIR 1917 All 177 (178).
- (85) 8 Mad 484 (493). (86) 9 Mad 130 (133). (13) 21 Ind Cas 461 (462) (Mad). (29) AIR 1929 Nag 66 (67). (23) AIR 1923 Oudh 208 (208). (18) AIR 1918 Upp Bur 45 (46) : 3 Upp Bur Rule 13. (Error consists in misappreciation of evidence or misconstruction of the law.) (29) AIR 1929 Rang 297 (298) : 7 Rang 466. (34) AIR 1934 Rang 230 (231). (38) AIR 1938 Rang 319 (320). (Dismissal of objections to attachment under O. 21 R. 58—Party has remedy of suit.) (36) AIR 1936 Rang 306 (306) : 14 Rang 516. (Unless it can be shown that the Judge passing the order has in passing it failed to exercise jurisdiction vested in him by O. 21 R. 58 to 62. Where the Court has so failed to exercise its jurisdiction its order is open to revision.) (36) 163 Ind Cas 812 (813) (Cal). (36) AIR 1936 Sind 2 (3) : 30 Sind L R 288. (Order under Order 21 Rule 58.) [See also Note 23. (Under however (04) 28 Bom 458 (460). (Under the peculiar circumstances of the case High Court has interfered.)] 7. (84) 6 All 172 (173). (Reasoning not clear.) (33) AIR 1933 Pat 604 (605). (30) AIR 1930 Cal 848 (848). (11) 10 Ind Cas 188 (186) (Lah). (12) 14 Ind Cas 282 (283) (Mad). (15) AIR 1915 Mad 744 (744). (09) 2 Ind Cas 284 (284) : 12 Oudh Cas 109. (36) AIR 1936 Mad 940 (940). (Order on application under O. 21 R. 100—Though revision lies High Court will not interfere unless there are cogent reasons for interference and petitioner will suffer hardship if driven to suit—Normal remedy is by way of suit.) 8. (08) 80 All 331 (333). (32) AIR 1932 Oudh 39 (40). (Applications in revision are not in definite terms barred by the Section but they are not to be lightly entertained.) (11) 11 Ind Cas 814 (814) : 38 All 647. (34) AIR 1934 All 541 (542). (31) AIR 1931 All 205 (206) : 53 All 414. (88) 12 Bom 221 (225). (16) AIR 1916 Cal 621 (622). (14) AIR 1914 Mad 382 (384). (26) AIR 1926 Mad 18 (18). (18) AIR 1918 Nag 105 (106). (24) AIR 1924 Nag 38 (39). (26) AIR 1926 Nag 290 (291) : 22 Nag L R 30. (21) 63 Ind Cas 809 (809) (All). (10) 8 Ind Cas 215 (216) : 4 Sind L R 80. (37) AIR 1937 Oudh 183 (184) : 13 Luck 18. 9. (85) 9 Bom 97 (100). (94) 18 Bom 449 (452). (97) 21 Bom 731 (733).

with in revision as a general rule. But the rule as to non-interference stated above is not an inflexible one and will depend upon the special circumstances of each case.¹⁰ Thus the High Courts have interfered in the following cases:—

- (1) Where it is not clear whether another remedy is available to the applicant.¹¹
 (2) Where the other remedy is barred.¹²

10. (29) AIR 1929 Nag 366 (367).
 (31) AIR 1931 Bom 313 (317) : 58 Bom 623.
 (31) AIR 1931 Lah 119 (119). (Where the lower Court had committed obvious mistakes.)
 (33) AIR 1933 Pat 158 (159). (Order on a claim petition without considering evidence is a fit case for revision.)
 (33) AIR 1933 Pesh 52 (52). (Order under S. 73 of the Code.)
 (33) AIR 1933 Rang 61 (68) : 11 Rang 131.
 (31) AIR 1931 Cal 385 (386) : 58 Cal 55. (Where the onus of proof was misapplied leading to an erroneous conclusion, interference was made.)
 (10) 8 Ind Cas 876 (877) : 13 Oudh Cas 311. (The date of hearing on which the suit was dismissed was fixed by chief ministerial officer in the Judge's absence.)
 (08) 35 Cal 120 (131).
 (27) AIR 1927 Cal 578 (578).
 (27) AIR 1927 Cal 310 (311).
 (11) AIR 1914 All 231 (235). (When the Court summarily rejected the application under O. 21 R. 100 the High Court will interfere.)
 (06) 28 All 72 (74).
 (83) 7 Bom 341 (372) (P B).
 (1900) 4 Cal N 695 (698).
 (26) AIR 1926 Lah 612 (612). (When after close of arguments behind the back of the oppositeside, Court allowed defendants to examine witnesses.)
 (27) AIR 1927 Lah 911 (912). (Where all defendants except one were served out but the plaintiff deified in process, to a particular defendant, and the suit was dismissed as against all.)
 (25) AIR 1925 Nag 17 (18). (Where a lessee of the property deposited the decree amount under O. 21 R. 89 but did not disclose his interest, it is wrong to dismiss the petition on that ground.)
 (27) AIR 1927 Mad 799 (799). (But it would require very strong grounds to induce the Court to interfere.)
 (26) AIR 1926 Mad 179 (181). (When a petition under S. 73 was dismissed on the ground that the petitioner's application in execution did not end successfully.)
 (30) AIR 1930 Bom 875 (378) : 54 Bom 479. (When District Judge entertained an appeal against an order made by the Sub-Judge under O. 21 R. 98.)
 (18) AIR 1918 Cal 252 (252). (Where a suit for possession under the Specific Relief Act was dismissed for want of title.)
 (10) 8 Ind Cas 618 (614) (Low Bur). (Court in a petition under O. 21 R. 101, 102 adjudicating a question of title.)
 (31) AIR 1931 Lah 666 (666).

(31) 1831 Bom F J 133 (135). (Patently wrong order on an application by a purchaser at an execution sale for possession.)
 (28) AIR 1923 All 598 (539) : 51 All 398. (19 Ind Cas 736, Dissented from.)
 (22) AIR 1922 Nag 115 (115) : 18 Nag L R 71. (Where the decree of the Court below is manifestly wrong.)
 (31) AIR 1931 All 663 (669) : 53 All 532. (Decree entirely without jurisdiction.)
 (96) 21 Bom 777 (778, 779). (Mamlatdar's decision without jurisdiction.)
 (36) AIR 1936 Mad 91 (93) : 59 Mad 303. (Misapprehension of Section of Code—Refusal to exercise jurisdiction—Interference proper though other remedy by suit open.)
 (37) AIR 1937 Nag 30 (31) : 1 L R (1937) Nag 82. (Where the order of lower Court is obviously wrong, it is open to the High Court to interfere in revision if litigation will thereby be shortened.)
 (38) AIR 1938 Cal 577 (578). (Order under O. 21 R. 100—Separate suit though maintainable revision cannot be said to be mala fide.)
 (36) AIR 1936 Lah 560 (561).
 (35) AIR 1935 Rang 395 (396). (Plaintiff attaching property which defendant alleged to be wakf property—Court holding wakf illusory—Attachment order continued—Revision is competent though there is remedy by suit.)
 (31) AIR 1931 Bom 343 (347) : 58 Bom 623. (Where the action of the Court clearly amounts to material irregularity, the fact that there may be other remedies open is not in itself sufficient reason for refusing to exercise the powers vested in the High Court under Section 115.)
 (35) AIR 1935 Cal 279 (280) : 62 Cal 417. (Order demanding additional court-fee—Fact that plaintiff would have a right of appeal after plaint has been rejected is no bar to revision.)
 (38) AIR 1938 All 635 (636). (Only appeal is prohibited from decree in suit under Sec. 9 of Specific Relief Act.)
 (31) AIR 1931 Mad 669 (669) : 151 Ind Cas 765 (765).
 (25) AIR 1925 Nag 296 (298).
 (31) AIR 1931 Mad 558 (559).
 (96) 18 All 168 (168).
 (32) AIR 1932 Lah 176 (176). (Other remedy doubtful.)
 (28) AIR 1928 Mad 663 (664).
 (21) AIR 1921 Nag 9 (10). (Other remedy doubtful.)
 (21) AIR 1921 Nag 17 (18). (No other way to obtain possession, so interfered.)
 (38) AIR 1938 Rang 360 (362).
 (34) AIR 1934 Pat 50 (52).
 (24) AIR 1924 Nag 298 (299).

(3) Where non-interference will lead to multiplicity of proceedings and unnecessary expense and delay.¹³

(4) Where the other remedy is inconvenient or not expeditious and would involve so much expense as to practically amount to no remedy at all.¹⁴

(5) Where grave injustice or a defeat of the provisions of law is likely to result from non-interference.¹⁵

The powers of the High Court under Section 115 should, however, be liberally utilised where the applicant has no other remedy,¹⁶ though even in such cases the High Court may, in its discretion, refuse to interfere.¹⁷

9. Jurisdiction.—The word 'jurisdiction' has been used in this Section in its broad legal sense as meaning the power of administering justice according to the means which the law provided and subject to the limitations imposed by that law upon the judicial authority; such limitations may be territorial or pecuniary or they may relate to the nature of the litigation or the domicile or nationality of the parties or the class or rank to which the tribunal belongs.¹ Section 115 contemplates three cases in which the revisional powers of the High Court may be exercised—

- (1) the *assumption* by the lower Court of a jurisdiction which it does not possess,
- (2) its *failure* to exercise a jurisdiction which it does possess, and
- (3) where there is exercise of jurisdiction which the Court possesses but the exercise has been in a manner which is illegal or materially irregular.²

13. (99) 32 Mad 334 (386).
- (92) AIR 1932 Lah 176 (177).
- (93) AIR 1933 Lah 48 (49) : 14 Lah 243. (Order under Section 73 of the Code.)
- (93) AIR 1938 Rang 259 (260).
- (81) AIR 1931 Mad 1 (5). (Order of remand allowing amendment of a barred claim.)
- (28) AIR 1928 Rang 83 (84) : 5 Rang 742.
- (18) AIR 1918 All 405 (405) : 40 All 216. (When petitioners were clearly entitled to possession by virtue of a sale from the auction-purchaser.)
- (84) 6 All 125 (128, 129). (A person was held entitled for mesne profits by an order under this Section, though he might recover in a separate suit.)
- (27) AIR 1927 Cal 156 (157) : 53 Cal 918. (When applicants were clearly entitled to possession, and the Court dismissed the application under O. 21 R. 100 on an erroneous view of the law.)
- (29) AIR 1929 Lah 175 (176). (Order unnecessarily remanding a case for trial on an issue of jurisdiction on a misappreciation of law and facts.)
- (81) AIR 1931 Lah 302 (302). (Order of remand passed in appeal under S. 151, C. P. C., appeared to have been passed without jurisdiction.)
- (32) AIR 1932 Lah 176 (177).
- (19) AIR 1919 Pat 425 (430) : 4 Pat L. Jour 94 (PB).
- (39) AIR 1939 Lah 52 (53).
- [See also (96) AIR 1936 Pat 160 (161). (Improper order of remand can be interfered with in revision.)]
14. (05) 2 All L. Jour 370 (371).
- (25) AIR 1925 All 610 (612) : 48 All 175 (PB).
- (38) AIR 1938 All 374 (376) : 55 All 256.
- (03) 1903 Pun Re No. 76, p. 318.
15. (31) AIR 1931 All 632 (634) : 54 All 183 (PB).
- (33) AIR 1933 All 86 (87, 88).]
- (Nussalman Wakt Act, 1928.)
- (32) AIR 1932 Oudh 210 (213) : 7 Luck 601 (PB).
- (16) AIR 1916 Pat 75 (75, 76) : 1 Pat L. Jour 465.
- (21) AIR 1921 Upp Bur 27 (29) : 4 Upp Bur Bul 16.
- (85) 7 All 345 (351).
2. (85) 7 All 345 (351).
- means jurisdiction of the Court and not the competence of a party to sue.]]
- (36) AIR 1936 Lah 783 (784). (Jurisdiction)
- (14) AIR 1914 Cal 388 (390, 391) : 41 Cal 323.
- (85) 7 All 345 (350).
1. (85) 7 All 345 (350).
- Note 9
- (11) 11 Ind Cas 231 (232) : 1911 Pun Re No. 96.
- (14) AIR 1914 Lah 179 (179).
- (19) AIR 1919 Pat 203 (204) : 1919 Pun Re No. 169.
- (09) 4 Ind Cas 20 (21) (Cal).
- [See also (15) AIR 1915 Bom 269 (270) : 40 Bom 86.]
- (24) AIR 1924 Sind 49 (51). (Refusal to order a stay of suit when the matters were referred to an arbitration was considered an illegal exercise of jurisdiction.)
- (21) AIR 1921 Sind 80 (80) : 15 Sind L. R. 185.
- (22) AIR 1922 Lah 68 (64).
- (39) AIR 1939 Sind 137 (141) : 1 L. R. (1939) Kan 380. (The High Court will interfere if a defect of law and a grave wrong are manifest, for the High Court will not permit a case to proceed on jurisdiction snatched and having no basis or justification.)
- (21) AIR 1921 Sind 80 (80) : 15 Sind L. R. 185.
- (24) AIR 1924 Sind 49 (51). (Refusal to order a stay of suit when the matters were referred to an arbitration was considered an illegal exercise of jurisdiction.)
- (09) 4 Ind Cas 20 (21) (Cal).
- (19) AIR 1919 Pat 203 (204) : 1919 Pun Re No. 169.
- (14) AIR 1914 Lah 179 (179).
- (11) 11 Ind Cas 231 (232) : 1911 Pun Re No. 96.

jurisdiction to decide a matter, thinks erroneously under a misapprehension of the law or of the facts that it has no such jurisdiction, and declines to exercise the same, there is a failure to "exercise the jurisdiction vested in it" and the High Court can

- late Court rejects a memorandum of appeal on the ground that it is out of time before registering the appeal, the Appellate Court assumes a jurisdiction which it does not possess, as the Civil Procedure Code does not authorize the Appellate Court to pass such order at that stage.) ('87) AIR 1937 Rang 449 (449). (Property of judgment-debtor sold—Order for delivery of possession made and possession delivered without obstruction—Subsequent obstruction by judgment-debtor—Court issuing fresh order of delivery of possession—No fresh order *held* could be issued—Court acted without jurisdiction and order could be set aside in revision.) ('35) AIR 1935 All 398 (402). (Order of dismissal on merits, duly embodied in decree—Same judge has no jurisdiction four months later to recall the order for merely arbitrary reasons—*Held*, High Court can interfere in revision and set aside order.) ('36) AIR 1936 Pesh 176 (178). (Appellate Court reversing finding of fact arrived at in another suit.) ('35) 18 Nag L Jour 123 (125). (Where a regular Court entertains a suit of small cause nature which it has no jurisdiction to entertain or try and tries it to the exclusion of the Small Cause Court.) ('38) AIR 1938 Pesh 81 (82). (Order under S. 151 is not appealable—Order passed on appeal is without jurisdiction and open to revision.) ('36) AIR 1936 Cal 420 (420). (District Judge having no jurisdiction to appoint receiver in proceedings under Ss. 9 and 10, Mussalman Wakf Validating Act, appointing receiver under misapprehension of scope of Act—Order is liable to be set aside in revision.) ('37) AIR 1937 All 207 (208). (Loan providing for compound interest—Court altering it into simple interest—*Held*, Court had no jurisdiction to do so and hence revision could lie.) ('37) AIR 1937 Pat 104 (105). (Lower Court setting aside sale on a misunderstanding of law.) ('37) AIR 1937 Pat 647 (651) : 16 Pat 729. (Court passing an order under S. 151, C. P. C., without jurisdiction.) ('37) AIR 1937 Pat 477 (479). (Suit filed in Civil Court by witnesses in criminal case for recovery of additional expenses—Suit not vexatious but only misconceived—S. 35 A, C. P. C., has no application—Order for special damages against such witness is without jurisdiction and can be set aside in revision.) [See also ('11) 10 Ind Cas 299 (300) (Lab) (Rev).] ('31) AIR 1931 Cal 673 (675). (Where a decree is obtained not against the proper person who represents the estate and the estate is sought to be sold in execution of such a decree the decree is liable to be set aside in revision for want of jurisdiction.)] (Where the Appel-
- (88) 1888 Pun Re No. 95, p. 253. (Order without necessary sanction required by the Punjab Government Rules.) ('24) AIR 1924 Mad 713 (715). (Setting aside abatement after limitation.) ('12) 14 Ind Gas 711 (712) (Oudh). (Limitation question, as to how far a question of jurisdiction.) ('26) AIR 1926 Nag 388 (389). ('25) AIR 1925 Oudh 402 (403). (Application for correction in the bond dismissed without considering merits.) ('14) AIR 1914 Mad 301 (303). ('28) AIR 1928 Mad 1077 (1082). (Court admitting evidence as to qualification of voter and how he voted.) ('05) 7 Bom L R 288 (289). ('16) AIR 1916 Pat 306 (307). ('86) 1886 Pun Re No. 70, p. 152. (Giving a decree after holding that plaintiff has no cause of action.) ('17) AIR 1917 P C 71 (74) : 40 Mad 793 : 44 Ind App 261 (PC). ('39) AIR 1939 Sind 187 (142) : 1 L R (1939) Kar 330. (Judge setting aside order passed by his predecessor and thus usurping appellate jurisdiction which he does not possess—High Court can set aside order in revision.) ('37) AIR 1937 Nag 384 (385). (Where the lower Court itself has to determine whether it has jurisdiction or not to try the case, and it exercises its discretion wrongly and proceeds to try the case the High Court has power to interfere in revision.) ('37) AIR 1937 Lab 63 (64). (Order for execution of award which (award) was a nullity.) ('35) AIR 1935 Pesh 157 (157). (Right of way granted by Court—No finding as to its existence in past nor right claimed as easement of necessity—Court acts without jurisdiction.) ('38) AIR 1938 Oudh 107 (109) : 14 Luck 13. (Order under S. 5, U. P. Agriculturists' Relief Act passed by Court exercising jurisdiction not vested in it by law—Revision lies.) ('38) AIR 1938 Bom 159 (160) : ILR (1938) Bom 259. (The High Court under S. 115 has jurisdiction to interfere with an order passed by the Collector under S. 28 (2) of the Alamlatdar's Courts Act, setting aside in appeal the order of findings of fact—The Collector in setting aside the order of the Alamlatdar exercises a jurisdiction not vested in him.) ('39) AIR 1939 Bom 279 (282, 283) : 41 Bom L R 490 (496). (Where the lower Court threatens to invade vested rights of the subject by assuming jurisdiction which it does not possess and it is about to resort to the use of the machinery at its disposal, the High Court as a superior Court will show a strong leaning against construing the powers under S. 115 so as to oust or restrict its jurisdiction.) ('37) AIR 1937 Cal 732 (735). (Where the Appel-

interfere in revision.¹ Where, however, the Court rightly assumes jurisdiction but decides against the rights of a party under an error of law, there is no failure to exercise jurisdiction but only an erroneous conclusion arrived at in the exercise of it.² In the

As to whether under Section 38 of the Presidency Small Cause Courts Act, a Full Bench has jurisdiction to go into questions of fact, see the following cases :

- (17) AIR 1917 Mad 135 (139) : 40 Mad 355 (PB).
 (17) AIR 1917 Mad 455 (457).
 (11) 12 Ind Cas 11 (12) : 38 Cal 425 (No).
 (17) AIR 1917 Bom 53 (51) : 42 Bom 80.
 (97) 24 Cal 455 (460).
 (14) 22 Ind Cas 92 (33) (Cal).
 As to the powers of the High Court to interfere with a decision given by Small Cause Court in a Presidency town, see the following cases :

- (16) AIR 1916 Mad 671 (572).
 (11) 10 Ind Cas 551 (551) (Mad).
 (97) 20 Mad 358 (360).
 (03) 30 Cal 558 (591).
 (05) 31 Mad 490 (492).
 (10) 8 Ind Cas 160 (160) (Mad).
Note 11

1. (93) 20 Cal 8 (11) (P.C).
 (81) AIR 1931 All 332 (332). (Refusal to exercise jurisdiction by erroneous order staying suit.)

- (25) AIR 1925 All 267 (270) : 47 All 140. (Refusal to exercise—Appellate Court concurring—Revision lies against orders of both Courts.)
 (93) AIR 1933 All 374 (376) : 55 All 256. (Refusal to allow amendment.)

- (84) AIR 1934 All 260 (264) : 56 All 656 (PB).
 (District Judge declining to exercise jurisdiction in reference by Collector under Land Acquisition Act, Section 18.)
 (94) AIR 1934 Bom 252 (253) : 53 Bom 485.

- (11) 12 Ind Cas 75 (75) (Mad).
 (23) AIR 1923 Mad 230 (232). (Refusal to release property from attachment on a wrong construction of S. 64 and O. 21 R. 2, C. P. C.)
 (23) AIR 1923 Mad 435 (436) : 46 Mad 938.
 (06) 8 Bom L R 567 (569). (Failing to set aside ex parte decree on an erroneous view of limitation.)

- (30) 34 Cal W N 733 (735).
 (86) 9 Mad 375 (376). (Erroneous construction of the Legal Practitioners' Act.)
 (02) 12 Mad L Jour 473 (475).
 (33) AIR 1935 All 455 (456). (Court having jurisdiction to decide application for refund of court-fee not doing so—Revision is competent.)

- (39) 43 Cal W N 973 (978). (Order of a District Judge rejecting a reference made under S. 18 of the Land Acquisition Act in the erroneous view that the party at whose instance the reference was made was not entitled to demand a reference, is open to revision under S. 116.)
 (35) AIR 1935 All 810 (821) : 67 All 810.
 (87) AIR 1937 Nag 267 (267) : 1 L R (1937) Nag 159. (Refusal to entertain defence.)
 (37) AIR 1937 Nag 39 (40) : 1 L R (1937) Nag 97.

- (36) 162 Ind Cas 860 (860) (Nag). (Judgment-
 (35) AIR 1935 Pat 201 (202).

debtor alleging that execution was taken out in bad faith—Court refusing to give him opportunity of proving it and refusing to grant compensatory costs—Failure to exercise jurisdiction.)
 (36) AIR 1936 Pesh 38 (39).
 (39) AIR 1939 Mad 196 (199). (Court declining to entertain application due to misapprehension of true effect of statutory rules of Civil Procedure Code—Revision lies.)
 (38) AIR 1938 Mad 555 (556). (Attachment of judgment-debtor's share in tarwad property—Pending attachment registration of tarwad as impartible—Court's order declining to proceed with execution on wrong view of law—Order is liable to revision.)
 (37) AIR 1937 Mad 405 (406). (Application to revoke submission on ground of want of jurisdiction of arbitrator—Refusal of Court to decide question of jurisdiction—Revision lies.)
 (39) AIR 1939 Pat 263 (264).
 (39) AIR 1939 Lah 222 (222). (Objection to sale refused to be entertained by Court owing to erroneous belief that it was not entertainable in view of O. 21 R. 90, proviso—Error of law affects jurisdiction of Court—Revision is competent.)
 (35) AIR 1935 All 353 (357) : 57 All 450. (Suit on promissory note—Plaintiff binding his suit as such may fail, applying for amendment by falling back on original consideration—Amendment held should be allowed—Refusal is disregard of express provision of law. But it was held in AIR 1936 All 656 (PB) that there is no case decided in such cases.)

(38) AIR 1938 Cal 161 (162). (Mistake wrong in not exercising his powers under S. 8 (c), Court-fee (Bengal Amendment) Act.)
 (36) AIR 1936 Cal 275 (276) : 63 Cal 49. (Refusal, under an erroneous construction of the Section to entertain and decide application which the statute directs the Court to decide.)
 (35) AIR 1935 Sind 212 (213) : 29 Sind L R 399. (35) AIR 1935 Pat 86 (88). (Refusal to allow amendment on the assumption that it has no power to amend.)
 (36) AIR 1936 Lab 574 (574). (Court dismissing objection by judgment-debtor and refusing to apply the provisions of the Punjab Relief of Indebtedness Act.)
 (37) AIR 1937 Nag 267 (267) : 165 Ind Cas 926 (297) : 1 L R (1937) Nag 159. (Court refusing to entertain defence.)
 (36) AIR 1936 Mad 91 (93) : 59 Mad 303. (Misapprehension of S. 63, C. P. C.—Refusal to exercise jurisdiction vested by law—Interference is proper though another remedy open.)
 [See also (38) AIR 1938 All 86 (88) : 1 L R (1938) All 153. (Stay of whole suit under S. 7 of U. P. Encumbered Estates Act—Plaintiff disclosing two sets of causes of action—Failure to order separate trial—Revision lies.)]

2. (19) AIR 1919 Pat 501 (502) : 4 Pat L Jour 340.
 (35) AIR 1935 Pat 201 (202).

following cases a Court will be deemed to have failed to exercise a jurisdiction vested in it by law : —

(1) Where it refuses to entertain or it rejects a plaint, application, or memorandum of appeal on the erroneous view that it has *no power* to entertain or deal with it.³ Thus the rejection of an application under O. 21 R. 89, on the ground that the applicant had no *locus standi* to apply, is a failure to exercise jurisdiction.⁴ The

- [See (35) AIR 1935 Mad 117 (117). (But an order refusing permission to a minor defendant on attaining majority to file an additional written statement is not one with which the High Court will interfere in revision, because there is no refusal to exercise a jurisdiction vested in the lower Court which it was bound to exercise.)]
3. (21) AIR 1931 All 269 (269) : 16 All 73. (Refusal to permit execution of decree.)
- (31) AIR 1931 Cal 812 (812) : 61 Cal 903. (Refusal to set aside a sale on a wrong construction of S. 14 A, Bengal Land Regulation.)
- (31) AIR 1931 Lah 41 (45). (Order returning plaint for presentation to another Court—Revision here.)
- (32) AIR 1932 Nag 70 (71) : 28 Nag L R 54. (Rejection of an application under O. 46 R. 7.)
- (31) AIR 1934 Oudh 352 (351) : 3 Luck 734. (Application to amend plaint, judgment and decree eminently just and equitable — Court refusing it—High Court can interfere.)
- (86) 10 Bom 200 (202). (Do.)
- (91) 18 Bom 731 (736). (Do.)
- (95) 19 Bom 514 (516). (Do.)
- (25) AIR 1925 Cal 679 (680). (Do.)
- (10) 5 Ind Cas 742 (743) (Mad). (Do.—Order for payment of expenses to witnesses.)
- (21) AIR 1924 Mad 82 (82). (Do.)
- (92) 16 Bom 550 (551, 552). (Refusal to execute a revised decree.)
- (14) AIR 1914 Cal 910 (912). (Refusal to sell a holding under the Bengal Tenancy Act.)
- (85) 11 Cal 146 (149). (Order restraining the decree-holder from executing his decree merely on the possibility of the lower Court's decision being reversed in appeal.)
- (20) AIR 1920 Mad 282 (283). (Refusal to entertain application.)
- (18) AIR 1918 All 422 (425) : 40 All 674. (Refusal application.)
- (18) AIR 1918 All 422 (425) : 40 All 674. (Refusal to entertain application under O. 21 R. 89 on the ground that applicant was a minor and not properly represented.)
- (31) AIR 1931 All 594 (595). (31) AIR 1931 All 756 (757) : 53 All 959. (Refusal to entertain application under O. 21 R. 89 for want of deposit of poundage fee.)
- (05) 32 Cal 146 (153). (Plaint not received on the ground that as presented, defendant will be put to great inconvenience and trouble.)
- (90) 1890 Pun Re No. 75, page 219. (Suit to recognize the assignment of a decree.)
- (29) AIR 1929 Lah 605 (607). (Wrongly refusing to accept plaint.)
- (30) AIR 1930 Lah 611 (613). (Order returning plaint on ground of want of jurisdiction.)
- (30) AIR 1930 Nag 207 (208) : 26 Nag L R 300. (Memorandum of appeal.)
- (20) AIR 1920 Lah 120 (120). (Do.)
- (25) AIR 1925 Lah 479 (480). (Do.)
- (91) 18 All 320 (323). (Do.)
- (11) 12 Ind Cas 107 (108) (All). (Do.)
- (29) AIR 1929 Lah 125 (125). (Do.)
- (03) 31 Cal 344 (348). (Do.)
- (27) AIR 1927 Lah 134 (135). (Do.)
- (96) 1896 Pun Re No. 54, page 154. (Do.)
- (09) 31 All 610 (612). (Rejection of application for review on the ground of want of jurisdiction.)
- (29) AIR 1929 Cal 513 (518). (Application for review of a decree obtained by fraud.)
- (11) 12 Ind Cas 172 (173) (Mad). (Declining jurisdiction to grant review, because succession certificate was not put in, though application had been made for the same.)
- (96) 20 Bom 281 (283). (Review.)
- (10) 6 Ind Cas 977 (978) : 18 Oudh Cas 109. (Rejection of application to add parties.)
- (02) 5 Oudh Cas 91 (92). (Failure to exercise jurisdiction under Ss. 32 and 372 of the old Code.)
- (94) 21 Cal 539 (541). (Refusal to add party.)
- (16) AIR 1916 Cal 80 (82). (Failure to order transposition of some defendants.)
- (19) AIR 1919 All 189 (190) : 41 All 515. (Refusal of application of legal representative to be brought on the record.)
- (02) 26 Bom 317 (319). (Do.)
- (12) 14 Ind Cas 544 (550) (Mad). (Do.)
- (22) AIR 1922 Cal 514 (515) : 49 Cal 928. (Refusing an application to fix a standard rent on the ground that the Calcutta Rent Act of 1920 does not apply.)
- (26) AIR 1926 All 346 (346, 350) : 48 All 482. (Rejection of application by mortgagee of a decree under O. 21 R. 16, on the ground that the applicant was not such an assignee as is contemplated by the terms of the rule.)
- (29) AIR 1929 Bom 467 (467) : 53 Bom 773. (Refusing permission to bring a suit under S. 9, Specific Relief Act, because tenant is in actual possession.)
- (29) AIR 1929 Nag 179 (180). (Refusing to a discharged defendant the benefit of Section 47 in a petition under O. 21 R. 58.)
- (09) 2 Ind Cas 856 (857) (Cal). (Rejecting an insolvency application.)
- (20) AIR 1920 Pat 519 (520). (Refusing to entertain a plaint.)
- (25) AIR 1925 Lah 174 (174). (Suit thrown out on an erroneous ground that it is not maintainable.)
- (25) AIR 1925 Cal 320 (322) : 52 Cal 128. (Suit for partition thrown out on the erroneous construction of Court-Fees Act.)
- (31) AIR 1931 Rang 332 (333). (Application by decree-holder under O. 21 R. 2 stating full satisfaction—Court refusing to record satisfaction.)
- (19) AIR 1919 Pat 501 (502) : 4 Pat L Jour 340. (If decision is the very basis and foundation of

reason is that the Court could only adjudicate upon the application if it was prosecuted by a person fulfilling the character required by R. 89, and the decision upon the point whether the applicant has the necessary legal character is clearly a question involving jurisdiction inasmuch as it is the very basis and foundation of the power to adjudicate upon the merits of the application.⁵ The High Court of Allahabad has, however, held in the undermentioned case⁶ that the refusal of an application under O. 21 R. 89, on the ground that the applicant had no *locus standi* to apply is only an error in the *exercise* of jurisdiction and not a failure to exercise jurisdiction.

- (2) Where it fails to decide one way or the other any question submitted to it for decision⁷ as where it merely writes on the application "the petition will be recorded." (3) When it refuses to pass an order on the ground that it has no power to do so.⁸ Thus, a refusal to confirm an execution sale when the conditions for setting aside the same are not present,¹⁰ or a refusal to annul an execution sale when the proceedings were found to have been carried on against a deceased judgment-debtor,¹¹ is a failure to exercise jurisdiction vested in it.

- jurisdiction in its limited sense as distinguished from powers, it comes within the purview of the Section.)
- (23) AIR 1923 Pat 490 (491): 2 Pat 715. (Refusal to accept deposit tendered for the purpose of setting aside a sale.)
- (19) AIR 1919 Pat 465 (466). (Where a Court declines to accept a deposit by the debtor under O. 21 R. 89 on the ground that he has sold his interest to a third party.)
- (21) AIR 1921 Mad 167 (168): 44 Mad 554 (FB). (Overruling 38 Mad 775; AIR 1914 Mad 46; Doublet-Infir 32 Ind Cas 3: AIR 1917 Mad 76 is good law.)
- (95) 22 Cal 767 (783) (FB). (Refusal to set aside a sale under S. 810-A of the old Code on the erroneous view that the Section is not applicable.)
- [See also] (28) AIR 1923 Mad 659 (660). (Wrongly admitting application under O. 21 R. 89.)
- (26) AIR 1926 Nag 10 (14, 15): 21 Nag LR 102. (84) AIR 1934 Cal 812 (815): 61 Cal 903. (District Judge bound to set aside sale under S. 14A, Bengal Pacht Regulation, not doing so—Order 102.)
6. (23) AIR 1923 All 392 (393): 45 All 425 (FB).
7. (27) AIR 1927 Loh 808 (809).
- (34) AIR 1934 Pesh 33 (33). (Omission to give finding on necessary issue is failure to exercise jurisdiction.)
- (35) AIR 1935 Mad 150 (151). (Refusal to exercise Court's jurisdiction in deciding the preliminary point raised as to whether judgment-debtors were estopped from questioning the correctness of a proclamation order.)
- (35) AIR 1935 Pat 454 (455). (Where the lower
- jurisdiction under O. 41 R. 4.)
- (85) 8 Mad 192 (195). (Failure to exercise discretion under O. 46 R. 7.)
- (32) AIR 1932 Nag 70 (71): 28 Nag LR 54 (56). (Refusal to make a reference under O. 46 R. 7.)
- (29) AIR 1929 Loh 694 (695). (Staying execution proceedings by wrongly applying S. 10, C.P.C.)
- (11) 10 Ind Cas 527 (530) (Cal). (Refusal to consider correctness of the decision of the lower Court under Dekkhan Agriculturists' Relief Act, on the ground that the decision is not a decree.)
- (10) 7 Ind Cas 966 (967) (Bom). (Refusal to consider correctness of the decision of the lower Court under Dekkhan Agriculturists' Relief Act, on the ground that the decision is not a decree.)
- (97) 1897 Pun Re No. 13, p. 51. (Order rejecting an application by a duly appointed guardian for custody of the minor on the ground that the proper course for the guardian would be to bring a civil suit.)
- (10) 7 Ind Cas 966 (967) (Bom). (Refusal to consider correctness of the decision of the lower Court under Dekkhan Agriculturists' Relief Act, on the ground that the decision is not a decree.)
- (11) 10 Ind Cas 527 (530) (Cal). (Refusal to consider correctness of the decision of the lower Court under Dekkhan Agriculturists' Relief Act, on the ground that the decision is not a decree.)
- (29) AIR 1929 Loh 694 (695). (Staying execution proceedings by wrongly applying S. 10, C.P.C.)
- (32) AIR 1932 Nag 70 (71): 28 Nag LR 54 (56). (Refusal to make a reference under O. 46 R. 7.)
- (85) 8 Mad 192 (195). (Failure to exercise discretion under O. 41 R. 4.)
- [See also] (19) AIR 1919 Mad 714 (716).]
10. (93) 20 Cal 8 (11): 19 Ind App 154 (PC). (33) AIR 1933 Loh 99 (100): 13 Loh 761.
- (32) AIR 1932 All 403 (404).
- (15) AIR 1915 Cal 268 (271).
- [See also] (23) AIR 1923 Mad 230 (232). (Refusal to release property from attachment under erroneous construction of law.)
- (97) 1897 Pun Re No. 8. (Do.)]

which such jurisdiction is to be exercised. The arriving at a *conclusion* or *decision* is only a mental operation and the Court cannot be said to be "acting" in so coming to a conclusion or decision on a question of law or fact. The decision in *Amir Hassan Khan's* case is perfectly intelligible upon this principle. There is no necessity, nor is there anything in the language of the Section, to limit the meaning of the words in clause (c) to *perverse decisions* only though where the Court is perverse, *i. e.*, where it willfully or consciously disregards the provisions of law, it is certainly acting illegally in exercise of its jurisdiction."

Where there is an *illegality* in the exercise of jurisdiction the order of the Court is void and of no effect and nothing more need be shown for maintaining a provision. Where, however, there is an *irregularity* in the exercise of jurisdiction such irregularity must be shown to be a *material* one, *i. e.*, one which would have affected the decision of the case upon the merits.¹⁰ Whether an act is illegal or merely irregular seems to depend upon the importance of the provision of law disregarded.¹¹ Thus, where the law expressly prohibits a thing to be done, a disregard of such a provision has been held to amount to an *illegality*.¹² The distinction, however, between what is illegal and what is *materially* irregular, has not been very clearly drawn by the decisions¹³ and very often the same thing is sometimes treated as an *illegality* and sometimes as a *material irregularity*. Thus, it was held in the undermentioned case¹⁴ that a Court acts *illegally* in the exercise of its jurisdiction if it arrives at a conclusion without any evidence to support it. The same thing has been treated as a *material* irregularity in other cases.¹⁵

starting point of limitation, is not revisable under Section 115.)

(36) AIR 1936 Nag 280 (280) : 1 L R (1937) Nag 428.

(37) AIR 1937 Oudh 103 (111). (Erroneous decision—Order as to locus standi of person to apply under O. 21 R. 89—No revision lies.)

(39) AIR 1939 Mad 733 (733, 731) : (1939) 2 Mad L. Jour 44 (45).

(36) AIR 1936 Sind 205 (206). (The fact that the High Court, if it had been the trial Court, might have come to a different conclusion is not sufficient to justify interference under S. 115.)

(85) AIR 1935 Pat 191 (192). (Decision on matter in which Court has jurisdiction—Question of jurisdiction is not involved.)

[See also (93) AIR 1933 All 295 (297); 55 All 216. (88) 1888 Pun Re No. 105, page 278.

(38) AIR 1938 Lah 827 (827). (Courts having jurisdiction—Decision whether right or wrong is no ground for interference.)

7. See the dissenting judgment of Davis, J., in (94) 17 All 410 (421) (R.B.).

8. (94) 2 Low Bur Rul 338 (339, 340).

9. (93) 7 Bom 341 (358, 359).

(32) AIR 1932 Bom 584 (587) : 56 Bom 585.

(85) 9 Bom 82 (85).

(93) 25 All 509 (524) (R.B.).

(21) AIR 1921 Upp Bur 27 (29) : 4 Upp Bur Rul 16.

(15) AIR 1915 Mad 891 (891).

(15) AIR 1915 Mad 1122 (1123).

(39) AIR 1939 Pat 430 (431). (Erroneous decision on question of law or fact—Order unjustifiable and almost perverse—High Court will interfere.)

(35) AIR 1986 Bom 222 (225) : 59 Bom 430.

(Provisions of Order 41 disregarded.)

(36) AIR 1936 Mad 526 (527). (Perverse decision on question of law or procedure—Mortgage bond on the face of it discharged and in the possession of the obligor—it is material irregularity to make the latter to prove the fact of discharge.)

10. (86) 13 Cal 225 (230). (Misapplication of S. 73.)

(19) AIR 1919 Low Bur 151 (153) : 9 Low Bur Rul 269.

(38) 17 Ind Gas 138 (140) (Pat). (Sale fixed for 18th—Sale actually under hammer that day but in fact held on the 20th, a day not fixed for sale—There is no illegality but mere irregularity.)

11. [See (92) 25 Mad 61 (68) : 28 Ind App 257 (P.C.). (12) (20) AIR 1920 Cal 305 (308) : 46 Cal 962.

(Order attaching in execution a provident fund deposit—Provident Funds Act, S. 4.)

(32) AIR 1932 All 337 (339) : 54 All 490. (Court taxing costs in conjunction of R. 1 Ch. 21 of the Allahabad High Court Rules.)

(86) 8 All 111 (115).

(86) 8 All 519 (523).

(78) AIR 1930 Rang 129 (129) : 7 Rang 766.

(Attaching house of agriculturist.)

(80) 1880 Pun Re No. 78, p. 175.

[See also (27) AIR 1927 Mad 786 (788).

(94) 18 Bom 737 (738).]

13. (86) 13 Cal 225 (230).

(98) 2 Cal W N 474 (477).

(11) 9 Ind Gas 132 (132) (Cal).

14. (87) 9 All 398 (409).

15. (25) AIR 1925 Mad 877 (878).

(32) AIR 1932 Pat 9 (11) : 11 Pat 161. (Arbitrary decision based on speculative factors and on no evidence.)

The following are all illustrations of the classes of cases in which Courts have interfered under this clause, on the ground of illegality or material irregularity in the exercise of jurisdiction:—

- (1) Where the lower Court decides a case without considering the materials placed before it or in disregard of the evidence.¹⁶
- (2) Where it decides on evidence not legally taken¹⁷ or without considering the

- (25) AIR 1925 Mad 494 (455). (Order setting aside abatement based on no evidence.)
- (26) AIR 1926 Lah 566 (566).
- (31) AIR 1931 All 452 (452).
- (36) 1886 Pun Re No. 29, p. 51. (Decree based on admission when there is no evidence of it.)
- (12) 14 Ind Cas 793 (793) (Lah).
- (25) AIR 1925 Lah 278 (278).
- (06) 10 Cal W N 14 (16). (In this case it was held to be without jurisdiction.)
- (23) AIR 1923 Mad 503 (504).
- [See also (19) AIR 1919 Lah 123 (123).]
16. (23) AIR 1923 Nag 292 (293); 19 Nag L.R. 72.
- (34) AIR 1934 Bom 313 (317); 33 Bom 623. (Disregard of the important piece of evidence.)
- (34) AIR 1934 Lah 198 (198). (Decision in support of which there is no evidence on record may be set aside in revision.)
- (34) AIR 1934 Rang 135 (137).
- (34) AIR 1934 Rang 214 (215).
- (30) 1930 Mad W N 1227 (1228). (Inconsistent finding as to service opposed to facts.)
- (21) AIR 1924 Nag 44 (45); 19 Nag L.R. 165.
- (10) 8 Ind Cas 552 (552) (Lah).
- (15) AIR 1915 Lah 242 (243). (Judgment without considering whole evidence.)
- (15) AIR 1915 Lah 242 (243).
- (15) AIR 1915 Lah 242 (243).
- (06) 1906 Upp Bur Rui 42.
- (15) AIR 1915 Cal 417 (419).
- (20) AIR 1920 Cal 459 (460, 463). (Petition for probate granted without considering relationship of parties to deceased.)
- (25) AIR 1925 Cal 254 (255). (Petition for stay of execution of decree.)
- (29) AIR 1929 Lah 882 (882).
- (13) 18 Ind Cas 318 (318) (Lah). (Not properly deciding all the grounds of appeal.)
- (06) 1906 Pun Re No. 29, p. 110.
- (1900) 1900 Pun L.R. page 200. (Failure to notice ground of appeal.)
- (11) 12 Ind Cas 97 (98) (Mad).
- (10) 8 Ind Cas 466 (468); 1 Upp Bur Rui 14.
- (26) AIR 1926 Rang 205 (206); 4 Rang 221.
- (81) 1881 All W N 65 (65). (Decree unsupported by evidence.)
- (87) 11 Bom 435 (438). (Raising a question of the execution of an instrument when execution was admitted.)
- (14) AIR 1914 Cal 521 (523). (Treating matters as appeal instead of like revision under S. 153, Bengal Tenancy Act.)
- (38) AIR 1938 Mad 634 (637); 1 L.R. (1938) Mad 988. (Court of revision cannot be expected to weigh the evidence led before the lower Court but if there was no evidence at all from which the Court has drawn inferences High Court will interfere.)
- (38) AIR 1938 Nag 216 (217). (Judgment superficial—No consideration of evidence.)
- (39) AIR 1939 Pesh 9 (13). (Disregard of important factors resulting in miscarriage of justice.)
- (35) AIR 1935 All 705 (706). (Refusal to look into terms of bond.)
- (37) 172 Ind Cas 752 (753); 39 Pun L.R. 499 (501).
- (34) AIR 1934 Rang 356 (357).
- (34) AIR 1934 Rang 214 (215). (Finding based entirely on guess.)
- (34) AIR 1934 Bom 343 (347); 33 Bom 623. (Lower Court not referring to deed of grant, the principal evidence—Reliance on other evidence—Material irregularity is constituted.)
- (23) 4 L.R. All (Rev) 248 (248).
- (23) AIR 1923 All 145 (146).
- (17) AIR 1917 Low Bur 83 (84).
- (24) AIR 1924 Rang 318 (319). (Disposal of appeal without considering ground of appeal namely that plaintiff was not permitted to call further witnesses.)
- [See also (34) AIR 1934 Lah 84 (84). (Dismissal of suit under O. 9, R. 3—Order refusing to restore, was set aside in revision.)]
17. (14) AIR 1914 Cal 575 (577). (Decision on evidence of witnesses examined in absence of parties.)
- (77) 26 Suth W R 55 (70); 3 Ind App 259 (PC). (Decision based on Judge's own knowledge of the case.)
- (16) AIR 1916 Mad 547 (548).
- (36) AIR 1936 Pesh 72 (74).
- (35) AIR 1935 Mad 184 (185). (Arbitrator improperly admitting evidence—Confirmation of award by Court—Award can be set aside.)
- [See (36) 1936 Oudh W N 237 (239). (Court acts with material irregularity in basing its conclusions on surmises for which there is no justification from the evidence on the record.)]
- [See also (36) AIR 1936 Pesh 12 (14). (Where in a pre-emption suit the lower Courts import irrelevant considerations into the discussion of evidence and refuse to give the vendee the full benefit of those considerations raise suspicions in the minds with regard to genuineness of the price paid, it commits a material irregularity.)]
- [But see (26) AIR 1926 Pat 29 (30). (One piece of inadmissible evidence but finding arrived at on the rest of the evidence.)]

question of its admissibility.¹⁹

- (3) Where it arrives at a conclusion in opposition to the finding expressed in the body of the judgment.²⁰
- (4) Where it decides a case without giving reasons for its judgment.²⁰
- (5) Where it disregards and does not apply its mind to, or misapplies the provisions of any law.²¹

18. (26) AIR 1926 All 161 (162). (A letter not properly proved.)
- (31) 18 Bom 369 (372). (Acting on unstamped bundle illegally inadmissible.)
- (34) 18 Bom 614 (616).
- (94) 18 Bom 745 (747).
- (11) 9 Ind Cas 806 (810) (Cal). (Previous deposition without proof.)
- (97) 1807 Pun Re No. 68, p. 311.
19. (29) AIR 1929 Mad 841 (841).
- (35) AIR 1935 All 280 (281). (Proportionate costs awarded in judgment — Total costs entered in decree—Revision lies.)
20. (16) AIR 1916 All 65 (66). (Application for adjournment.)
- (90) 1890 Pun Re No. 72, p. 197. (Court of final appeal not stating the true points for determination nor the reasons for its decision.)
- (27) AIR 1927 Lah 798 (799).
- (38) AIR 1938 All 91 (92) : 1 L R (1938) All 48. [But see (35) AIR 1935 Mad 105 (106). (Failure to state reasons for order is no ground for revision.)]
21. (12) 15 Ind Cas 528 (524) : 15 Oudh Cas 234. (Entering into an uncertified adjustment of decree to see whether execution application is in time.)
- (38) AIR 1938 All 49 (50).
- (33) AIR 1933 All 648 (649). (Court failing to apply its mind to question of limitation even though attention was drawn to it.)
- (32) AIR 1932 Cal 448 (450) : 59 Cal 329. (Adding a party under O. 1 R. 10 when the Court had no power to act under that rule held to be an irregularity.)
- (3) AIR 1933 Lah 139 (140). (Modification of an award in contravention of the provisions of Sch. II para. 12.)
- (33) AIR 1933 Lah 260 (261). (Failure to consider extension of time under S. 5, Limitation Act.)
- (33) AIR 1933 Lah 385 (386). (Wrongly applied a Section of an Act whereby injustice was caused.)
- (32) AIR 1932 Mad 217 (217). (Suit triable by District Judge—It amounts to material irregularity.)
- (32) AIR 1932 Pat 342 (343). (Purchaser bringing money on last day unable to deposit it owing to delay in passing challans in spite of his diligence—Order setting aside sale is reversible.)
- (32) AIR 1932 Pat 346 (347) : 11 Pat 627. (Lower Court following a decision of another High Court as against a decision of its own High Court.)
- (3) AIR 1933 Pat 61 (62). (Consolidation of suits with little in common at one party's instance.)
- (19) AIR 1919 Low Bur 151 (153) : 9 Low Bur Rul 263.
- (30) AIR 1930 Lah 572 (573).
- (16) AIR 1916 Bom 55 (56) : 41 Bom 402. (When lower Court discharged surety under O. 38 R. 1 on death of defendant.)
- (30) AIR 1930 Lah 512 (512). (Court refusing to proceed against surety.)
- (15) AIR 1915 Cal 87 (91).
- (24) AIR 1924 Lah 380 (380). (Court assuming market value of property for jurisdiction in pre-emption suit.)
- (26) AIR 1926 Lah 402 (403). (Disregard of Section 93, C. P. Code.)
- (29) AIR 1929 Lah 824 (824). (Following obsolete decisions.)
- (28) AIR 1928 Mad 484 (485). (Erroneous construction of "good faith".)
- (12) 15 Ind Cas 431 (431) (Low Bur). (The failure of the lower Court to keep in view the distinction between a case where ownership had passed and a case where the goods were merely bailed.)
- (91) 1891 Pun Re No. 65, page 319. (Appellate Court acting in contravention of old S. 578 of the Code.)
- (23) AIR 1923 Lah 431 (431).
- (9) 4 Ind Cas 314 (316) (Lah). (Failure to consider the effect of prior peaceful possession as owner.)
- (95) 19 Bom 138 (135). (Suit in ejectment—Tenant wrongly allowed to deny landlord's title.)
- (28) AIR 1928 Bom 548 (549).
- (27) AIR 1927 Mad 985 (985).
- (30) AIR 1930 Nag 207 (208) : 26 Nag L R 300. (Judge wrongly thinking that appeal is untenable.)
- (17) AIR 1917 All 166 (166). (Enterprising appeal which does not lie.)
- (29) AIR 1929 Rang. 210 (211). (Court overlooking canon of interpretation that the statutory provision in the nature of taxation should be interpreted liberally in favour of subject.)
- (7) 9 Bom L R 986 (941).
- (88) 15 Cal 47 (49, 50).
- (16) AIR 1916 Cal 318 (319) : 42 Cal 926 (931). (Applying S. 11 to proceedings under S. 10.)
- (89) 1889 Pun Re No. 42, page 145.
- (86) 13 Cal 225 (230).
- (25) AIR 1925 Rang. 300 (300) : 3 Rang 211. (Applying O. 25 R. 1 to a suit not for payment of money.)
- (27) AIR 1927 Rang. 90 (91). (Applying wrong law is ground for revision.)
- (84) 8 Bom 395 (397, 398). (Order directing next friend to obtain a certificate under S. 2, Act 20 of 1864 for filing suit on behalf of a minor member of a joint Hindu family.)
- (17) AIR 1917 Low Bur 177 (177).
- (04) 2 Low Bur Rul 333 (340).
- (29) AIR 1929 Rang. 145 (146) : 7 Rang 339.
- (23) AIR 1923 Mad 254 (257) : 40 Mad 123.

which it is subordinate.²²

(6) Where it misinterprets the evidence²³ or misapprehends the facts.²⁴

(7) Where it decides a case in the absence of the party whose rights are affected by such decision,²⁵ or without hearing him,²⁶ or without giving him an opportunity

Art. 163, Limitation Act, applies to the case which does not in fact so apply, it constitutes a material irregularity and the order is open to revision.)

('88) AIR 1938 Pesh 49 (50). (Court ignoring fundamental principles of law.)

('34) AIR 1934 Mad 617 (617). (Refusal to go into the question of jurisdiction before proceeding to hear the suit on merits may amount to material irregularity.)

('85) AIR 1935 Lah 161 (161). (Appellate Court setting aside lower Court's order and remanding suit to lower Court with issue re-framed with directions to take additional evidence if required—Order is illegal.)

('36) AIR 1936 Lah 693 (694). (Refusal to grant extension of time due under the law.)

('36) AIR 1936 Lah 746 (747). (Where the Judge omits to apply an obvious principle of law he acts illegally in the exercise of his jurisdiction.)

('25) AIR 1925 Rang 381 (382). (Court overlooking the provisions of Sec. 6, Limitation Act.)

[See ('32) AIR 1932 Cal 220 (221). (Court ordering unequal division of shares.)

('38) AIR 1938 All 26 (27). (Court reducing interest without application by judgment-debtor but after giving parties opportunity of being heard—Decision though contrary to provisions of Sec. 30 (2), U. P. Agriculturists' Relief Act, should not be interfered with in revision if justice has been done.)]

[See also ('29) AIR 1929 Bom 220 (222) : 53 Bom 432. (Failure of plaintiff to annex controller's order under S. 17, Bombay Rent (War Restrictions) Act, 1918—Proceeding with suit.)]

22. ('33) AIR 1933 Mad 94 (95).

('32) AIR 1932 Pat 346 (347) : 11 Pat 616.

23. ('29) AIR 1929 Mad 204 (205).

('88) AIR 1933 Pesh 67 (69). (Concurrent findings based on misinterpretation of document can be revised.)

('10) 7 Ind Cas 713 (714) (Lah).

('19) AIR 1919 Lah 91 (92).

[See also ('11) 9 Ind Cas 1008 (1009) (Lah).]

24. ('11) 9 Ind Cas 806 (809) (Cal). (Inferring estoppel without any finding or issue.)

('34) AIR 1934 Oudh 212 (213). (Court construing a plaint for declaration as one for consequential relief also and ordering payment of deficient court-fee.)

('88) 1888 Pun Re No. 105, page 278. (Assuming wrongly that plaintiff did not tender his evidence.)

('89) 1889 Pun Re No. 206, page 721.

('90) 1890 Pun Re No. 108, page 316.

('89) 1889 Pun Re No. 130, page 458.

('92) 1892 Pun Re No. 26, page 108.

('97) 1897 Pun Re No. 60, page 261 (F B).

('15) AIR 1915 All 60 (60, 61).

('12) 15 Ind Cas 897 (899) (Cal). (Order consolidating suit on mortgage, a money suit and partner-

ship suit when the substantial questions were not identical.)

('25) AIR 1925 All 253 (253). (Lower Court finding that mortgagor was member of an agricultural tribe, opposed to facts, and referring case to Collector.)

('26) AIR 1926 All 604 (605). (Appellate Court treating findings as being the opposite of what they really are.)

('30) AIR 1930 Bom 129 (131) : 54 Bom 105. (Judge inferring misconduct from facts which cannot be taken into consideration.)

('14) AIR 1914 Lah 174 (175).

('20) AIR 1920 Lah 178 (179). (As to the nature of the contract.)

('27) AIR 1927 Mad 427 (429). (Lower Court has not correctly perceived the evidence and case from a correct standpoint.)

('20) AIR 1920 Pat 137 (138).

('22) AIR 1922 Nag 104 (105, 106) : 19 Nag L R 131. (Court assuming that the contract made on behalf of minor, was made by minor himself.)

('23) AIR 1923 Nag 108 (108). (Decision on imaginary facts.)

('25) AIR 1925 Pat 125 (127) : 3 Pat 683. (Court below seemed to have treated the matter of a commission to examine the plaintiff as if it was merely a commission to examine witnesses.)

('11) 9 Ind Cas 32 (33) (Mad). (Dismissal of plaintiff's suit simply on the ground of certain discrepancies between the terms of the pro-notes and the description of them in the plaint.)

('29) AIR 1929 Rang 244 (245) : 7 Rang 300.

('31) AIR 1931 Rang 111 (112).

('27) AIR 1927 Mad 227 (228).

('39) AIR 1939 Lah 470 (470) : 41 Pun L R 492 (493). (Court holding that the defendant has admitted a certain claim of the plaintiff when the defendant has not done any such thing.)

('35) AIR 1935 P C 185 (186) : 62 Ind App 257 : 57 All 678 (PC). (Trial Judge misapprehending nature of application to be added as party to suit and dealing with it summarily, acts with material irregularity.)

25. ('26) AIR 1926 P C 142 (144) : 54 Cal 338 : 53 Ind App 271 (P C).

('29) AIR 1929 All 761 (761). (Collector, in a suit for money against minors.)

('94) 18 Bom 594 (596, 597). (Order returning purchase money of an execution sale in the absence of judgment-creditor.)

('28) AIR 1928 Lah 414 (417).

('14) AIR 1914 Oudh 425 (426) : 18 Oudh Cas. 66.

('31) AIR 1931 Oudh 410 (411).

('32) AIR 1932 All 166 (168).

('24) AIR 1924 Lah 570 (570, 571).

('94) 18 Bom 606 (607). (When Court acted on endorsement of Post Office on a registered packet 'refused', without satisfying whether it referred to defendant.)

26. ('07) 34 Cal 929 (933).

of being heard,²⁷ or without giving him an opportunity of obeying the orders of the Court.²⁸

(8) Where it takes a mistaken view of the question at issue,²⁹ or decides an issue

- ('33) AIR 1933 All 196 (196). (Commencement to write judgment before hearing whole evidence and arguments is irregular.)
- ('22) AIR 1922 Bom 207 (209) : 47 Bom 11. (Application to set aside an ex parte decree.)
- ('29) AIR 1929 Lah 878 (879).
- ('23) AIR 1923 Pat 102 (102). (Sale proclamation settled without hearing parties by taking petition earlier than date fixed.)
- ('30) AIR 1930 Lah 177 (178). (Main evidence excluded by Court through error of law.)
27. ('86) 8 All 111 (115). (Ordering a dismissed suit to be restored to file without notice to defendant.)
- ('33) AIR 1933 All 313 (314). (Award filed — Decree without giving time to party to file objections is a material irregularity.)
- ('33) AIR 1933 All 523 (525) : 55 All 719. (Refusing to allow a defendant to cross-examine the plaintiff's witnesses.)
- ('33) AIR 1933 Lah 538 (539). (Court refusing to summon proper witness acts with illegality and not only with material irregularity.)
- ('13) 19 Ind Cas 241 (242) (Mad). (Setting aside ex parte decree without notice to plaintiff.)
- ('26) AIR 1926 All 17 (18). (Transfer of suit without notice.)
- ('20) AIR 1920 Oudh 213 (213) : 23 Oudh Cas 216. (Do. See however AIR 1923 Oudh 240 (240).)
- ('17) AIR 1917 Mad 217 (217). (Order for refund of poundage fees on a sale being set aside without any notice to the judgment-debtor.)
- ('19) AIR 1919 Mad 868 (868). (Ascertainment of mesne profits in a partition suit without notice.)
- ('22) AIR 1922 Mad 63 (65). (Amendment of a sale certificate without giving notice.)
- ('24) AIR 1924 Mad 813 (814). (Impleading legal representative without notice to another claimant.)
- ('29) AIR 1929 Mad 49 (49). (Allowing commutation under Sec. 40, Estates Land Act.)
- ('23) AIR 1923 Pat 180 (183).
- ('18) AIR 1918 Oudh 111 (112). (Notice to pleader may be sufficient.)
- ('28) AIR 1928 Mad 592 (594). (One party applying to Court to prevent pleader of opposite party from appearing—Court preventing the pleader.)
- ('09) 4 Ind Cas 550 (551) (Lah). (Notice of hearing not given.)
- ('06) 29 Mad 324 (326). (Wrongly holding as regards service, and thereupon passing ex parte decree.)
- ('98) 1 Oudh Cas 166 (168). (Notice to parties of time and place at which Court is to be held not given.)
- ('69) 1869 Pun Re No. 60. (When no date was fixed and appeal dismissed for default.)
- ('19) AIR 1919 Mad 14 (15). (Do.)
- ('22) AIR 1922 All 72 (73) : 44 All 325. (Taking up a case after the hours fixed by the High Court and dismissing it for default.)
- ('96) 18 All 119 (121).
- ('11) 9 Ind Cas 857 (858) (All). (Dismissal of appeal — Pleader's physical inability to argue the case.)
- ('25) AIR 1925 Nag 236 (238). (Senior counsel absent and his belated request for adjournment refused—Junior counsel's unpreparedness.)
- ('07) 11 Cal W N 112 (116).
- ('01) 3 Bom L R 130 (131). (Restoration petition — Dismissal for want of affidavit is a material irregularity.)
- ('37) AIR 1937 Oudh 268 (269) : 13 Luck 111. (Court cannot dismiss objection under O. 21 R. 58 without giving opportunity to objector to explain delay—Where no such opportunity is given order can be set aside in revision.)
- ('36) 162 Ind Cas 860 (860) (Nag). (Judgment-debtor alleging bad faith—Court refusing to give opportunity of proving it.)
- [See also ('36) AIR 1936 Sind 1 (2). (Arbitrators claiming certain amount as fees — Amount grossly reduced by Court without hearing them — Material irregularity.)]
- [See however ('21) AIR 1921 Bom 219 (219) : 45 Bom 360. (Failure to give notice where none is required to be given is not a ground of revision.)]
28. ('15) AIR 1915 All 133 (134). (Dismissing appeal for failure to furnish security.)
- ('26) AIR 1926 Cal 1017 (1018). (Dismissing execution petition for failure to pay process.)
- ('26) AIR 1926 Lah 571 (571). (For failure to amend plaint and pay costs of adjournment.)
- ('11) 9 Ind Cas 132 (133) (Cal). (Suit brought in plaintiff's name but plaint describing him in representative capacity; failure to give option to plaintiff to say in what capacity he wishes to proceed is illegal.)
- ('20) AIR 1920 Pat 82 (84). (When plaint did not contain the settlement of rental as per record of rights, and suit dismissed for that defect.)
- ('16) AIR 1916 Mad 1164 (1164). (Omission to produce succession certificate.)
- ('12) 14 Ind Cas 507 (508) : 34 All 348. (Dismissing a suit because the person acting as agent had no proper power as required by law.)
- ('35) 158 Ind Cas 250 (250) (Pesh). (Failure of a Court to fix a time for payment of process fee amounts to a material irregularity, and if the Court, which has not fixed a time for the same, dismisses a suit under O. 9 R. 2, C. P. Code, for failure to pay process-fees, the High Court will interfere in revision.)
- ('36) AIR 1936 Lah 560 (561). (Dismissal of suit without informing parties of date fixed.)
- ('35) AIR 1935 Oudh 119 (120) : 10 Luck 476. (Rejection of appeal for non-payment of deficient court-fee—Appellant not given opportunity to make good deficiency—Court acts illegally and with material irregularity.)
- [See also ('19) AIR 1919 Lah 203 (203) : 1919 Pun Re No. 169.]
29. ('88) 12 Bom 617 (620).

which does not properly arise,³⁰ or omits to decide issues which properly arise.³¹

(8a) Where the lower Court wrongly places the onus of proof.³²

(9) Where it declines to examine the evidence offered in support of a case³³ or to go

('05) 29 Bom 213 (219).

('32) AIR 1932 Nag 177 (179) : 28 Nag L R 221. (Appeal from order granting review — Appellate Court confusing between reasons for review and merits of order — Revision lies.)

('33) AIR 1933 Nag 188 (188) : 29 Nag L R 164. (Finding of fact reached owing to misconception of method by which question should be considered can be interfered with.)

('20) AIR 1920 Cal 459 (460).

('27) 99 Ind Cas 946 (947) (Cal).

('93) 1893 Pun Re No. 89, page 355. (Suit based on adoption of plaintiff, decided on defendant's title.)

30. ('22) 3 L R All (Rev) 219 (221).

('29) AIR 1929 Lah 294 (295). (Plea of *res judicata* which did not at all arise.)

('30) AIR 1930 Lah 80 (80). (Decision based on question not arising in case.)

('29) AIR 1929 Nag 347 (348). (Do.)

('21) AIR 1921 Sind 159 (165) : 16 Sind L R 207 (F B).

('26) AIR 1926 Mad 947 (948). (Court taking point not disclosed in election petition.)

('31) AIR 1931 Mad 534 (536). (Court finding a case not set up.)

('98) 1898 Pun Re No. 41, page 141.

('28) AIR 1928 Lah 299 (301).

('35) AIR 1935 Pesh 174 (175). (Where a Court decides a suit, adjudicating on a case not put forward by the parties, it amounts to an irregularity in respect of which the High Court's power of revision may be invoked.)

31. ('94) 1894 Pun Re No. 19, page 44.

('11) 10 Ind Cas 405 (405) (Lah).

('12) 13 Ind Cas 657 (658) (Cal). (Per Stephen, J., *contra*.)

('25) AIR 1925 Mad 884 (885). (Defendant challenging plaintiff's title—Court ignoring issue—Revision should be allowed.)

('12) 14 Ind Cas 627 (628) (Cal).

('13) 18 Ind Cas 610 (610) (Lah). (No adjudication was made as to minority.)

('16) AIR 1916 Mad 583 (584). (In a suit on an award when it was contested that the arbitrators were guilty of misconduct and an issue was not raised.)

('20) AIR 1920 Mad 843 (846).

('23) AIR 1923 Mad 134 (135). (Issue as to under-valuation.)

('28) AIR 1928 Mad 815 (816) : 51 Mad 860. (Suit for setting aside ex-parte decree—Validity of substituted service not considered.)

('36) AIR 1936 Pesh 97 (100). (Failure by Appellate Court to notice important ground of appeal.)

('39) AIR 1939 Pat 216 (217). (Lower Appellate

Court not dealing with points raised.)

('35) AIR 1935 Lah 964 (965). (When the executing Court did not give any consideration to the question whether the Collector's proposal ought to be confirmed in the circumstances, but proceeded to adopt it as a matter of course, the Court failed to exercise judicially the discretion which is vested in it under S. 72, C. P. C.—It amounts to a material irregularity in the exercise of its jurisdiction and revision is competent.)

('39) AIR 1939 Pat 74 (75).

('35) AIR 1935 Pat 454 (455).

[See also ('33) AIR 1933 Rang 156 (157).]

32. ('38) AIR 1938 All 520 (521). (Where the plaintiff's evidence does not satisfy the Court and the Court wrongly places the burden of proof on the defendant and proceeds to decide an issue on a presumption raised against the defendant because of non-production of certain documents, High Court can interfere in revision.)

('35) AIR 1935 Cal 710 (711).

('35) AIR 1935 Mad 784 (784).

('31) AIR 1931 Rang 136 (137) : 9 Rang 71. (Onus wrongly placed — Interference in revision not justified in absence of grave injustice having been caused.)

('36) AIR 1936 Mad 526 (527).

('39) 41 Pun L R 513 (514).

('35) AIR 1935 Rang 131 (132).

('39) AIR 1939 Mad 644 (645) : (1939) 1 Mad L Jour 334 (337). (To disregard the direction of the statute with regard to burden of proof is a perverse decision and conscious departure from the rule of procedure—High Court will interfere—AIR 1923 Mad 607 followed.)

[But see ('26) 92 Ind Cas 46 (46) (Oudh).

('19) AIR 1919 Cal 266 (269).

('34) 151 Ind Cas 548 (548) (Lah). (The fact that the burden of proof as to certain issues was not correctly placed is no ground for interference in revision—AIR 1924 Lah 425 followed.)

('39) AIR 1939 Mad 733 (734) : (1939) 2 Mad L Jour 44 (45). (Burden of proof wrongly placed—High Court will not interfere.)]

33. ('21) 64 Ind Cas 85 (86) (Cal).

('83) 13 Bom 642 (649).

('33) AIR 1933 Pat 278 (279).

('27) AIR 1927 Lah 239 (239). (Application for restoration of suit.)

('29) AIR 1929 Lah 878 (879). (Application to restore an application for restoration of a suit dismissed for default.)

('35) 7 All 345 (352).

('18) AIR 1918 Pat 100 (102, 103) : 4 Pat L Jour 20.

('19) AIR 1919 Pat 573 (574). (Petition to set aside execution sale.)

('23) AIR 1923 Pat 530 (531).

into the merits.³⁴

- (10) Where it orders the execution of a decree which is inexecutable,³⁵ or orders execution contrary to the directions contained in decree,³⁶ or orders notice in garnishee proceedings to a firm to pay into Court a debt really due by the individuals of the firm,³⁷ or attaches, in the execution of a personal decree, property which the judgment-debtor holds as trustee for another.³⁸
- (11) Where the lower Appellate Court decides an appeal on a case not raised in the first Court,³⁹ or remands a case after framing issues which do not arise⁴⁰ or after practically deciding the whole case itself,⁴¹ or passes an order of remand which it is incompetent to pass⁴² or without setting aside the lower Court's decree.⁴³
- (12) Where it refuses to record a compromise in a proceeding under O. 21 R. 90⁴⁴ or where it passes a decree on a compromise in the absence of a completed compromise before the Court.⁴⁵
- (13) Where it appoints a person as a *guardian ad litem* of another, without his consent⁴⁶ or where it appoints such guardian to a person of unsound mind without considering the question of his unsoundness of mind.⁴⁷
- (14) Where the Court passes a decree on compromise by the guardian *ad litem* without enquiring whether it was for the benefit of the minor⁴⁸ or allows reference to arbitration by the guardian without passing an order under Section 462 (O. 32 R. 7) of the Code.⁴⁹
- (15) Where it proceeds with a suit stayed under Section 10 of the Code.⁵⁰
- (16) Where it refuses to issue a sale certificate to the auction-purchaser⁵¹ or omits to draw up a decree in pursuance of a judgment.⁵²
- (17) Where the Income-tax Commissioner refuses to make a reference to the High Court under Section 66 clause 2 of the Income-tax Act.⁵³

- 34. ('12) 15 Ind Cas 212 (213) : 15 Oudh Cas 78. (Though defendant made default in filing written statement.)
- 35. ('97) 1897 Pun Re No. 34, page 157.
- 36. ('88) 1888 All W N 126 (126).
- 37. ('99) 1899 All W N 124 (125) : 20 All 311. (Declaratory decree for partition did not complete the decree by allotting specific shares.)
- 38. ('12) 16 Ind Cas 235 (236) (Cal). (Sale contrary to directions in decree.)
- 39. ('80) AIR 1930 Lah 103 (104). (Ordering arrest in execution of mortgage decree.)
- 40. ('10) 8 Ind Cas 856 (856) (Mad).
- 41. ('01) 28 Cal 574 (583).
- 42. ('09) 1 Ind Cas 456 (457) : 33 Bom 35.
- 43. ('27) AIR 1927 Lah 73 (74).
- 44. ('10) 6 Ind Cas 1010 (1011) (Lah).
- 45. ('14) AIR 1914 Lah 39 (41) : 1913 Pun Re No. 34.
- 46. ('25) AIR 1925 Lah 68 (69). (That plaintiff was not entitled to sue.)
- 47. ('25) AIR 1925 Mad 357 (357). (Decreeing suit on a point of *res judicata* not raised by parties.)
- 48. ('26) AIR 1926 Rang 214 (215) : 4 Rang 202. [See also ('36) AIR 1936 Rang 235 (236) : 14 Rang 511. (Where the lower Court decrees the suit on a case which is not to be found in the pleadings and is inconsistent therewith it acts illegally in the exercise of its jurisdiction and with material irregularity.)]
- 49. ('28) AIR 1928 Mad 984 (985).
- 50. ('29) AIR 1929 Mad 205 (207).

- 41. ('23) AIR 1923 Mad 113 (113).
- 42. ('25) AIR 1925 Mad 171 (171, 172).
- 43. ('27) AIR 1927 Cal 850 (852) : 55 Cal 219.
- 44. ('27) AIR 1927 Cal 401 (402). (Anomalous order of remand by Appellate Court.)
- 45. ('05) 9 Cal W N 492 (494). (District Judge interfering with Munsif's decision under Bengal Tenancy Act on a question of law under S. 153.)
- 46. ('28) AIR 1928 Mad 991 (994). (Improper rejection of evidence by trial Court — Appellate Court ordering remand.)
- 47. ('31) AIR 1931 Mad 791 (791, 792).
- 48. ('28) AIR 1928 Mad 984 (985). (Remand not shown to be without jurisdiction — No interference by High Court.)
- 49. ('32) 1932 Mad W N 348 (350). (Do.) [See also ('27) AIR 1927 Mad 1111 (1112). (Do.) ('27) AIR 1927 Mad 335 (336). (Do.)]
- 50. ('24) AIR 1924 Rang 177 (178) : 1 Rang 656.
- 51. ('29) AIR 1929 Lah 886 (887).
- 52. ('98) 1898 Pun Re. No. 50, page 164.
- 53. ('09) 4 Ind Cas 1103 (1103) (Mad).
- 54. ('22) AIR 1922 Cal 86 (86).
- 55. ('89) 1889 Pun Re No. 105, page 368.
- 56. ('35) AIR 1935 Oudh 287 (289) : 11 Luck 30.
- 57. ('95) 1895 Pun Re No. 37, page 153.
- 58. ('29) AIR 1929 All 957 (959).
- 59. ('17) AIR 1917 Pat 697 (697) : 1 Pat L Jour 446.
- 60. ('12) 15 Ind Cas 935 (936) : 8 Nag L R 92.
- 61. ('12) 17 Ind Cas 637 (637) : 37 Bom 60.
- 62. ('24) AIR 1924 Lah 662 (663).

- (18) Where it omits to determine who the real legal representatives are,⁵⁴ or refuses to issue a certificate for refund of court-fee where the case was remanded under O. 41 R. 23,⁵⁵ or refuses to issue summons.⁵⁶
- (19) Where it passes an instalment decree not allowed by the law.⁵⁷
- (20) Where it passes a decree on a contract *prima facie* void in law.⁵⁸
- (21) Where it grants reliefs not prayed for without reference to any provision of law.⁵⁹

For other cases where the lower Court was held to have acted illegally or with material irregularity in the exercise of jurisdiction, see the following decisions.⁶⁰

See also the undermentioned cases⁶¹ where the exercise of jurisdiction was held to be neither illegal nor irregular.

54. ('19) AIR 1919 Mad 510 (511): 42 Mad 76 (79).
55. ('18) AIR 1918 Bom 157 (158): 42 Bom 363.
56. ('85) 9 Bom 308 (310).
57. See ('07) 11 Cal W N 857 (858). (Though decree was wrong, it was held to be an error of law only.)
58. ('12) 15 Ind Cas 35 (36) (All). (It is an illegality.)
59. ('15) AIR 1915 Mad 635 (636): 37 Mad 385.
60. ('24) AIR 1924 Mad 159 (160). (Bond given for future adulterous cohabitation.)
61. ('24) AIR 1924 Nag 101 (103): 21 Nag L R 6. (Not given as part and parcel of an illegal transaction.)
59. ('24) AIR 1924 Mad 911 (911).
62. ('26) AIR 1926 Pat 519 (520). (Addition of party having no *locus standi*.)
63. ('24) AIR 1924 Oudh 11 (14).
64. ('35) AIR 1935 Pesh 157 (157).
60. ('36) AIR 1936 Pat 591 (593): 15 Pat 738. (Where it refuses to grant time for substitution of legal representative of a deceased pauper applicant.)
65. ('37) AIR 1937 All 753 (753): I L R (1937) All 943. (Refusal to give relief under U. P. Agriculturists' Relief Act.)
66. ('35) AIR 1935 All 810 (821): 57 All 810. (But Court not judicially considering what it ought to have done — There is illegal or irregular exercise of jurisdiction.)
67. ('37) AIR 1937 Mad 767 (769). (Registration of firm subsequent to suit, filed on its behalf—Suit should be allowed to proceed—Plaint should be treated valid from date of registration — Defendants not objecting to suit until a year elapsing after their written statement — Suit dismissed by lower Court on objection — Case held fit for interference in revision.)
68. ('37) AIR 1937 Lah 352 (352): 38 Pun L R 431 (432). (Omission to write judgment in accordance with law.)
69. ('39) AIR 1939 Lah 470 (470, 471): 41 Pun L R 492 (493). (It is material irregularity to hold an item proved which the trial Court has held not proved without stating on what evidence the Appellate Court relies for proof of the item.)
70. ('39) AIR 1939 Pat 30 (32). (Trial Court refusing to consolidate the suits although there is sufficient unity in the issues in suits to warrant consolidation — High Court can interfere in revision.)
71. ('36) AIR 1936 Pesh 185 (186). (Company in liquidation itself starting execution proceedings—It cannot rely on S. 171, Companies Act, to debar persons from raising objections under O. 21 R. 58—Order refusing to entertain objections is open to revision.)
72. ('38) AIR 1938 Nag 411 (412). (Suit for specific performance of contract of sale — Lower Courts failing to give effect to decree which is in terms of agreement between parties — High Court can rectify error under S. 115.)
73. ('36) AIR 1936 Lah 883 (885). (Refusal to entertain appeal which is competent constitutes error in exercise of jurisdiction.)
74. ('35) AIR 1935 All 147 (147). (Application under S. 7, Charitable and Religious Trusts Act—Judge should not dispose of matter without allowing parties to produce evidence — When he so does, there is irregular exercise of jurisdiction.)
75. ('38) AIR 1938 Sind 76 (78): 32 Sind L R 703.
76. ('35) AIR 1935 All 343 (345). (Court disallowing decree-holders' prayer to attach property of judgment-debtor without adequate reasons by allowing objections of third party before attachment is effected.)
77. ('37) 39 Pun L R 582 (583). (Court acts with material irregularity in the exercise of its jurisdiction in placing a construction on an award which is not in accordance with the evidence given by the arbitrator himself.)
78. ('24) AIR 1924 Pat 816 (817). (Rejecting of certificate of an unregistered medical practitioner.)
79. ('32) AIR 1932 All 76 (78).
80. ('33) AIR 1933 Lah 266 (266). (Granting leave under S. 20, cl. (b) without first issuing notice to opposite party is neither illegality nor material irregularity.)
81. ('34) AIR 1934 Lah 349 (350). (Execution application dismissed for default—Revision against the order—Jurisdiction of lower Court held to be neither illegal nor irregular.)
82. ('33) AIR 1933 Oudh 255 (256). (Order under O. 23 R. 1.)
83. ('33) AIR 1933 Oudh 345 (345). (Order of refusal to receive documentary evidence.)
84. ('34) AIR 1934 Rang 202 (203). (Remanding case on matter of opinion is not acting with material irregularity.)
85. ('84) 1884 All W N 167 (167). (Appellate Court going into merits of appeal in dismissing appeal for default.)

3 A plea that the Court *refused* to exercise jurisdiction cannot be raised along with
3 the plea that the Court acted with material irregularity in the exercise of jurisdiction.⁶²
An objection to an application for revision that the lower Court had jurisdiction to
hear and decide the matter and that it did not exercise its jurisdiction illegally or with
material irregularity is not a *preliminary* objection inasmuch as such objection cannot
be decided without going into the merits of the application for revision.⁶³

13. Error of law or fact. — An error of law or fact by which a Court assumes a jurisdiction which it has not, or declines to exercise a jurisdiction which it has, will come under clauses (a) and (b).¹ And an error of law in the *mode* prescribed for the exercise of jurisdiction will come under clause (c). But a *conclusion* or *decision* arrived at in the proper exercise of jurisdiction, which is erroneous in law or fact is, as has been observed in Note 12 above, not a ground for revision.² In

material irregularity in procedure followed by Court justifying interference in revision.)

('35) AIR 1935 All 476 (477). (Adjournment—Decision of lower Appellate Court as to whether there was sufficient cause for adjournment *held* not open to revision.)

('35) 160 Ind Cas 519 (519) : 18 Nag L Jour 192 (134). (Decision in pending suit that certain evidence is inadmissible—Court does not act illegally or with material irregularity.)

('34) AIR 1934 Oudh 491 (492). (Order allowing application to set aside order dismissing suit for default — Such order to be sparingly interfered with.)

('36) AIR 1936 Nag 157 (159) : 1 I L R (1936) Nag 73. (Where what the Court has done is only to decide the starting point of limitation, it has every power to do so and such an order is not revisable.)

('39) AIR 1939 Pat 564 (565) : 1939 Pat W N 341 (843). (Refusal to decide some issues as preliminary issues in suit.)

('36) AIR 1936 Oudh 172 (172). (No second appeal lies from order rejecting application for setting aside sale which has been confirmed — Nor can such appeal be treated as application for revision, even though lower Court wrongly holds that time for confirmation of sale cannot be extended without consent of parties.)

('35) AIR 1935 Pat 143 (144). (Court fixing value of attached holding and ordering sale of part of the holding under O. 21 R. 17—Order not irregular.)

62. ('26) AIR 1926 Cal 773 (775) : 53 Cal 679.

63. ('35) AIR 1935 All 810 (814) : 57 All 810.

Note 13

1. ('35) AIR 1935 Pat 385 (388) : 14 Pat 488. (If a particular jurisdiction originates in some special law or enactment, the High Court can always interfere in the sense that it can construe the law and in accordance with that construction compel the lower Court to exercise such jurisdiction or to refrain from exercising such jurisdiction if not warranted by law or the enactment in question.)

('37) AIR 1937 Pat 647 (651) : 16 Pat 729. (The decision on a question of law can be interfered with if in fact a question of jurisdiction does arise.)

('37) AIR 1937 Pat 651 (652). (Where matter of jurisdiction arises High Court can interfere in a

question of law or fact.)

('35) AIR 1935 Pat 22 (24) : 16 Pat 766 (FB). (High Court will interfere where the jurisdiction is divided from statute and matter is one of construction of statute.)

('36) AIR 1936 Pat 119 (121).

2. See also the following cases :

('33) AIR 1933 All 86 (89).

('33) AIR 1933 All 557 (558). (Dismissal of application under O. 38 R. 5 on an erroneous view.)

('34) AIR 1934 All 363 (370) : 56 All 721.

('34) AIR 1934 All 541 (542).

('34) AIR 1934 All 620 (622) (F B). (Decision on a question of court-fee.)

('34) AIR 1934 Bom 299 (300) : 58 Bom 597. (Small Cause Court deciding the stamp duty payable under a vakalatnama.)

('33) AIR 1933 Cal 20 (21).

('33) AIR 1933 Lah 940 (941). (Trial Court returning plaint for want of jurisdiction—Appellate Court remanding case finding that trial Court has jurisdiction — Revision does not lie from appellate order.)

('34) AIR 1934 Lah 165 (166). (Leave to amend plaint refused — Decision held to be only erroneous.)

('34) AIR 1934 Lah 230 (231).

('32) AIR 1932 Mad 716 (720).

('33) AIR 1933 Nag 107 (108) : 29 Nag L R 125 (F B). (Order regarding sufficiency of court-fees is not revisable when the finding is reached with due care.)

('33) AIR 1933 Oudh 240 (241).

('34) AIR 1934 Pat 550 (551). (Order setting aside an award.)

('33) AIR 1933 Sind 82 (84) : 26 Sind L R 491.

('33) AIR 1933 Sind 229 (230, 231) : 27 Sind L R 261.

('34) AIR 1934 Rang 230 (231).

('34) AIR 1934 Rang 306 (307).

('39) 16 Cal 749 (751) : 16 Ind App 104 (P C).

('26) 95 Ind Cas 838 (839) (Cal).

('28) 113 Ind Cas 539 (540) (Lah).

('29) 118 Ind Cas 141 (142) (Pat).

('29) 116 Ind Cas 660 (661) (Nag).

('35) 7 All 407 (409).

('35) 7 All 661 (664).

- ('85) 1885 All W N 259 (259). (Order adding a party under old S. 32, C. P. Code.)
- ('86) 8 All 111 (114, 115). (Failure to exercise jurisdiction vested by law.)
- ('86) 1886 All W N 57 (57). (Small Cause Court after inquiry and finding that it relates to immovable property non-suiting plaintiff.)
- ('87) 9 All 104 (105, 106).
- ('90) 1890 All W N 233 (234). (Holding that the particular property was not attachable under law.)
- ('98) 20 All 299 (302). (The fact that the Subordinate Judge wrongly rejected the pauper application on the ground that the applicant has no prima facie case is no ground.)
- ('03) 25 All 509 (526).
- ('04) 26 All 572 (573).
- ('05) 27 All 380 (382).
- ('05) 2 All L Jour 370 (371). (Order rejecting a petition for rateable distribution.)
- ('06) 28 All 84 (87).
- ('09) 31 All 38 (41).
- ('14) AIR 1914 All 125 (125).
- ('18) AIR 1918 All 186 (186). (The finding of a lower Court in a suit on a note executed by defendant that the defendant-executant is a minor but that as he fraudulently misrepresented his age is liable is a mistake of law.)
- ('20) AIR 1920 All 142 (142).
- ('23) AIR 1923 All 465 (466) : 46 All 295.
- ('24) AIR 1924 All 691 (691).
- ('27) AIR 1927 All 573 (574). (Whether or not an award is valid.)
- ('29) AIR 1929 All 581 (585) : 51 All 957. (Error of judgment in accepting the proposal of sale of trust property by a particular person.)
- ('29) AIR 1929 All 593 (595) : 51 All 910.
- ('30) AIR 1930 All 122 (123).
- ('30) AIR 1930 All 158 (160).
- ('31) AIR 1931 All 72 (73). (Dismissal of a receiver appointed by lower Court in the exercise of discretion.)
- ('31) AIR 1931 All 425 (426).
- ('31) AIR 1931 All 667 (668).
- ('32) AIR 1932 All 379 (381).
- ('05) 30 Bom 113 (115).
- ('06) 30 Bom 625 (630). (Revision against an order dismissing review.)
- ('85) 11 Cal 45 (49). (Releasing in execution the share of a person who was no party to the suit.)
- ('88) 15 Cal 446 (449).
- ('89) 16 Cal 749 (752) : 16 Ind App 104 (P C).
- ('92) 19 Cal 544 (561).
- ('95) 22 Cal 729 (734) : 22 Ind App 90 (P C). (Where decree was obtained in a personal capacity and not as manager, Court of Wards.)
- ('97) 24 Cal 133 (140).
- ('98) 26 Cal 74 (76).
- ('07) 11 Cal W N 857 (858). (Order for payment of the amount of rent decreed by instalments.)
- ('09) 3 Ind Cas 466 (467) (Cal). (Error of law in coming to a decision on the question of possession in a suit under S. 9, Specific Relief Act.)
- ('10) 6 Ind Cas 327 (331) (Cal).
- ('11) 11 Ind Cas 125 (126) (Cal). (Summary rejection of application to deposit decree amount to save tenancy.)
- ('15) AIR 1915 Cal 278 (280).
- ('16) AIR 1916 Cal 642 (644).
- ('16) AIR 1916 Cal 887 (888).
- ('17) AIR 1917 Oudh 24 (25).
- ('20) AIR 1920 Cal 75 (75). (Rent suit dismissed on the ground that while the holding consisted of two plots, only one was described in the plaint.)
- ('20) AIR 1920 Cal 71 (72). (Order staying or refusing stay of execution.)
- ('21) AIR 1921 Cal 749 (750).
- ('23) 65 Ind Cas 512 (513) (Cal).
- ('23) AIR 1923 Cal 280 (280).
- ('25) AIR 1925 Cal 814 (816). (Order of Court in accepting plaint valuation as correct in spite of objection.)
- ('26) AIR 1926 Cal 773 (775) : 53 Cal 679. (That O. 9 R. 4 does not apply to execution proceedings is only an error of law.)
- ('27) AIR 1927 Cal 928 (929). (Lower Court thinking that O. 9 R. 9 did not apply to set aside a dismissal for default.)
- ('85) 1885 Pun Re No. 64, p. 184.
- ('86) 1886 Pun Re No. 111. (Lower Appellate Court remanding a case to a Court other than the Court which tried it.)
- ('90) 1890 Pun Re No. 6 p. 13.
- ('94) 1894 Pun Re No. 9 p. 26.
- (1900) 1900 Pun LR 237 (238). (Order to a bank to furnish copies of an account from its book under S. 6, Act 18 of 1891, though not proper is not open to revision.)
- ('02) 1902 Pun Re No. 13, p. 47.
- ('11) 9 Ind Cas 1018 (1018) (Lah).
- ('13) 19 Ind Cas 847 (847) (Lah).
- ('15) AIR 1915 Lah 105 (105) : 1915 Pun Re No. 66. (Rejection of private award in toto where part of award is valid and separable is at the most an error of law.)
- ('18) AIR 1918 Lah 334 (335) : 46 Ind Cas 189 (190).
- ('27) AIR 1927 Lah 43 (44). (Refusal to excuse delay under S. 5 of the Limitation Act.)
- ('27) AIR 1927 Lah 847 (847). (When leave to amend was given.)
- ('27) AIR 1927 Lah 862 (862).
- ('28) AIR 1928 Lah 102 (103). (Error in applying a proper test to decide a question of fact.)
- ('28) AIR 1928 Lah 427 (428). (Decision whether a decree was passed under O. 17 R. 2 or R. 3.)
- ('29) AIR 1929 Lah 26 (27).
- ('30) AIR 1930 Lah 468 (469). (Restitution of property sold in execution under S. 151.)
- ('30) AIR 1930 Lah 574 (575).
- ('87) 10 Mad 51 (52). (Order refusing to amend a decree to bring it in conformity with judgment.)
- ('88) 11 Mad 303 (304). (Personal decree against adult sons is only an error but one against minor sons is materially irregular.)
- ('82) 16 Mad 424 (426). (Amending a decree to bring it in conformity with the plaint.)
- ('94) 17 Mad 371 (372).
- ('04) 27 Mad 504 (509). (Order refusing restoration of property sold but directing refund of excess money.)
- ('08) 31 Mad 458 (460). (But where the mistake of law is caused by the case not being properly

- heard, then there will be interference by the High Court on the ground of material irregularity.) ('08) 18 Mad L Jour 249 (249). (That one of the arbitrators being a party's pleader was insufficient to invalidate award.) ('11) 11 Ind Cas 835 (837) (Mad). ('11) 12 Ind Cas 250 (253) (Mad). (Wrong view of the presumption as to consideration for pro-notes.) ('12) 16 Ind Cas 405 (406) (Mad). ('14) AIR 1914 Mad 141 (142). ('14) AIR 1914 Mad 216 (217, 218). (Wrong on the question of law relating to service of summons.) ('32) AIR 1932 Mad 472 (473). (Do.) ('85) 11 Cal 261 (263). ('14) AIR 1914 Mad 149 (149). (Order refusing to excuse delay in presenting an appeal is not open to revision though the appeal was as a matter of fact presented in time.) ('16) AIR 1916 Mad 387 (388, 389). ('17) AIR 1917 Mad 404 (405). ('19) AIR 1919 Mad 183 (184). (Decision dismissing an application by prior vendor of portion of property to set aside a sale.) ('22) AIR 1922 Mad 3 (4). ('29) AIR 1929 Mad 624 (624). ('30) AIR 1930 Mad 486 (488). ('30) AIR 1930 Mad 528 (531) : 53 Mad 378. (Transfer of territorial jurisdiction — Trial of pending suit by Court having jurisdiction without transfer order—Irregularity is merely technical.) ('31) AIR 1931 Mad 83 (90) : 54 Mad 627. ('15) AIR 1915 Nag 91 (92) : 11 Nag L R 99. (Erroneous view of the law as regards ancestral property of a Hindu.) ('16) AIR 1916 Nag 86 (88) : 13 Nag L R 116. ('22) AIR 1922 Nag 128 (129). ('22) AIR 1922 Nag 264 (265). ('26) AIR 1926 Nag 472 (473). ('29) AIR 1929 Nag 317 (318). ('30) AIR 1930 Nag 136 (136). (1900) 3 Oudh Cas 321 (323). (Confirming execution sale ordered to be postponed.) ('08) 11 Oudh Cas 238 (239). ('26) AIR 1926 Oudh 28 (30). ('26) AIR 1926 Oudh 80 (80). (Where the Court below decided that the death of one of several arbitrators did not render the award invalid.) ('26) AIR 1926 Oudh 183 (184). (Defect in judgment was only due to want of experience.) ('29) AIR 1929 Oudh 26 (29) : 4 Luck 93. (That High Court would come to a different conclusion on fact in a petition under O. 21 R. 90.) ('31) AIR 1931 Oudh 408 (410). ('18) AIR 1918 Pat 520 (521). (Appointment of guardian *ad item*.) ('19) AIR 1919 Pat 476 (477). ('20) AIR 1920 Pat 266 (266) : 5 Pat L Jour 263. (Appellate Court taking additional evidence under O. 41 R. 27.) ('22) AIR 1922 Pat 376 (377) : 1 Pat 48. ('24) AIR 1924 Pat 37 (38) : 2 Pat 800. (That notice was not served within a month of deposit under O. 21 R. 89.) ('25) AIR 1925 Pat 372 (374). (Subordinate Judge deciding a question following a ruling of another High Court.) ('15) AIR 1915 Lah 175 (175). (Do.) ('29) AIR 1929 Pat 747 (748). (Order on the question of possession under O. 38 R. 8 based on an enquiry into title.) ('93-1900) 1893-1900 Low Bur Rul 548. ('01) 1 Low Bur Rul 142 (142). ('11) 12 Ind Cas 855 (857) (Rang). ('14) AIR 1914 Low Bur 62 (63) : 7 Low Bur Rul 101. ('17) AIR 1917 Low Bur 42 (43). ('19) AIR 1919 Low Bur 45 (45). (Fatal defect to a suit not taken in the first Court but only in appeal.) ('29) AIR 1929 Rang 21 (22) : 6 Rang 667. ('29) AIR 1929 Rang 187 (188). ('29) AIR 1929 Bom 198 (199). (Court taking one view out of conflicting authorities.) ('31) AIR 1931 Rang 136 (137) : 9 Rang 71. (Do.) ('26) 23 Mad L W 603 (604). (Do.) ('32) AIR 1932 Mad 472 (473). (Do.) ('29) AIR 1929 Rang 270 (271). (Erroneous decision on issue.) ('14) AIR 1914 Sind 141 (141) : 8 Sind L R 190. ('19) AIR 1919 Sind 104 (104) : 13 Sind L R 98. (Erroneous view as to misconduct of an arbitrator.) ('74) 22 Suth W R 277 (277). ('31) 136 Ind Cas 251 (252) (Oudh). ('32) AIR 1932 All 113 (114) : 53 All 519. (Judge wrongly applying a ruling.) ('82) 8 Cal 832 (833). ('94) 21 Cal 799 (806). (Erroneous legal conclusion in petition to set aside sale.) ('18) AIR 1918 Cal 415 (419). ('19) AIR 1919 Mad 869 (870). ('18) AIR 1918 Nag 263 (264). ('24) AIR 1924 Cal 493 (495). (Court holding that a notice under S. 77 of the Railways Act is not necessary on the facts of the case.) ('22) AIR 1922 All 441 (441). ('13) 18 Ind Cas 529 (530) : 1912 Pun Re No. 119. (Order passed in appeal remanding a case under O. 41 R. 23.) ('19) AIR 1919 Cal 312 (314). (Where the lower Court ordered in a suit for redemption of jewels their production under O. 39 R. 7.) ('28) AIR 1928 Lah 140 (141, 142) : 9 Lah 308. ('37) AIR 1937 Pat 25 (27). (Lower Appellate Court decreeing permanent reduction in assessment contrary to provisions of Municipal Act—Error of law—No interference.) ('35) AIR 1935 Mad 399 (401). ('39) AIR 1939 Lah 162 (163). ('35) AIR 1935 Pat 186 (188). (Decision on matters of court-fee not affecting jurisdiction is one of law.) ('39) AIR 1939 Pat 430 (431) : 1939 Pat W N 229 (230). (But if the order is absolutely unjustifiable and perverse, High Court can interfere.) ('36) AIR 1936 Pat 119 (121). (But if before assuming jurisdiction Judge determines a question of law or fact to determine the question of jurisdiction, a wrong decision in a case of this kind is certainly revisable by the High Court.) ('37) 170 Ind Cas 125 (125) (All).

Balkrishna v. Vasudeva,³ their Lordships of the Privy Council observed as follows :

“The section applies to jurisdiction alone, the irregular exercise, or the non-exercise of it or the illegal assumption of it. The Section is not directed against *conclusions* of law or fact in which the question of jurisdiction is not involved.”

Thus, an erroneous decision on a question of *limitation* or of *res judicata* is not a ground for revision⁴ unless, in arriving at such conclusion, the Court has failed to consider

- ['35] AIR 1935 Pat 448 (449).
- ['35] AIR 1935 Pat 191 (192).
- ['37] 167 Ind Cas 672 (672) (Pat). (Order in claim case based on findings of fact which are conclusive—No interference.)
- ['35] AIR 1935 Pat 16 (17). (Decision as to whether arbitrator's conduct amounts to misconduct—No revision.)
- ['37] AIR 1937 All 65 (69, 70) : I L R (1937) All 317 (FB). (Decision overruling objection not relating to validity of award and passing decree in terms of award—No revision lies.)
- ['35] AIR 1935 Pat 267 (269).
- ['35] AIR 1935 All 456 (457). (Court having jurisdiction to set aside award on proof of misconduct—No revision is competent even if Court took erroneous view of law.)
- ['36] AIR 1936 All 868 (869).
- ['37] AIR 1937 All 740 (742) : I L R (1937) All 913.
- ['37] AIR 1937 All 598 (604) : I L R (1937) All 805 (FB).
- ['36] 163 Ind Cas 573 (575) (Cal). (Court having jurisdiction to decide an election petition under the Bengal Municipal Act, misconstruing a Section of the Act—No revision.)
- ['36] AIR 1936 Cal 706 (707).
- ['38] I L R (1938) Lah 125 (126, 127).
- ['35] AIR 1935 Lah 972 (972).
- ['34] AIR 1934 Lah 1019 (1019). (Interference in revision sought for under S. 44, Punjab Courts Act.)
- ['34] AIR 1934 Lah 825 (827). (Order in review though wrong on merits is not revisable if Court had jurisdiction.)
- ['35] AIR 1935 Lah 120 (121).
- ['35] AIR 1935 Lah 602 (604) : 16 Lah 1090.
- ['35] AIR 1935 Lah 951 (951). (Court taking one view of law points—Another view possible—No question of jurisdiction—No revision lies.)
- ['36] AIR 1936 Lah 521 (523). (Where the custody Court decided that certain person is not entitled to any priority, no revision is competent even if the decision is erroneous in law as the custody Court has jurisdiction to decide such question. Further the petitioner has remedy to file a regular suit.)
- ['38] AIR 1938 Lah 357 (358). (Error by lower Court in drawing certain presumptions and conclusions is no ground for revision.)
- [See ('33) AIR 1933 Mad 697 (698, 699). (In the absence of objection by party Court is not bound *suo motu* to remit award under para. 14—High Court will not interfere in revision with decrees passed on award as made.)
- ['34] AIR 1934 Mad 392 (394) : 57 Mad 808. (Correctness of decision based on Bench decision cannot be interfered with in revision by another Bench.)]
- [See also ('77) 3 Cal 243 (247).
- ['33] AIR 1933 Lah 327 (328).
- ['36] AIR 1936 Pat 490 (491).]
- [But see ('33) AIR 1933 Mad 496 (496).]
- 3. ('17) AIR 1917 P O 71 (74, 75) : 40 Mad 793 : 41 Ind App 261 (PO).
- [See also ('33) AIR 1933 Oudh 240 (241).
- ['33] AIR 1933 Oudh 534 (534).
- ['27] AIR 1927 Cal 965 (966).
- ['31] AIR 1931 Oudh 408 (410).
- ['29] 115 Ind Cas 176 (176) (Nag).
- ['32] AIR 1932 All 140 (140).]
- 4. ('84) 11 Cal 6 (8) : 11 Ind App 237 (PO). (Wrong decision on a question of *res judicata*.)
- ['33] AIR 1933 Lah 317 (318) : 14 Lah 51. (Do.)
- ['33] AIR 1933 Mad 231 (231). (Do.)
- ['33] AIR 1933 Lah 783 (783). (Question of limitation.)
- ['33] AIR 1933 Rang 263 (263, 264).
- ['32] 137 Ind Cas 513 (513) (Lah). (Wrong application of S. 19, Limitation Act.)
- ['12] 15 Ind Cas 33 (33) (All). (Wrong decision on a question of *res judicata*.)
- ['30] AIR 1930 All 702 (704). (Question of limitation.)
- ['85] 9 Bom 432 (434). (Do. Question of *res judicata*.)
- ['87] 11 Bom 488 (492). (Do.)
- ['32] AIR 1932 Bom 81 (82). (Do.)
- ['99] 1899 Pun Re No. 26, page 140. (Do.)
- ['10] 6 Ind Cas 735 (736) : 1910 Pun Re No. 2. (Do.)
- ['11] 10 Ind Cas 679 (680) (Lah). (Do.)
- ['31] 32 Pun L R 130 (130). (Do.)
- ['21] AIR 1921 Oudh 54 (55) : 24 Oudh Cas 243. (Do.)
- ['15] AIR 1915 Mad 907 (908). (Decision of a question of limitation is not one of jurisdiction.)
- ['27] AIR 1927 Mad 660 (661). (Do.)
- ['20] AIR 1920 All 181 (181). (Do.)
- ['15] AIR 1915 All 54 (55).
- ['25] AIR 1925 All 164 (165) : 5 L R All (Civ) 694 (695).
- ['12] 15 Ind Cas 547 (548) : 39 Cal 473.
- ['12] 15 Ind Cas 679 (681) (Cal).
- ['17] AIR 1917 Cal 572 (572).
- ['28] AIR 1928 Cal 189 (190).
- ['28] AIR 1928 Cal 202 (204).
- ['86] 1886 Pun Re No. 22, page 39.
- ['15] AIR 1915 Lah 209 (210).
- ['32] 33 Pun L R 330 (331).
- ['30] AIR 1930 Lah 112 (113).
- ['31] 133 Ind Cas 439 (439) (Lah).
- ['78] 1 Mad 401 (402).
- ['10] 6 Ind Cas 745 (746) (Mad).
- ['08] 4 Nag L R 184 (186).
- ['27] AIR 1927 Nag 389 (389).
- ['30] AIR 1930 Nag 88 (88). (A revision does not lie on the ground that burden of proving that an

erroneously thinks that it has, or that it has no jurisdiction to act in a particular manner or to pass a particular order, there is either an illegal assumption of jurisdiction or a failure to exercise the jurisdiction which it has. But suppose the order of the trial Court as to its own jurisdiction is appealed against and the Appellate Court either confirms such order or reverses it, can the lower Appellate Court itself be said to have exercised a jurisdiction not vested in it or to have failed to exercise a jurisdiction which it has or to have exercised its jurisdiction illegally or with material irregularity? According to the High Courts of Allahabad,¹ Bombay,² Calcutta,³ Madras⁴ and Patna⁵ and the Judicial Commissioner's Court of Nagpur,⁶ the decision of the Appellate Court is reversible under Section 115. There is a difference of opinion in the Lahore High Court⁷ and the Oudh Judicial Commissioner's Court.⁸ The High Courts of Allahabad and Lahore and the Judicial Commissioner's Court of Nagpur have also held that the order of the Court of the first instance can itself be revised notwithstanding that it was appealed against.⁹

16. "May make such order in the case as it thinks fit." — When once the jurisdiction to revise is established, there is no limitation imposed on the power of the Court as to the mode of disposal.¹ The High Court may finally dispose of the case itself² or pass any other order which may satisfy the justice of the case.³ What the

Note 15

1. ('30) AIR 1930 All 713 (717) : 53 All 75 (F.B.).
- ('38) AIR 1938 All 17 (18) : 1 L R (1938) All 40.
- ('86) 8 All 111 (113) (F.B.).
- ('30) AIR 1930 All 158 (160).
- ('26) AIR 1926 All 58 (61) : 48 All 168.

The following cases are, in view of the Full Bench Ruling, no longer good law :

- ('98) 1898 All W N 74 (75).
- ('18) AIR 1918 All 415 (415).
- ('21) AIR 1921 All 226 (227) : 43 All 334.
- ('21) AIR 1921 All 236 (237).
2. ('91) 15 Bom 148 (151, 152).
- ('92) 16 Bom 608 (617, 618).
- ('96) 20 Bom 50 (53).
- ('28) AIR 1928 Bom 548 (549).

3. ('05) 32 Cal 146 (153). (1 Cal W N 626, dismissed from.)
- ('20) AIR 1920 Cal 977 (977).
4. ('15) AIR 1915 Mad 1223 (1229) : 18 Ind Cas 555 (560, 565) : 39 Mad 195.
- ('16) AIR 1916 Mad 739 (739).
- ('29) AIR 1929 Mad 396 (398).
- ('30) AIR 1930 Mad 216 (216, 217).

5. [See ('22) AIR 1922 Pat 525 (526) : 1 Pat 232.]

6. ('32) AIR 1932 Nag 70 (71).
- ('34) AIR 1934 Nag 257 (258).
7. ('22) AIR 1922 Lah 100 (101). (Revision dismissed.)
- ('23) AIR 1923 Lah 412 (413). (Do.)
- ('25) AIR 1925 Lah 174 (174). (Do.)
- ('29) AIR 1929 Lah 605 (606). (Do.)
- ('30) AIR 1930 Lah 611 (612). (Do.)
- ('34) AIR 1934 Lah 536 (537). (No revision dismissed.)
- ('24) AIR 1924 Lah 349 (350). (Should only be exercised in exceptional cases to remedy an injustice.)
- ('86) 1886 Pun Re No. 46, p. 87. (No revision dismissed.)
- ('11) 9 Ind Cas 674 (675) : 1911 Pun Re No. 4. (Do.)
- ('13) 19 Ind Cas 237 (238) (Lah.). (Do.)
- ('24) AIR 1924 Lah 278 (279). (Do.)

Note 16

- ('26) AIR 1926 Lah 47 (47). (Do.)
- ('29) AIR 1929 Lah 83 (84). (Do.)
- ('30) 128 Ind Cas 51 (51) (Lah.).
8. ('05) 8 Oudh Cas 257 (259). (Revision dismissed.)
- ('29) AIR 1929 Oudh 91 (92) : 4 Luck 347. (Do.)
- ('26) AIR 1926 Oudh 31 (32). (Does not lie.)
- ('30) AIR 1930 Oudh 2 (3) : 4 Luck 667 (Do.)
9. ('26) AIR 1926 All 58 (61) : 48 All 168.
- ('34) AIR 1934 Lah 108 (108).
- ('32) AIR 1932 Nag 70 (71) : 28 Nag L R 54.
- ('74) 11 Bom H O R 194 (195).
- ('33) AIR 1933 Lah 210 (211).
- [See also ('71) 6 Mad H O R 360 (363).
- ('25) AIR 1925 Oudh 163 (163).]

1. ('98) 1898 Pun Re No. 41, p. 141.
2. ('98) 1898 Pun Re No. 41, p. 141.
- ('32) AIR 1932 Mad 714 (716). (Appeal entertained against a non-appealable order — High Court in addition to setting aside the appellate order can also revise the order of the first Court if necessary and justified.)
- ('22) AIR 1922 Pat 359 (360) : 4 Pat L Jour 195.
- ('35) AIR 1935 Pesh 21 (22). (Under S. 115, C.P. Code, in cases where a Court below has failed to exercise jurisdiction vested in it, the High Court may pass such order as it thinks fit, and it is not incumbent upon the High Court to remand the case for exercise of that jurisdiction by the Court below.)
- ('38) AIR 1938 Oudh 107 (108) : 14 Luck 13. (The Chief Court has power under its revisional jurisdiction to amend decree so as to make it conform with the judgment.)
- ('81) 3 All 203 (205, 206) (F.B.).
- ('31) AIR 1931 Lah 748 (749).
3. ('81) 3 All 417 (420).
- ('33) AIR 1933 Cal 559 (560).
- ('19) AIR 1919 All 76 (78) : 42 All 18.

order should be in any particular case will depend on the circumstances of that case.⁴ As a general rule, when justice has been done between the parties, the High Court will very rarely interfere with the findings of fact or the orders of the lower Court.⁵ Similarly,

- ('17) AIR 1917 Mad 223 (224). (May expunge seditious, blasphemous, or irrelevantly scandalous or indecent remarks in the judgment.)
- ('02) 6 Cal W N 346 (348).
- ('15) AIR 1915 Oudh 171 (172). (When pre-emption money deposited on last day was not sent to bank in time due to mistake of Court, order refusing to deliver property was set aside.)
- ('36) AIR 1936 Lah 909 (910). (Time fixed by lower Appellate Court already expired and appeal dismissed for want of payment of court-fees—High Court, even then, can extend time in revision.)
- ('36) AIR 1936 Nag 140 (143) : I L R 1936 Nag 188. (When High Court as a Court of revision, under its inherent powers to remand, remands a case for further evidence on an issue and findings, retaining seisin of the case, it has no power to scrutinize or review the evidence. The powers of that Court are limited by S. 115 and all it can do is to determine whether the lower Court exercised its jurisdiction with material irregularity in arriving at the finding it did on the issue remanded to it for trial.)
- 4. ('03) 27 Bom 563 (574). (Where the Court, instead of remitting the case for a new trial, reversed the decree dismissing the suit and passed a decree for the plaintiff.)
- 5. ('15) AIR 1915 All 241 (242).
- ('32) AIR 1932 Oudh 156 (158) : 7 Luck 642.
- ('94) 18 Bom 449 (452).
- ('04) 28 Bom 458 (460).
- ('11) 12 Ind Cas 709 (710) : 36 Bom 123. (When fresh documentary evidence cannot be taken by a collector revising a Mamlatdar's order.)
- ('04) 8 Cal W N 621 (624). (Revision of restoration order on ex parte decree.)
- ('09) 1 Ind Cas 741 (742) : 36 Cal 189. (Order under old Section 108.)
- ('09) 1 Ind Cas 151 (152) (Cal).
- ('22) 66 Ind Cas 127 (128) (Cal).
- ('25) AIR 1925 Cal 1223 (1225).
- ('26) AIR 1926 Cal 245 (246). (Amendment of a patently wrong decree.)
- ('29) AIR 1929 Cal 78 (80) : 55 Cal 1084. (Where the evidence was not taken down in a manner provided by Order 18 but was dictated to the stenographer, who typed it and was later verified and signed by the Judge.)
- ('36) AIR 1936 Pesh 213 (214).
- ('34) AIR 1934 Pesh 103 (105). (Concurrent findings of Courts below cannot be interfered with in revision.)
- ('32) AIR 1932 Cal 441 (442) : 59 Cal 311. (Notice not taken in the prescribed way — No prejudice — Will not be interfered with.)
- ('01) 1901 Pun Re No. 19, p. 63.
- ('02) 1902 Pun Re No. 36, p. 135. (A Divisional Judge hearing an appeal which he cannot hear.)
- ('03) 1903 Pun L R No. 14, p. 44.
- ('04) 1904 Pun L R No. 73.
- ('07) 1907 Pun Re No. 125, p. 611. (Lower Court hearing on appeal triable by a superior Court.)
- ('10) 8 Ind Cas 733 (735) : 1911 Pun Re No. 1.
- ('11) 11 Ind Cas 445 (446) : 1911 Pun Re No. 93. (An oral acknowledgment of a debt.)
- ('11) 9 Ind Cas 744 (745) (Lah),
- ('12) 13 Ind Cas 720 (720) (Lah). (Error on a technical point.)
- ('32) AIR 1932 Mad 223 (224). (Do.)
- ('13) 18 Ind Cas 251 (251) (Lah). (Objection to jurisdiction not raised — No failure of justice—Will not be revised.)
- ('19) AIR 1919 Lah 297 (297). (Where a certain inadmissible evidence was admitted.)
- ('23) 73 Ind Cas 873 (873, 874) (Lah).
- ('26) 96 Ind Cas 822 (823) (Lah).
- ('27) AIR 1927 Lah 55 (55, 56). (No revision, as petitioner had acquiesced in the order setting aside the ex parte decree.)
- ('29) AIR 1929 Lah 777 (777). (Surety claiming discharge in revision on ground of dismissal of suit against principal—Revision not competent.)
- ('32) AIR 1932 Lah 305 (306).
- ('98) 8 Mad L Jour 149 (151). (When small cause was tried in ordinary way and also in appeal without objection.)
- ('14) AIR 1914 Mad 298 (298). (Refusing to amend a plaint at a late stage.)
- ('15) AIR 1915 Mad 335 (335). (New defendants added—Plaint not amended — Defendants not prejudiced.)
- ('16) AIR 1916 Mad 882 (882) : 39 Mad 882. (Extending time for payment of mortgage money.)
- ('18) AIR 1918 Mad 1060 (1062). (Land acquisition Judge reviewing an order passed by him under the Land Acquisition Act though without power.)
- ('22) AIR 1922 Mad 63 (65).
- ('24) AIR 1924 Mad 586 (586). (Where Section 151 was applied for Section 47 but the order was just.)
- ('26) AIR 1926 Mad 1059 (1060). (Where lower Court granted extension of time allowed by the decree from 2 to 6 months, applying Sections 148 and 151 though none of the provisions applied.)
- ('27) AIR 1927 Mad 1009 (1009). (Order as to costs acquiesced in cannot be challenged in revision.)
- ('29) AIR 1929 Mad 790 (791). (Plaint with defective or no signature, filed with plaintiff's knowledge.)
- ('24) AIR 1924 Nag 293 (294). (Where execution sale was held only 29 days after the proclamation.)
- ('22) AIR 1922 Pat 315 (316) : 1 Pat 63. (Though the order passed by the Court below was passed on an invalid reference to the Civil Court by the Land Registration Deputy Collector under Section 55 of the Land Registration Act (VII B. C. of 1876.)
- ('25) AIR 1925 Pat 36 (37) : 3 Pat 778. (Lower Court's order under Section 151, C. P. C., passed without jurisdiction setting aside its own

where the interference is likely to work not in the interest of justice but rather against an anonymous position or leaves the matter in a muddle, the High Court will set it aside in revision. Thus, while a Small Cause Judge returned a plaint which had been returned by the Munsif to be presented before the former and the Munsif adhered to his previous order, the High Court is entitled to make such an order as would enable the plaintiff to have his action tried.⁹ But a party who, by his conduct creates a particular position, cannot, in revision, seek to set it aside.¹⁰

16a. Nature of order made in revision against a decree.—An order passed in revision from a decree is a decree as much as an appellate decree.¹ But, an order *dismissing* a petition for revision does not substitute a decree of the revisional Court for that of the Court below. When a revising Court refuses to exercise its power of revision, it does not confirm any decree but merely declines to interfere, leaving the decree of the Court below intact as the decree of that Court.²

17. Laches in making the application.—Applications in revision are not governed by any law of limitation.³ Revision is a purely discretionary remedy. It is a

decree is not revivable where the decree would have been successfully avoided in review.)

(26) AIR 1926 Pat 218 (222) : 5 Pat 36 (PB). (Restoration though O. 9 R. 1 did not apply.) (29) AIR 1929 Kang 198 (200). (Appellate Court though without power deciding rightly a case under S. 73, C. P. Code.)

(13) 21 Ind C.A. 831 (531) : 7 Sind L.R. 186. (Where a Court allowed interest to a party when the merits of the case did not entitle him to interest, and the Court, on an application under Section 152, C. P. Code, modified its judgment by disallowing such interest.)

(14) AIR 1911 Sind 61 (63) : 8 Sind L.R. 927. (Where S. 151 was applied to rectify a mistake of the Court and to restore an execution petition, it will not be interfered with.)

(See (32) AIR 1932 Mad 157 (158). (Revision against order disallowing objections to award—Here illegality is not enough, but there must be some harm resulting from such illegality.) (20) AIR 1920 All 112 (116) : 12 All 626. (Order setting aside an order rejecting an appeal for failure of the appellant to give security for costs.)

(25) AIR 1925 All 51 (52). (When a suit was disposed of as a small cause without objection.) (30) AIR 1930 L.A. 417 (418). (Order extending time under S. 5, Limitation Act for a petition under S. 9, Provincial Insolvency Act.)

(33) AIR 1933 All 154 (155). (Application under O. 1 R. 8 held to be mala fide and hence dismissed—Held order should not be interfered with.)

(25) AIR 1925 All 264 (266). (98) 28 Bom 458 (460). (11) 12 Ind Cas 908 (908) (Low Bur). (31) AIR 1931 Cal 425 (427). (05) 1905 Pun L.R. No. 109. (Ex parte decree set aside in 30 days after date of order.)

(08) 81 Mad 414 (415). (14) AIR 1914 Mad 159 (160). (Where a petition

under S. 195, Criminal Procedure Code was wrongly dismissed for default and subsequently restored.)

(23) AIR 1928 Mad 559 (560). (Amendment of plaint to bring case within the Court's pecuniary jurisdiction at late stage allowed though irregular.) (25) AIR 1925 Pat 153 (154). (Where S. 148 was applied to extend time to a conditional order for payment of costs though it did not apply.)

(30) AIR 1930 Pat 279 (280). (21) AIR 1921 Oudh 168 (169). (38) AIR 1938 Pat 447 (449). (The High Court under S. 115, C. P. Code, ought not obviously to interfere in revision so as to restore an order which itself is without jurisdiction, or founded on irregularity in the exercise of jurisdiction, although the order under revision is one without jurisdiction.)

(27) AIR 1927 L.A. 485 (489) : 8 L.A. 617. (33) AIR 1933 Bom 245 (250). (Two appeals in one revision in cases disposed of by one judgment—Decision of lower Court held to be wrong in appeals—Revision should also be allowed.)

(8) (25) AIR 1925 All 202 (202). (92) AIR 1932 Bom 210 (213). (29) AIR 1922 Pat 868 (869). (34) AIR 1934 Nag 257 (258). (10) (86) 9 Mad 451 (452). (04) 28 Bom 264 (274, 275).

Note 16a
1. (34) AIR 1934 All 134 (135) : 56 All 608. (In the Allahabad High Court a decree is invariably prepared in such cases.)

2. (35) AIR 1935 Pesh 91 (92). **Note 17**
1. (33) AIR 1933 Pesh 51 (52).

[See (36) AIR 1936 Sind 172 (173) : 30 Sind L.R. 271. (The period of ninety days provided by the Rules of the Sind Court in case of a revision application is subject to the High Court's discretion.)]

privilege and not a right and corresponds to the remedies in England known as *certiorari* and *mandamus*. The invariable rule in all these cases is that the party aggrieved must come to the Court at the *earliest possible moment*. When, therefore, there has been a great and unexplained delay or *laches* in making the application, the Court will refuse to interfere.² Where, however, the petitioner is not to be blamed for the delay³ or where there are exceptional circumstances⁴ the High Court will not refuse to exercise its powers under the Section. Thus, when the petitioner failed in his attempt to set aside an *ex parte* decree and then filed a suit to vacate the same for want of jurisdiction but the Court held that the relief could not be granted, and then a revision was preferred to the High Court, the circumstances were held sufficient to explain the delay in applying for revision.⁵ The practice of the High Court of Patna is to entertain applications in revision only if they are filed within three months of the date of the order sought to be revised.⁶

18. Application in revision treated as appeal. — Where an application for revision is filed in a case in which an appeal lies, the Court may treat the petition as an appeal, provided the same was filed within the time prescribed for filing the appeal¹

2. ('17) AIR 1917 All 215 (215). (Where the order complained of was passed very early and the applicant took part in the proceedings and lost and then came in revision to set aside the same.)

('38) AIR 1938 All 98 (100) : I L R (1938) All 148. (Nine months.)

('36) AIR 1936 Oudh 185 (187) : 12 Luck 52. (Interference in revision being discretionary the practice of the Chief Court is to refuse to entertain applications for revision if they are made too late and to demand an explanation from the applicant for the delay in case the application is made more than ninety days after the passing of the order.)

('35) AIR 1935 Lah 120 (121). (Considerable delay in filing a petition is not in itself a sufficient ground for rejecting the petition where once it has been admitted to hearing.)

('33) AIR 1933 Lah 175 (176). (Delay of one year.)

('69) 1 N W P H O R 271 (272).

('82) 4 All 154 (154). (Application made after 17 months against order setting aside an execution sale.)

('10) 8 Ind Cas 529 (529) (All). (Delay of five and half months.)

('26) AIR 1926 All 228 (228, 229). (7 months.)

('83) 7 Bom 341 (372).

('74) 22 Suth W R 522 (523).

('78) 2 Cal L Rep 545 (547).

('76) 1876 Pun Re No. 50, p. 92. (Eight and half months.)

('90) 1890 Pun Re No. 34, p. 92.

('11) 10 Ind Cas 129 (130) (Lah). (Two months.)

('11) 10 Ind Cas 183 (186) (Lah). (Preliminary order unchallenged till after the enquiry had been made and final order passed.)

('13) 18 Ind Cas 795 (795) (Lah). (17 months' delay.)

('14) AIR 1914 Lah 249 (250) : 1914 Pun Re No. 25. (One year.)

('11) 12 Ind Cas 169 (170) (Mad).

('14) AIR 1914 Mad 299 (299). (8 Months from

date of order and after an inexcusable delay of 5 months.)

('18) AIR 1918 Oudh 116 (117). (Where a plaint was returned by the Court of first instance for presentation to the proper Court and the plaintiff delayed long after the order of return and also after the lower Appellate Court's order.)

('21) AIR 1921 Oudh 141 (142) : 24 Oudh Cas 282.

('23) AIR 1923 Oudh 272 (272). (One year.)

('25) AIR 1925 Oudh 608 (608). (Three years of unexplained delay.)

('30) AIR 1930 Oudh 496 (496).

[See also (1900) 1900 Pun L R No. 7. (Extreme remissness of petitioner.)]

3. ('84) 6 All 125 (126).

('36) AIR 1936 Oudh 185 (187) : 12 Luck 52. (If the applicant was not a party to any of the orders which he seeks to revise and they were all passed behind his back and without notice to him, the delay on the part of the applicant should be condoned.)

('28) AIR 1928 Mad 528 (530) : 51 Mad 672.

4. ('15) AIR 1915 Cal 290 (291).

('22) AIR 1922 Mad 63 (64).

('69) 11 Suth W R 56 (57).

[See also ('30) AIR 1930 Oudh 496 (496).]

5. ('29) AIR 1929 Oudh 383 (383).

6. ('33) AIR 1933 Pat 582 (582).

Note 18

1. ('98) 25 Cal 757 (778) (F B). (Suit to file an award which was rejected on objection by opposite party on the ground that there was no reference at all to arbitration.)

('32) AIR 1932 Bom 77 (78).

('34) AIR 1934 Pat 281 (282).

('11) 10 Ind Cas 51 (53) (Cal). (Order setting aside a sale under O. 21 R. 89.)

('11) 10 Ind Cas 542 (543) (Cal). (Where the lower Court wrongly refused to entertain an appeal as being barred by limitation.)

('15) AIR 1915 Cal 268 (271).

('84) 7 Mad 555 (556). (Application presented as an appeal — But amended and received as an

and provided the proper court-fee is paid.² In cases where the time for filing the appeal had expired on the date when the revision was converted into an appeal, the Court has ample jurisdiction to excuse the delay under Section 5 of the Limitation Act.³ If a revision is treated as a second appeal *ex parte*, the respondents are not precluded from showing that no second appeal lay.⁴

19. Appeal treated as an application in revision.—In cases where no appeal lies but an appeal is wrongly preferred, the Court has a very wide discretion to allow the appeal to be treated as a petition for revision, where the conditions of Section 115 are satisfied.¹

application under this Section — But ultimately held that an appeal lay and therefore treated as an appeal.)

(19) AIR 1919 Mad 358 (358).
(25) AIR 1925 Pat 16 (17) : 3 Pat 344.
(15) 29 Ind Cas 678 (678). (U P B R).

(17) AIR 1917 U P B R 9 (10) : 2 U P B R 106. (Second appeal.)
(27) AIR 1927 All 120 (120) : 49 All 178. (Appeal admitted as revision.)

2. (1900) 23 Mad 101 (104).
[See also (27) AIR 1927 Cal 581 (584).]
3. (18) AIR 1918 Lah 67 (68) : 1917 Pun Re No. 95. (On the facts of this case, extension of time under S. 5, Limitation Act was not granted.)

(20) AIR 1920 Lah 450 (451). (The facts were so peculiar and the order of the Court below was so manifestly unjust, that the Chief Court extended the time under Sec. 5 of the Limitation Act.)

(22) AIR 1922 Lah 233 (234) : 2 Lah 1. (Period cannot be extended where no sufficient cause has been shown.)

4. (94) 1894 Pun Re No. 80, page 274.
Note 19

1. (92) 5 C P L R 81 (82).
(34) AIR 1934 Bom 252 (253) : 58 Bom 485.
R. 6 (2) treated as revision. (Order of remand under O. 41 R. 25 is not appealable—Appeal can be treated as revision.)

(32) AIR 1932 Lah 538 (539). (Appeal filed against a non-appealable order of remand.)
(33) AIR 1933 Lah 73 (74).
(33) AIR 1933 Lah 135 (136). (Conditions of Section not satisfied — Appeal not treated as revision.)

(33) AIR 1933 Lah 421 (421).
(34) AIR 1934 Lah 198 (198). (Second appeal against an appellate order under the Provincial Insolvency Act treated as revision.)
(33) AIR 1933 Mad 152 (153) : 56 Mad 453.

(32) AIR 1932 Oudh 61 (62). (Appellate order by District Court under Sec. 75 of the Provincial Insolvency Act—Second Appeal to High Court treated as revision.)

(33) AIR 1933 Pesh 46 (46). (Appeal not maintainable — Question of jurisdiction raised — Appeal can be converted into revision.)

(04) 26 All 358 (361).
(05) 27 All 380 (381).
(06) 1906 All W N 58 (59).
(06) 1906 All W N 62 (63).

(14) 25 Ind Cas 933 (934) : 7 Low Bur Rul 133.
(24) AIR 1924 Rang 177 (178) : 1 Rang 656.
(An order of remand directing further evidence to be taken not under O. 41 R. 23.)

(04) 26 All 358 (361).
(05) 27 All 380 (381).
(06) 1906 All W N 58 (59).
(06) 1906 All W N 62 (63).

(14) 25 Ind Cas 933 (934) : 7 Low Bur Rul 133.
(24) AIR 1924 Rang 177 (178) : 1 Rang 656.
(An order of remand directing further evidence to be taken not under O. 41 R. 23.)

(14) 25 Ind Cas 933 (934) : 7 Low Bur Rul 133.
(24) AIR 1924 Rang 177 (178) : 1 Rang 656.
(An order of remand directing further evidence to be taken not under O. 41 R. 23.)

(14) 25 Ind Cas 933 (934) : 7 Low Bur Rul 133.
(24) AIR 1924 Rang 177 (178) : 1 Rang 656.
(An order of remand directing further evidence to be taken not under O. 41 R. 23.)

(14) 25 Ind Cas 933 (934) : 7 Low Bur Rul 133.
(24) AIR 1924 Rang 177 (178) : 1 Rang 656.
(An order of remand directing further evidence to be taken not under O. 41 R. 23.)

(95) 19 Bom 286 (288). (Special Judge under Dekkhan Agriculturists' Relief Act setting aside Sub-Judge's decree on facts.)
(95) 19 Bom 675 (678).
(95) 19 Bom 790 (795, 796). (Order granting a succession certificate on applicant's furnishing security.)
(98) 22 Bom 520 (524).
(92) AIR 1932 Bom 228 (230).
(09) 1 Ind Cas 116 (118) (Cal). (Where the witnesses to a claim are same, allowing them to proceed with two suits together.)
(12) 17 Ind Cas 361 (362) (Cal). (When plaintiff filed a suit in ejectment and applied for a temporary injunction and the Court ordered defendant to furnish security.)
(16) AIR 1916 Pat 268 (269) : 1 Pat L Jour 92. (Where a Court extended time in a pre-emption suit for depositing money under S. 148, Civil Procedure Code.)
(19) AIR 1919 Cal 979 (980). (Restoration of a dismissed suit for default in the ends of justice.)
(19) AIR 1919 Cal 323 (324, 325). (Order allowing substitution of parties under O. 22 R. 10.)
(19) AIR 1919 Cal 234 (234). (Fixing rent under S. 105, Bengal Tenancy Act.)
(23) AIR 1923 Lah 506 (508). (Decision that no grounds existed for exercise of inherent power.)
(22) 64 Ind Cas 563 (564) (Cal). (Rejection of an application under O. 1 R. 10.)
(22) 67 Ind Cas 252 (253) (Cal). (Refusal to admit additional evidence in appeal.)
(28) AIR 1928 Cal 421 (423) : 55 Cal 748. (Issue of a commission under Order 26.)
(02) 5 Oudh Cas 151 (152).
(30) AIR 1930 Cal 426 (428). (Admitting appeal out of time under S. 5, Limitation Act.)
(14) AIR 1914 Lah 9 (11) : 20 Ind Cas 203 (205) : 1914 Pun Re No. 10. (Dismissal of an application for restitution and failing to act under Section 151.)
(16) AIR 1916 Mad 1220 (1221) : 39 Mad 235 (R.B.).
(83) 6 Mad 227 (228). (Junior widow impleaded in an execution petition by senior widow.)
(84) 7 Mad 584 (586). (Admitting appeal out of time.)
(87) 10 Mad 98 (100). (Refusing leave under S. 18 of the Act, 20 of 1869, Religious Endowments Act.)
(06) 16 Mad L Jour 526 (528).
(07) 30 Mad 274 (276). (Restoration of suit dismissed for default.)
(09) 4 Ind Cas 1130 (1130) (Mad). (Setting aside of a wrong order.)
(10) 5 Ind Cas 291 (291) : 38 Mad 412.
(14) AIR 1914 Mad 149 (149). (Order refusing to excuse delay in presentation of an appeal.)
(19) AIR 1919 Mad 479 (481). (Refusing to extend time for setting aside an abatement.)
(22) AIR 1922 Mad 198 (193). (When delay is excused under S. 5, Limitation Act, in admitting an appeal.)
(26) AIR 1926 Mad 591 (592).
(28) 118 Ind Cas 818 (818) (Mad). (Where the Court amended an issue at a late stage but

before passing of a decree.)
(29) AIR 1929 Mad 192 (193). (Allowing examination of witness on commission.)
(80) AIR 1930 Mad 72 (74). (Order as to costs.)
(31) AIR 1931 Mad 10 (11). (Granting extension of time for discharge under S. 43, Provincial Insolvency Act.)
(14) AIR 1914 Nag 60 (62) : 10 Nag L R 139. (Refusing to extend time spent in obtaining copies.)
(20) AIR 1920 Nag 149 (149). (Grant of adjournment on payment of costs.)
(26) AIR 1926 Nag 156 (157). (Court's discretion for extending time for payment of deficient court-fee.)
(27) AIR 1927 Nag 258 (255). (Application for appointment of curator.)
(29) AIR 1929 Nag 288 (288). (Allowing secondary evidence of a lost document.)
(28) 111 Ind Cas 141 (142) (Nag). (An order passed under O. 1 R. 10, O. P. Code.)
(24) AIR 1924 Oudh 348 (349). (Fixing of high fee of commissioner.)
(25) AIR 1925 Oudh 148 (148). (Appellate Court excusing delay in filing appeal.)
(31) AIR 1931 Oudh 408 (409). (Discretion in the appointment of a person as mutawalli.)
(18) AIR 1918 Pat 520 (521). (Appointment of a pleader as a guardian for the suit.)
(26) AIR 1926 Oudh 160 (160). (Question of sufficiency of security.)
(28) 108 Ind Cas 804 (804) (Pat). (Exercise of inherent jurisdiction.)
(17) AIR 1917 Low Bur 81 (81). (Compensation in breaches of contracts of service.)
(14) AIR 1914 Sind 105 (107) : 8 Sind L R 275. (Grant of adjournments.)
(81) 3 All 508 (509). (Order granting or withholding sanction to prosecute by Civil Court.)
(96) AIR 1936 Lah 904 (906). (Refusal to stay suit under S. 19, Arbitration Act, in exercise of discretion—No interference.)
(36) AIR 1936 Lah 140 (140).
(34) 86 Pun L R 374 (374). (Discretion under S. 5, Limitation Act.)
(35) 158 Ind Cas 259 (259) (Lah). (Rejection of application for extension of time under S. 5, Limitation Act.)
(35) AIR 1935 Cal 102 (107).
(34) AIR 1934 Cal 780 (781). (Exercise of inherent power.)
(35) AIR 1935 All 49 (49). (Court considering matter judicially and refusing to exercise discretion under S. 151 — S. 115 does not apply—No question of jurisdiction arises.)
(36) AIR 1936 Pesh 97 (99). (Lower Court exercising discretion vested in it by S. 5, Limitation Act—High Court will not interfere.)
(35) AIR 1935 Pesh 182 (185). (One Court notifying to another a complicated situation and suggesting that proceedings in the other Court may be stayed — Other Court should give weight to such suggestion and give reasons for refusing to comply with such request—That is matter of Court's discretion and High Court is reluctant to interfere with such discretion.)

ground for interference.² But when the discretion is exercised *perversely* so as to cause serious prejudice to a particular party, the High Court will be justified in interfering with it.³ It was held in the undermentioned case⁴ that the Judge's order as to whether a ballot paper is valid or not, is *final* under Rule 12 of the rules for the decision of disputes relating to election to local bodies, and cannot be interfered with in revision. But where the revisional power is not distinctly barred by any specific provision, it remains.⁵

- (1938) AIR 1938 Mad 979 (980); ILR (1938) Mad 317.
 ('35) AIR 1935 Nag 68 (68). (Parties to mortgage — Person claiming paramount title may be joined as a party to a mortgage suit if just and convenient — High Court should not interfere under Section 115.)
 ('38) AIR 1938 Mad 347 (348); I L R (1938) Mad 667 (FB). (Court thinking that guardian acted properly throughout — It has full discretion to discharge him and his order cannot be challenged in revision.)
 ('37) AIR 1937 Pat 38 (39). (Judge in exercise of his discretion rejecting application to be added as intervenor of person depositing landlord's fee under Sec. 26 (O), Bihar Tenancy Act — High Court in revision will not interfere.)
 ('37) AIR 1937 Pat 528 (530). (Even when such exercise is founded on a mistaken view of the law.)
 ('39) AIR 1939 Lah 170 (171). (Court accepting security in exercise of its discretion — No material irregularity — No revision lies against order accepting security.)
 [See ('37) AIR 1937 Lah 206 (207). (*Obiter* — Order refusing to stay under S. 19, Arbitration Act — No appeal lies but revision is entertainable.)]
 ('33) AIR 1933 All 343 (344). (Order restraining returning officer from holding election.)
 [See also ('91) 15 Bom 180 (182). (Special Judge under Bombay Act 17 of 1879 exercising his discretion in setting aside the decree of a subordinate Judge.)]
 2. ('23) AIR 1923 Mad 690 (692). (Refusal to add parties.)
 ('28) 113 Ind Cas 313 (313) (Mad). (Amendment of issue at a late stage.)
 ('16) AIR 1916 Mad 384 (385). (Bare failure to exercise discretion as regards costs.)
 ('26) AIR 1926 Cal 1112 (1113). (Amendment of pleading.)
 ('31) AIR 1931 Lah 672 (672). (Order under S. 41, Provincial Insolvency Act.)
 ('67) 7 Suth W R 519 (520). (Sending a witness to a Magistrate for refusing to attend Court in obedience to a summons.)
 ('18) AIR 1918 All 418 (419) : 40 All 612.
 ('11) 12 Ind Cas 173 (174) (Mad). (Amending pleading.)
 ('23) 111 Ind Cas 141 (142) (Nag).
 ('93) 16 Mad 424 (428).
 ('27) AIR 1927 Rang 311 (313) : 5 Rang 615. (Order extending time for performance is not revisable unless discretion is wrongly exercised.)
 ('38) AIR 1938 Lah 548 (550); I L R (1938) Lah 289.
 3. ('16) AIR 1916 Pat 75 (76); 1 Pat L Jour 465.
 ('33) AIR 1933 All 957 (958). (Order refusing amendment of plaint — *Held* exercise of discretion was arbitrary — Hence revisable.)
 ('25) AIR 1925 Cal 293 (294). (Order setting aside sale under S. 173 of Bengal Tenancy Act — Not revisable unless prejudice caused.)
 ('31) AIR 1931 Cal 268 (269).
 ('14) AIR 1914 Mad 203 (203). (A refusal by a subordinate Court to issue a commission to examine certain witnesses is not an abuse of process warranting an interference by the High Court.)
 ('23) AIR 1923 Lah 506 (508). (Exercise of discretion under S. 151 not shown to be perverse — No interference.)
 ('37) AIR 1937 Oudh 282 (283); 13 Luck 171. (Court disallowing plaintiff costs of suit — Discretion as to costs based on erroneous view of law — Order as to costs can be interfered with under S. 115.)
 ('35) AIR 1935 Mad 230 (232).
 ('36) AIR 1936 Pat 250 (252). (Court summarily rejecting prayer for trying preliminary issue on point of law — No opinion expressed as to whether point of law would be sufficient to dispose of case — High Court would interfere in revision.)
 ('35) AIR 1935 All 705 (706). (Discretion exercised capriciously.)
 ('37) AIR 1937 Pat 21 (22). (Refusal to issue commission to a pardanashin lady at her place of residence which is different from the place of suit.)
 ('35) AIR 1935 Cal 336 (337). (By acting under S. 151, Court having no jurisdiction to do so, depriving a party of a valuable right which he had acquired by virtue of the law of limitation — High Court can interfere in revision.)
 [See ('37) AIR 1937 Mad 338 (339). (Order under O. 1 R. 10 can be revised when the Court fails to exercise a discretion vested in it due to error.)]
 ('38) AIR 1938 Pat 413 (417) : 17 Pat 507.
 ('34) AIR 1934 Mad 84 (85); 57 Mad 542. (Excess fee paid by mistake of party — Certificate should be granted even in revision.)
 4. ('29) AIR 1929 Mad 793 (793).
 5. ('29) AIR 1929 All 581 (584) : 51 All 957.
 [See ('32) AIR 1932 Oudh 39 (40). (Decree under S. 9, Specific Relief Act, may be revised.)]
 ('32) AIR 1932 Oudh 210 (213); 7 Luck 601 (FB). (Revision lies against order of Court under Mussalman Waqf Act of 1923 if conditions of Section are satisfied.)
 [See also ('33) AIR 1933 Rang 2 (3); 10 Rang 517 (SB). (Order of District Judge as to validity of election — Rule providing that the order shall be final — Revisional powers will not be exercised unless the order is made without jurisdiction.)]

As to whether the High Court will interfere in revision against an order which has been declared to be final by a particular Act, see the undermentioned cases.⁶

21. Orders under Sections 152 and 153.—The High Courts of Allahabad, Bombay⁷ and Calcutta⁸ and the Chief Court of the Punjab⁹ have held that an order passed under Section 206 of the old Code constitutes an adjudication separate from that concluded by the decree and amounts to a decision of a 'case' capable of being revised. The same view has been taken under the present Code also.⁵ Accordingly, it has been held that if a Court refuses to amend a decree in conformity with the judgment it amounts to a refusal to exercise jurisdiction.⁶ In an old Allahabad case⁷ when the decree was amended from "I dismiss the appeal" to "I accept the appeal" it was considered to be a grave irregularity in the exercise of jurisdiction. Similarly, a Court has no power to vary or amend a decree when it is in conformity with the judgment and, if done, it will be open to revision.⁸

The High Court of Madras⁹ has, on the other hand, held that no revision lies.

6. (132) AIR 1932 Cal 727 (729). (Order of District Judge under S. 88 of the Bengal Act, 5 of 1919 is final—High Court will discourage application in revision.)

(133) AIR 1938 All 47 (47) : 1 L R (1938) All 110. ('Final' in S. 45 (5), U. P. Encumbered Estates Act means finality for purposes of appeal—High Court can interfere in revision under Section 115.)

(134) AIR 1938 All 456 (459) : 1 L R (1938) All 702 (711). (The provision about the finality of the decision of the Appellate Court contained in S. 5 (2) of the U. P. Agriculturists' Relief Act, cannot warrant the inference that the Legislature meant in any way to control or limit the revisional jurisdiction conferred on the High Court by S. 115, C. P. Code.)

(135) AIR 1938 Cal 465 (466). (Order of District Judge arising out of proceedings under Ss. 86 to 10 of the Bengal Municipal Act is final and High Court has no power to revise it.)

(136) AIR 1938 Cal 959 (960). (Order of District Magistrate on petition under R. 1 (a) of Election Rules under Bengal Local Self Government Act is final and no revision lies to High Court.)

(137) AIR 1938 Oudh 162 (165). (Application under S. 4, U. P. Encumbered Estates Act—Applicant making default in paying charges for issue of notice under S. 11—Special Judge dismissing application and further refusing to restore it—Appeal lies to District Judge under S. 45 (2)—Revision under S. 115 does not lie.)

Note 21

1. (185) 7 All 875 (876) (FB).

2. (107) 31 Bom 447 (449).

3. (101) 28 Cal 177 (179).

4. (188) 1888 Pun Re No. 101.

5. (134) AIR 1934 All 100 (101).

[See (11) 10 Ind Cas 850 (850) : 1911 Pun Re No. 24.

(127) AIR 1927 Lah 68 (68). (Order of amendment of a decree in regard to the amount of the plaintiff's fee allowed as costs.)

[See also (37) AIR 1937 Oudh 246 (247) : 13 Luck

186. (Order refusing to amend decree—High Court, even if precluded from interfering in revision, can interfere under S. 151.)

(186) AIR 1936 Oudh 81 (82). (Decision under S. 152, C. P. C., allowing amendment of preliminary decree is an order and not a decree and is open to revision.)

(187) AIR 1938 Lah (4) (5). (Amended decree though appealable, revision from order amending decree is entertainable, if order is passed without jurisdiction.)

[See however (127) AIR 1927 Cal 114 (116). (Order amending decree not open to revision as appeal lies on amended decree.)]

6. (184) 6 All 125 (129).

(186) 8 All 519 (532).

(191) 1691 All W N 114 (114). (Delay in applying when not caused by petitioner is no ground to refuse.)

(110) 6 Ind Cas 707 (707) (All).

(18) AIR 1918 All 208 (209).

(124) AIR 1924 Lah 621 (622). (When judgment is given against a person sued in a representative capacity, the decree giving a personal liability was refused to be amended.)

(129) AIR 1929 Lah 664 (664).

(131) AIR 1931 Oudh 423 (424).

(15) AIR 1915 All 1 (1). (But not when the refusal arose from a mistake of law or fact.)

7. (185) 7 All 875 (876) (FB).

8. (198) 15 All 121 (122). (Decree was amended by adding interest from date of suit, till date of payment when judgment awarded only a specified sum.)

(134) AIR 1934 All 100 (101).

(114) AIR 1914 Cal 387 (387). (Where the Court acts under S. 151 in a case where it should not have done.)

(128) 108 Ind Cas 787 (788) (Lah).

[See (130) AIR 1930 Lah 589 (591).

(113) 18 Ind Cas 725 (726) (Cal). (An amendment to a sale certificate to show the purchase of a larger share of the property than what was stated in the sale proclamation under S. 152 is beyond jurisdiction.)]

9. (101) 24 Mad 646 (650).

way of a suit is available to the aggrieved party under clause (2) of Section 73.¹ This, however, does not mean that the aggrieved party should be confined to that remedy "if the circumstances of the case warrant an interference." Accordingly when Courts have acted in defiance of the terms of Section 73 and thereby assumed a jurisdiction which they did not possess or declined jurisdiction in a proper case, the High Court will interfere to set matters right.²

See Notes to Section 73 also.

23. Orders in claim cases.

As has been seen in Note 8 *ante*, no application will ordinarily be entertained to revise an order passed under O. 21 Rr. 60, 61 or 62 inasmuch as the party against whom the order is made has a special remedy by way of a suit. But this does not bar the High Court's power of interference in exceptional cases.¹ Thus, if the lower Court fails to determine the only real question that has to be decided, namely, that of possession² and disposes of the petition on a determination of the question of title³ which it was not competent to investigate, or allows a claim in express violation of the Code, as for example, after the execution sale⁴ or against mortgaged property which was brought for sale,⁵ the High Court will interfere.

(17) AIR 1917 Mad 589 (589).
[See (32) AIR 1932 All 337 (339) : 54 All 490.
(Revision treated as application for amendment to prevent multiplicity of proceedings.)]

Note 22

1. See Note 8 *ante* and also point 1, Note 25 to Section 73.

2. (25) AIR 1925 Oudh 287 (287).
(32) AIR 1932 All 411 (413) : 54 All 516. (Interfered to avoid long and expensive litigation.)
(33) AIR 1933 Lah 48 (49) : 14 Lah 243.

(34) AIR 1934 Lah 119 (119).
(34) AIR 1934 Oudh 110 (111). (Disallowing rateable distribution in defiance of predecessor's order.)

(33) AIR 1933 Pesh 52 (53).
(09) 4 Ind Cas 52 (53) (Cal).
(11) 10 Ind Cas 527 (529, 530) (Cal). (Rateable distribution was refused because lower Court thought that execution petition was not put in before sale.)

(16) AIR 1916 Cal 371 (372). (Giving rateable distribution to a person who has simply obtained an attachment before judgment.)
(22) AIR 1922 Cal 19 (21).

(81) 4 Mad 383 (384). (Giving a share to decree-holder whose execution has been dismissed.)
(92) 15 Mad 372 (376). (Wrongly refusing to entertain an application.)

(09) 4 Ind Cas 509 (510) : 32 Mad 334. (Refused because there was other property of the judgment-debtor available.)
(21) AIR 1921 Mad 481 (482).

(26) AIR 1926 Mad 179 (181). (Where the lower Court thought that petitioner was not entitled to rateable distribution, because his execution did not end successfully.)
(31) 1931 Mad W N 1012 (1014).

(26) AIR 1926 Nag 380 (381).
(07) 10 Oudh Cas 129 (131).
(21) AIR 1921 Pat 401 (402) : 5 Pat L Jour 415. (Application refused because it was put in only when sale was going on.)

(24) AIR 1924 Pat 434 (435).
(31) AIR 1931 Pat 405 (408) : 11 Pat 250.
(38) 177 Ind Cas 269 (270) (Pat). (Court declining to exercise jurisdiction vested in it under S. 73.)
[See also (33) AIR 1933 Pat 277 (278). (Sum distributed not forming part of assets liable to be rateably distributed—Revision lies.)]

Note 23

1. (26) AIR 1926 Nag 257 (259). (But the mere fact that if he files a suit the onus will be on him is no ground for interference in revision.)
(33) AIR 1933 Pat 158 (159). (Where order is passed without consideration of evidence, High Court will interfere.)
(23) AIR 1923 Mad 663 (664).
(36) AIR 1936 Rang 306 (306) : 14 Rang 516. (High Court will interfere where Court passing the order has failed to exercise jurisdiction vested in it.)

2. (29) AIR 1929 Cal 225 (226).
(09) 4 Ind Cas 125 (125) (Mad).
(16) AIR 1916 Mad 19 (19).
(28) AIR 1928 Mad 124 (125).
(27) AIR 1927 Nag 286 (288).
(21) 60 Ind Cas 616 (618) (Pat).
(23) AIR 1923 Rang 195 (196) : 1 Rang 276.
(87) 14 Cal 617 (620). (Really went behind and saw whether his possession was lawful or not.)

3. (15) AIR 1915 Cal 116 (117).
(33) AIR 1933 Rang 259 (260).
(25) AIR 1925 Mad 588 (588).
(31) AIR 1931 Lah 666 (666).
(37) 1937 Mad W N 320 (320).
(39) AIR 1939 All 117 (120).
4. (06) 33 Cal 487 (496).
(12) 15 Ind Cas 53 (54) (Cal).
(11) 9 Ind Cas 194 (195) (Cal).
(29) AIR 1929 Pat 746 (747). (Order based on erroneous view of fact and law.)

5. (05) 27 All 700 (701).
(18) 18 Ind Cas 215 (195) (Cal).
(18) AIR 1918 Lah 368 (368) : 1918 Pun Re No. 58
[See also (21) AIR 1921 Cal 479 (480).]

enough; it will be violating the principle of the rule if the sale is set aside without such an application.¹² though an oral application has been considered sufficient.¹³ No order could be made setting aside a sale under O. 21 R. 89, without notice as provided under R. 92, but there is no jurisdiction to confirm the sale for failure to pay process fees when the auction-purchaser appears in the proceeding by a pleader.¹⁴ When the deposit falls short, due to a mistake of the Court, and is subsequently made good, the Courts act with material irregularity in refusing to set aside a sale.¹⁵ No application for revision will lie from an order dismissing an application under R. 89 on the ground that an application under Rule 90 was previously dismissed.¹⁶ See also the undermentioned cases.¹⁷

As in the case of applications under O. 21 R. 89 so in applications under R. 90, only a first appeal is provided by Section 104 and O. 43 R. 1 clause (i).¹⁸ But if the application raises a question concerning the execution, discharge or satisfaction of the decree within the meaning of Section 47 and when no petition is put in under R. 89, the executing Court is bound to decide it and the decision so given being a decree, a second appeal will lie.¹⁹ An instance of the kind is to be found where a sale is held without issuing a proper notice provided by O. 21 R. 22.²⁰ When a Court rejects an application to set aside a sale summarily,²¹ or without allowing the petitioner an opportunity to substantiate his allegations²² or without considering the evidence let in by him²³ or by misapplying the law of limitation,²⁴ it was held to be a sufficient ground for interference. When the auction-purchaser²⁵ or the decree-holder²⁶ is not impleaded

(129) AIR 1929 Nag 10 (11). (Refusal to confirm a sale where the amount is not deposited in time as without jurisdiction.)
(187) 11 Cal 821 (328). (Under S. 174, B. T. Act, where T. P. Notes were deposited, it was held not a proper deposit.)
12. (119) AIR 1919 Bom 180 (131) : 43 Bom 735. (See (389) 18 Pat 210 (213). (Court refusing to set aside execution sale in absence of application though necessary deposit was made—High Court cannot interfere.)]
13. (21) 63 Ind Cas 140 (141) (All). (17) AIR 1917 Mad 225 (226). (An unstamped memo will not be allowed to be amended in revision to include a prayer for setting aside.)
14. (22) 67 Ind Cas 286 (287) (Cal).
15. (30) AIR 1930 Cal 249 (250).
[But see (20) AIR 1920 Cal 392 (392).]
16. (98) 1898 All W N 148 (149).
17. (37) AIR 1937 Pat 113 (116) : 16 Pat 202 (R.B.). (Parties agreeing that on default in payment of the decretal amount by a certain date the sale should be confirmed — Sale confirmed — Order one under O. 21 R. 89 — Appeal lay and even if appeal did not lie, revision lay.)
(37) AIR 1937 Pat 537 (540). (Sale in execution of rent decree—Transferee from judgment-debtor depositing in Court 5 per cent. for payment to stranger auction-purchaser on last day of limitation — In lieu of depositing in Court under Section 174 (1), Bengal Tenancy Act, transferee filing petition that payment had been made out of same — Court held was bound to affirm sale unless money actually deposited in Court within limitation — Sale set aside — Case held fit for

interference in revision.)
(36) AIR 1936 Oudh 55 (56) : 11 Luck 418. (Execution sale — Decree-holder consenting to accept decretal amount from judgment-debtor and have sale set aside though beyond time — Court setting aside sale — Equities held were in favour of judgment-debtor and High Court should not interfere in revision.)
(38) AIR 1938 Mad 307 (312). (An order rejecting an auction-purchaser's application for confirmation of the sale is not an appealable matter nor can it be revised.)
18. (95) 22 Cal 802 (805). (Sale set aside without knowledge of third party interested will not be interfered with.)
(27) AIR 1927 Cal 657 (658). (Order of remand for clearer findings was held not without jurisdiction.)
19. (24) AIR 1924 All 698 (699).
20. (24) AIR 1924 Mad 431 (436) : 47 Mad 288 (R.B.).
21. (25) AIR 1925 Nag 289 (291).
22. (29) AIR 1929 All 793 (793) : 51 All 1023.
23. (25) AIR 1925 Cal 515 (516). (When a sale was set aside after seven years and the judgment did not discuss all points.)
(21) AIR 1921 Cal 251 (252) : 48 Cal 119.
24. (26) AIR 1926 All 305 (306) : 48 All 286. (Because fuller particulars of fraud were given only after 30 days.)
(28) AIR 1928 All 354 (354). (S. 18, Limitation Act.)
(24) 44 Cal 2 Jour 555 (568).
(13) 18 Ind Cas 391 (392) (Cal). (A failure to consider S. 7, Limitation Act is not, when raised for first time.)
25. (29) AIR 1929 All 598 (595) : 51 All 910.
26. (93) 15 All 407 (409).

circumstances of the case, or on a ground not covered by the Section⁵ or where there is no material on which the discretion could be exercised.⁶ Similarly, an order granting leave to withdraw but without giving the necessary permission to bring a fresh suit⁷ or after the case has been disposed of on the merits,⁸ is open to revision. Where, however, the Court acts judicially in a proper manner, the order is not open to revision even if there is an error of judgment.⁹

Though Order 23 does not apply to execution proceedings, an order rejecting the application of a decree-holder to withdraw the execution proceedings and proceedings

- (116) AIR 1916 Mad 674 (674). (Appellate Court permitting withdrawal for non-joinder.)
 (115) AIR 1915 Nag 93 (91).
 (117) AIR 1917 Nag 121 (122).
 (117) AIR 1917 Cal 36 (37).
 (117) AIR 1917 Cal 172 (172).
 (117) AIR 1917 Cal 741 (741).
 (117) AIR 1917 Cal 152 (152).
 (117) AIR 1917 Pat 452 (451) : 3 Pat L Jour 460.
 (115) AIR 1915 Pat 452 (451) : 3 Pat L Jour 460.
 in revision.)
 for inadequate grounds—Order can be set aside without considering procedure under O. 23 and (113) AIR 1914 All 457 (453).
 (113) 14 Ind Cas 97 (93) (All).
 (113) AIR 1914 All 457 (453).
 (113) 31 Ind Cas 617 (613) (All). (Omission to consider question of costs causing prejudice to defendant.)
 (125) AIR 1925 All 466 (466) : 47 All 319.
 (126) 95 Ind Cas 556 (556) (All).
 (126) 92 Ind Cas 1030 (1031) (All).
 (113) AIR 1915 Mad 480 (481). (Permission given in spite of defendant's opposition to condone plaintiff's defects in the case.)
 (125) AIR 1925 Oudh 291 (292) : 27 Oudh Cas 291.
 (Order made in disregard of procedure prescribed by the rule.)
 (125) AIR 1925 Oudh 596 (597). (After close of evidence and before arguments.)
 (111) 10 Ind Cas 819 (819) : 35 Bom 261.
 (127) AIR 1927 All 701 (705).
 (110) 5 Ind Cas 187 (189) (Cal). (When plaintiff adduced all his evidence and failed to establish his allegations—improper.)
 (110) 6 Ind Cas 629 (630) (Cal).
 (104) 27 Mad 377 (380). (In order that plaintiff may wait, and see if the law is not altered in his favour.)
 (109) 1 Ind Cas 252 (253) : 33 Bom 722. (Do.)
 (112) 14 Ind Cas 33 (34) (Cal). (When it was granted after plaintiff failed in his attempt to prove his case.)
 (95) AIR 1935 All 284 (284). (When Court has applied its mind to the question no revision lies.)
 (See also (98) 15 All 169 (170).)
 5. (116) AIR 1916 Cal 255 (256) : 44 Cal 367.
 (117) AIR 1917 Cal 830 (830).
 (131) AIR 1931 Cal 268 (269).
 (118) AIR 1918 Loh 329 (330).
 (125) AIR 1925 Loh 497 (498).
 (118) AIR 1918 Pat 261 (262) : 3 Pat L Jour 651.
 (128) AIR 1928 Oudh 483 (484, 485) : 3 Luck 403.
 (115) AIR 1915 Mad 480 (481).
 (125) AIR 1925 Mad 617 (618).
- (126) AIR 1926 Mad 868 (864). (Insufficiency of evidence.)
 (118) AIR 1918 Mad 699 (699).
 (122) AIR 1922 Nag 84 (85) : 18 Nag L R 80.
 (125) AIR 1925 Oudh 61 (61).
 (125) AIR 1925 Oudh 291 (293) : 27 Oudh Cas 281.
 (135) AIR 1935 All 740 (742) : 58 All 245.
 (121) AIR 1921 Pat 42 (43) : 6 Pat L Jour 112.
 (Inability to produce important evidence is no ground.)
 (13) 21 Ind Cas 23 (24) : 37 Bom 682.
 (121) AIR 1921 Cal 34 (36, 37) : 48 Cal 138 (P.B.). (Overruling 44 Cal 867 : AIR 1916 Cal 255.)
 6. (123) AIR 1923 Loh 97 (98).
 7. (11) 10 Ind Cas 346 (346) (Cal).
 (117) AIR 1917 Cal 197 (198).
 (121) AIR 1921 Pat 360 (360).
 8. (129) AIR 1929 Cal 88 (89) : 55 Cal 1067.
 9. (118) AIR 1918 All 418 (419) : 40 All 612.
 (134) AIR 1934 All 214 (215). (Order cannot be interfered with even if discretion has been wrongly exercised.)
 (132) AIR 1932 Loh 860 (861) : 18 Loh 537.
 (133) AIR 1933 Oudh 255 (256).
 (132) 137 Ind Cas 804 (804) (Loh).
 (12) 14 Ind Cas 414 (415) (All).
 (15) AIR 1915 All 123 (124) : 37 All 326.
 (121) AIR 1921 All 65 (66). (That Appellate Court would have come to a different conclusion on same materials is no ground.)
 (120) AIR 1920 All 235 (235).
 (121) AIR 1921 All 65 (66). (When Appellate Court applied its mind judicially, no interference because it might come to a different conclusion.)
 (124) AIR 1924 All 121 (122).
 (126) AIR 1926 All 548 (548).
 (127) AIR 1927 All 750 (750) : 50 All 148. (Wrong exercise of discretion is no ground to interfere.)
 (129) AIR 1929 All 683 (685).
 (130) 125 Ind Cas 580 (581) (All).
 (118) AIR 1918 Cal 534 (534).
 (132) AIR 1932 Loh 360 (361) : 13 Loh 537.
 (12) 17 Ind Cas 400 (400) (Mad).
 (130) AIR 1930 Cal 424 (426).
 (126) AIR 1926 All 294 (295). (Error of judgment in permitting withdrawal because a certain power was not filed.)
 (135) AIR 1935 All 384 (284).
 [See also (96) AIR 1936 Mad 697 (698). (Suit by partners, not registered as firm, withdrawn—Subsequent suit by them on same cause of action on getting themselves registered is not.]

refusing an application for leave to sue in *forma pauperis* is a case decided.¹¹ The Nagpur and Sind Judicial Commissioners' Courts have maintained the distinction pointed out by the Allahabad Court though interference would be made only in cases where there is some material illegality or irregularity in the procedure adopted by the lower Court in rejecting the application.¹² In Oudh¹³ the application in *forma pauperis* was itself held to be a "case decided" and therefore if the lower Court committed an irregularity in deciding it, it could be revised whether the application was allowed or rejected. This view, it is submitted, is the correct view, and has been upheld by all the other High Courts. The Madras, Patna and Rangoon High Courts¹⁴ have also rejected the distinction referred to above between the rejection and the allowing of the application. Accordingly when the lower Court, after considering the whole question of pauperism and in the exercise of discretion comes to a proper decision it will not be interfered with when there is no error of jurisdiction.¹⁵ If, on the other hand, the lower Court commits an irregularity in the exercise of jurisdiction as where it declines to give notice to the Government Pleader or to the defendant before disposing of the application,¹⁶ or where it does not properly consider the

11. (26) AIR 1926 Lah 642 (643).
 (34) AIR 1934 Lah 231 (231).
 (29) AIR 1929 Lah 498 (498).
 (82) 1882 Pun Re No. 99.
 (19) AIR 1919 Lah 4 (5) : 1919 Pun Re No. 184.
 (See also) (36) AIR 1936 Pesh 69 (71). (Order rejecting application to sue in *forma pauperis* is reversible.)
 12. (11) 10 Ind Cas 471 (471) : 7 Nag L R 49. (Order granting leave to sue in *forma pauperis* is not reversible.)
 (24) AIR 1924 Nag 44 (45) : 19 Nag L R 165. (Order refusing permission—Revision lies.)
 (38) AIR 1938 Sind 82 (83) : 26 Sind L R 491.
 (25) AIR 1925 Nag 343 (344). (Where there is not any material irregularity, the High Court will not interfere in revision.)
 (27) AIR 1927 Nag 340 (341). (Wrong conclusion on facts and evidence is no ground for interference.)
 (28) AIR 1928 Nag 24 (27). (Application rejected and court-fee demanded—Revision filed, but later on suits dismissed for non-production of stay order—Still revision is maintainable.)
 (30) AIR 1930 Nag 53 (54). (Absence to record reasons does not vitiate the order.)
 (38) AIR 1938 Nag 209 (211) : 31 Nag L R 413. (Lower Court rejecting application to sue in *forma pauperis* on erroneous assumption, its decision thus amounting to a conscious violation of the rules of the Civil Procedure Code—Decision is open to revision.)
 [See also] (36) AIR 1936 Nag 280 (280) : 1 L R (1937) Nag 428. (Application for leave to sue in *forma pauperis* rejected—Second application in *forma pauperis* rejected—Trial Court has jurisdiction to decide if application is barred.)
 [But see] (38) AIR 1938 Nag 210 (211). (Order allowing person to sue as pauper is reversible when the conditions of S. 115 are satisfied.)
 13. (109) 4 Ind Cas 777 (778) : 12 Oudh Cas 381. (15) AIR 1915 Oudh 3 (3). (23) AIR 1923 Oudh 118 (119).

- (25) AIR 1925 Oudh 74 (74).
 (26) AIR 1926 Oudh 204 (204).
 (38) AIR 1938 Oudh 146 (149) : 14 Luck 116. (There is no distinction between cases where application has been granted and where it has been rejected—Neither is an interlocutory order.)
 [See also] (35) AIR 1935 Oudh 20 (21) : 10 Luck 265. (Result of dismissal of application is an end to the proceeding, hence rejection of application constitutes case decided.)
 (36) 1936 Oudh W N 237 (238). (Order rejecting application revised on ground of material irregularity.)
 14. (26) AIR 1926 Mad 958 (958).
 (38) AIR 1938 Pat 209 (209).
 (31) AIR 1931 Rang 131 (134) : 9 Rang 92. (Do.)
 (31) AIR 1931 Rang 129 (131) : 9 Rang 86. (Do.)
 (25) AIR 1925 Cal 990 (991).
 (30) AIR 1930 All 831 (832). (So also omission to give details as to the value of the applicants' property not illegal.)
 (26) AIR 1926 Lah 642 (643). (Agreement to pay small fee to counsel out of the suit amount in case of success does not bring it under O. 33 R. 5.)
 (29) AIR 1929 Lah 821 (822).
 (19) 1919 Pat H C O 232 (234). (The decision that a benamidar could not sue is wrong in law—Held, that it was an error in law at best which could not be interfered with in revision.)
 (24) AIR 1924 Pat 667 (669). (When on materials Court finds that petitioner is not a pauper.)
 (39) AIR 1939 Pat 55 (56). (The fact that the lower Court wrongly holds that the ornaments worn by a female applicant are her necessities wearing apparel cannot be a ground for holding irregularity in adopting that view.)
 16. (27) AIR 1927 Cal 464 (464).
 (34) AIR 1934 All 424 (425) : 56 All 893. (By allowing a party to appeal as a pauper without

115. right of appeal but it was held that the Collector could in such cases move the High Court under this Section.²⁵

27. Orders under Order 47.—An order rejecting an application for review on the merits is not open to revision¹ unless the Court has erroneously thought that it has no jurisdiction to deal with the application² or has declined to hold a proper inquiry³ or has rejected it under the erroneous view that the court-fee paid is not sufficient.⁴ The High Court will also set aside an appellate order setting aside an order granting review if the Appellate Court had entertained the appeal on the grounds other than those mentioned in O. 47 R. 7.⁵ An order *granting* review is revisable under this Section when the order is one without jurisdiction⁶ or has been made in the exercise of jurisdiction illegally or with material irregularity.⁷ But the High Court should not interfere in revision against an order granting a review simply because the Judge did not say that the additional evidence is important.⁸ Where the order granting review was substantially just and passed in the exercise of discretion, it is not a case for interference.⁹ See also the undermentioned case.¹⁰

27a. Orders under Order 45.—This Section is applicable to an order passed granting or refusing a certificate under Order 45.¹

27b. Decision as to court-fee, whether revisable.—It has been held that an order demanding additional court-fee is revisable under this Section as in such cases.

25. ('98) 21 All 188 (187).

('91) 15 Bom 77 (78).

('98) 18 Bom 454 (456).

('98) 21 Mad 118 (114).

[But see (1900) 28 Mad 78 (82). (But where no question of jurisdiction is involved, no revision lies.)]

Note 27

1. ('04) 26 All 572 (573).

('24) AIR 1924 Bom 344 (345). (On the ground that the additional evidence could have been adduced earlier.)

('16) AIR 1916 Cal 227 (228). (Rejection of an application for review of an order rejecting appeal.)

('18) AIR 1918 Cal 701 (701).

('26) AIR 1926 Cal 773 (775) : 53 Cal 679.

('23) AIR 1923 Oudh 153 (158).

('25) AIR 1925 Oudh 594 (594).

[But see ('34) AIR 1934 All 971 (971).]

2. ('21) AIR 1921 All 197 (198) : 48 All 288. (Because an appeal was filed after review.)

('20) AIR 1920 All 160 (161) : 42 All 317. (Do.)

('29) AIR 1929 Cal 513 (513). (Because the application is based on fraud.)

[See also ('24) AIR 1924 Lah 400 (400).]

3. ('28) AIR 1928 Nag 279 (279).

('29) AIR 1929 Nag 305 (311). (Error of law amounting to usurpation of authority in rejecting petition for review of order confirming auction sale.)

('14) AIR 1914 Cal 854 (854). (Where applicant was not heard.)

('25) AIR 1925 Pat 323 (325). (Where letters of administration were granted to a minor.)

4. ('07) 29 All 468 (470).

[See also ('13) 21 Ind Cas 943 (944) (Cal).]

1. ('37) AIR 1937 Mad 930 (936).

Note 27a

10. ('36) AIR 1936 Lah 618 (619). (Proceedings extended time.)

('25) AIR 1925 Pat 452 (453). (Application to abated—Order of restoration and order refusing to grant review of same constitute "case" within Section 115.)

('28) AIR 1928 All 392 (394) : 50 All 801.

('12) 16 Ind Cas 995 (996) (Lah).

('15) AIR 1915 Mad 1068 (1069).

9. ('24) AIR 1924 Mad 586 (586). (Though order passed was under S. 151 which might have been passed under Order 47.)

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Cas 670 (671) (Cal).]

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

there is a refusal to exercise jurisdiction in the matter and try the case on the merits unless the additional court-fee demanded is paid.¹ But a decision holding that the court-fee paid is sufficient is, it has been held, not subject to the revisional jurisdiction of the High Court as there is no refusal to exercise jurisdiction in such cases.² See also the undermentioned decision.³ For fuller discussion see Section 149 Note 14 and Order 7 Rule 11 Note 12.

28. High Court's power of superintendence. — See Note 5 *ante*, and Section 224, Government of India Act, 1935, in the Appendices.

29. High Court's revisional powers under other Acts. — 1. *Guardians and Wards Act, 1890.* — Section 47 of the Guardians and Wards Act enacts that in certain cases specifically mentioned therein an appeal shall lie to the High Court from the orders passed by the subordinate Courts and Section 48 of the same Act while enacting that all other orders are final has expressly saved the extraordinary powers of the High Court to interfere in cases where the lower Courts have not properly exercised their powers.¹ But the application for revision will be considered under Section 48 only where the Court exercised jurisdiction not vested by law, or declined to exercise jurisdiction vested by law or exercised the same in an illegal or irregular manner. As to the circumstances in which the High Courts² have interfered under this Section with the order of the lower Court, see the undermentioned cases.³

Note 27b

1. ('38) AIR 1938 Pat 22 (25) : 16 Pat 766 (FB).
(‘38) AIR 1938 Nag 122 (127) : I L.R. (1938) Nag 106 (FB).

(‘35) AIR 1935 Cal 279 (280) : 62 Cal 417. (Order for payment of additional court-fee not supportable under the law.)

(‘39) AIR 1939 Pat 274 (275) : 18 Pat 267. (The High Court has jurisdiction to interfere in revision with the decision of the lower Court on the question of the classification of the suit for purposes of court-fee, where such decision has been adverse to the plaintiff.)

[See also (‘36) AIR 1936 Pesh 140 (141). (The Appellate Court undoubtedly has jurisdiction to decide the correct amount of court-fee, but if its decision on the point results in its refusal to exercise jurisdiction in respect of the merits of the appeal before it, and if that decision is wrong it results in a refusal to exercise jurisdiction vested in it.)]

[But see (‘39) AIR 1939 Mad 380 (382). (An order of a trial Court determining the proper court-fee payable on a plaint and holding that it is insufficiently stamped, is not revisable by the High Court ; and such an order, which by itself does not fall under S. 115, C. P. Code, cannot be revised by the High Court merely because it is bound to be followed by some other order which may be without jurisdiction.)]

2. ('38) AIR 1938 Pat 22 (25) : 16 Pat 766 (FB).
(‘36) AIR 1936 Pat 85 (86) : 15 Pat 340.

(‘38) AIR 1938 Nag 122 (126) : I L.R. (1938) Nag 106 (FB).

3. ('36) AIR 1936 Mad 411 (411). (Where the decision on a question of court-fee also bears upon the valuation of the suit for purposes of jurisdiction, and the suit may have to be filed in a higher Court if the court-fee question should be decided in a different way, the High Court is justified

in interfering in revision, although the point has been decided in plaintiff's favour.)

Note 29

1. ('07) 31 Bom 590 (594).

(‘25) AIR 1925 Oudh 260 (261).

(‘15) AIR 1915 Cal 49 (51, 52).

(‘01) 1901 Pun Re No. 48, p. 157.

2. ('28) AIR 1928 Nag 291 (291).

3. ('14) AIR 1914 Oudh 425 (426) : 18 Oudh Cas 66. (Where no notice was served upon a person interested in the result of an application for guardianship.)

(‘31) AIR 1931 Cal 59 (60). (Party against whom order passed desirous of putting fresh facts for consideration of Court throwing different light on case—Court not hearing same.)

(‘07) 17 Mad L Jour 199 (200). (Order allowing the guardian after termination of guardianship to spend the minor's property for the marriage of his sister.)

(‘23) AIR 1923 Lah 89 (89). (Orders under S. 34 of the Guardians and Wards Act.)

(‘09) 2 Ind Cas 237 (238) : 12 Oudh Cas 78. (Where the order granting permission for sale did not recite the necessity for it.)

(‘30) AIR 1930 Lah 1017 (1018). (Where the Court wrongfully cancelled a lease granted by a guardian which was perfectly within his competence.)

(‘15) AIR 1915 Cal 1 (4) : 42 Cal 351. (Selecting suitable bridegroom without leaving the choice in the first instance to the guardian.)

(‘32) AIR 1932 Bom 156 (158) : 56 Bom 71. (Selection of bridegroom without consulting proper guardian, without taking evidence and consulting minor.)

(‘18) AIR 1918 Cal 242 (243). (Improper orders of the District Court refusing payment of money to the guardian of the person of a minor.)

(‘15) AIR 1915 All 199 (200) : 37 All 515. (Refusal to order custody of minor to the guardian.)

- ('12) 17 Ind Cas 470 (471) : 15 Oudh Cas 319. (Do.)
- ('11) 11 Ind Cas 259 (260) (All). (Substantial injustice should have been done.)
- ('95) 21 Bom 250 (255). (Do.)
- ('96) 23 Bom 334 (340). (Do.)
- ('02) 6 Cal W N 480 (483). (Do.)
- ('16) AIR 1916 Cal 230 (230). (Do.)
- ('16) AIR 1916 Cal 422 (423). (Do.)
- ('88) 1888 Pun Re No. 79, p. 206. (Do.)
- ('01) 1901 Pun Re No. 19, p. 63. (Do.)
- ('17) AIR 1917 Pat 332 (333) : 2 Pat L Jour 627 (Do.)
- ('91) 14 Mad 406 (407). (Do.)
- ('12) 17 Ind Cas 748 (750) (Mad). (Do.)
- ('15) AIR 1915 Mad 338 (339). (Do.)
- ('16) AIR 1916 Mad 433 (434). (Do.)
- ('17) AIR 1917 Mad 349 (350). (Do.)
- ('98) 11 C P L R 91 (92). (Do.)
- ('12) 14 Ind Cas 2 (4) (Oudh). (Do.)
- ('11) 9 Ind Cas 470 (471) (Low Bur).
- ('25) AIR 1925 Rang 310 (311) : 3 Rang 471. (Conclusions of Small Cause Court not shown to be perverse—No interference by High Court.)
- ('26) AIR 1926 Pat 575 (576). (Refusal to summon witnesses—Serious prejudice to party—Revision allowed.)
- ('17) AIR 1917 All 159 (160) : 39 All 101. (Small cause suit tried by a Munsif on the original side and his decision reversed on appeal.)
- ('01) 25 Bom 417 (417, 418). (Do.)
- ('09) 1 Ind Cas 543 (544) : 33 Mad 323. (Do.)
- ('03) 26 Mad 176 (178, 179). (Do.)
- ('22) AIR 1922 Mad 352 (353). (Do.)
- ('16) AIR 1916 Pat 31 (32). (Do.)
- ('14) AIR 1914 All 119 (119). (Original suit tried as small cause is an exercise of jurisdiction not vested by law.)
- ('92) 14 All 413 (416). (Unless facts ousting jurisdiction are patent on record, High Court will not interfere.)
- ('15) AIR 1915 Cal 378 (379). (Do.)
- ('10) 5 Ind Cas 742 (742) (Mad). (Application not necessary.)
- ('12) 14 Ind Cas 793 (793) (Lah). (Satisfaction of decree out of Court is no bar to revision.)
- ('98) 1898 Pun Re No. 23, p. 66.
- ('07) 17 Mad L Jour 62 (63).
- ('35) AIR 1935 Mad 554 (555). (Where the decree is passed without jurisdiction by the lower Court, the High Court ought to interfere in revision.)
- ('36) AIR 1936 Mad 132 (133) : 59 Mad 428. (Decision of Small Cause Court fundamentally wrong—Revision petition held justified.)
- ('34) AIR 1934 Nag 257 (258). (Order returning plaint for presentation to proper Court—High Court could revise.)
- ('37) AIR 1937 Nag 68 (69). (Where the Small Cause Court returns a plaint for presentation to the proper Court on the ground that it has no jurisdiction to try the suit, there is so far as the Small Cause Court is concerned a case finally decided by that Court and the order is open to revision by the High Court.)
- ('37) AIR 1937 Nag 136 (137) : I L R (1937) Nag 266. (Interlocutory orders can be revised under S. 25.)
- ('39) AIR 1939 Nag 19 (19). (Revision application from Small Cause Court decision—Findings of fact are to be accepted, unless they are perverse or unreasonable.)
- ('36) AIR 1936 Sind 160 (163) : 30 Sind L R 226. (Held, that even if the order was an interlocutory order, the High Court could interfere under Sec. 25, Provincial Small Cause Courts Act, as the order in question amounted to a case decided.)
- ('35) AIR 1935 All 372 (373). (S. 25 limits the High Court in revision to grounds of law that might be raised in a second appeal and does not cover a revision on a question of fact.)
- ('35) 62 Cal L Jour 530 (532). (Suit of small cause nature tried as ordinary suit by Judge having powers of Small Cause Court Judge—No appeal lies from decree—Remedy of aggrieved party is not by way of appeal but by way of revision.)
- ('36) 161 Ind Cas 423 (424) (Oudh). (High Court will not ordinarily exercise its discretionary powers in revision under S. 25 of the Small Cause Courts Act, if no injustice appears to have been done by the decision of the trial Court, even though the question raised is one of limitation.)
- ('36) AIR 1936 Oudh 223 (224) : 12 Luck 124. (Plea raising question of fact cannot be raised for first time in revision.)
- ('36) AIR 1936 Oudh 247 (248). (No injustice done to any party—High Court should not ordinarily exercise its discretionary power.)
- ('36) AIR 1936 Oudh 297 (298). (No miscarriage of justice—High Court will not interfere.)
- ('37) AIR 1937 Oudh 364 (385) : 13 Luck 263. (Suit dismissed for non-payment of court-fees—Application for restoration under S. 151, C.P. Code—Suit restored and decree passed—Judgment-debtor making application under S. 25 attacking not decree itself but order of restoration—Restoration of suit under S. 151, C.P. Code, held was wrong — But order of restoration being interlocutory order and application being after passing of decree, High Court could not interfere—Proper remedy of applicant was to attack decree itself.)
- ('36) AIR 1936 Pesh 1 (2). (The revisional Court would not upset the judgment of a Small Cause Court on a bare technicality if substantial justice has been done.)
- ('34) AIR 1934 All 107 (108). (Lower Court setting aside decree which was not an ex parte decree by summary order in which it has not given consideration to the points that it would be necessary to determine in setting aside an ex parte decree—High Court interfered.)
- ('35) AIR 1935 All 379 (381). (Revisional power can be exercised only where substantial injustice has directly resulted from material misapplication or misapprehension of law.)
- ('35) AIR 1935 All 437 (438). (Lower Court refusing restoration—High Court should not interfere in revision.)
- ('35) AIR 1935 All 690 (691). (Finding of fact cannot be considered in revision.)
- ('35) AIR 1935 All 716 (717). (Substantial injustice done to party by decreasing wages barred by time—High Court can interfere in revision.)

5. *Curator's Act (XIX of 1841).*—See the undermentioned cases.⁸
 6. *Provincial Insolvency Act (V of 1920), Section 75.*—Under that Section appeal by the District Court is according to law, call for the case and pass such order with respect thereto as it thinks fit. See also the undermentioned cases.⁹
 7. *Other Acts.*—See the undermentioned decision.¹⁰

30. Sanction to prosecute.—Prior to 1902, the Allahabad¹ and Madras High Courts (1935) AIR 1935 All 842 (843). (Question of jurisdiction involved—High Court should interfere though equity is in favour of opposite party.) (1936) AIR 1936 Cal 497 (503): 1 L R (1937) 1 Cal 1 (F.B.). (Finding on pure question of fact supported by documentary evidence cannot be assailed in revision under S. 25.) (1933) AIR 1933 Lab 452 (453). (Where issue is framed and then changed, onus being shifted to other side, evidence should be allowed to be adduced—High Court interfered.) (1935) AIR 1935 Lab 137 (138). (High Court will not interfere with an erroneous decision on a point of limitation, where the judgment of the lower Court does substantial justice between the parties.) (1935) AIR 1935 Lab 206 (208). (It is open to the High Court in revision under S. 25 to hold that the facts found by the trial Court do not in law constitute misconduct.) (1936) AIR 1936 Pat 84 (84). (Cases cannot be argued like second appeals—High Court cannot interfere wherever question of law is wrongly decided—It will interfere only when substantial injustice is caused.) (1936) AIR 1936 Pat 562 (568). (Patna High Court when exercising revisional powers under S. 25 will not interfere with lower Appellate Courts' decision if it is sound on merits.) (1939) AIR 1939 Nag 64 (65). (Incorrect view of law—High Court will interfere only when law is well-known.) (1936) AIR 1936 Pesh 148 (148). (Where the decision of a suit involves the decision of legal inferences to be drawn from the established facts and the question is an important question of law, revision is competent even if the suit is of a small cause nature.) (See also (1935) AIR 1935 Cal 556 (557). (Small Cause suit—Suit filed as Small Cause suit—Munsif transferred and successor not having Small Cause powers appointed—Suit transferred to his Court—Before commencement of hearing, Munsif invested with powers of Small Cause Court Judge to try such suits—Decision of Munsif is final and not appealable—Only revision is competent.) (See however (1925) AIR 1925 All 51 (52). [But see (1912) 15 Ind Cas 547 (548) (Cal). (An error on a point of limitation by the Small Cause Court cannot be revised.) (1917) AIR 1917 Mad 76 (76): 32 Ind Cas 3 (3) (Do.).] 8. (1907) 34 Cal 929 (934). (Order without conforming to the provisions of S. 3 of the Act.) (1901) 24 Mad 364 (369). (Do.) (1907) 10 Mad 68 (69). (Do.) (1935) AIR 1935 All 842 (843). (Question of jurisdiction involved—High Court should interfere though equity is in favour of opposite party.) (1936) AIR 1936 Cal 497 (503): 1 L R (1937) 1 Cal 1 (F.B.). (Finding on pure question of fact supported by documentary evidence cannot be assailed in revision under S. 25.) (1933) AIR 1933 Lab 452 (453). (Where issue is framed and then changed, onus being shifted to other side, evidence should be allowed to be adduced—High Court interfered.) (1935) AIR 1935 Lab 137 (138). (High Court will not interfere with an erroneous decision on a point of limitation, where the judgment of the lower Court does substantial justice between the parties.) (1935) AIR 1935 Lab 206 (208). (It is open to the High Court in revision under the C. P. Code taken by the High Court under the C. P. Code will not be subject to the provisions of the Insolvency Act but in contravention of such provisions. The High Court cannot interfere under any provision of the C. P. Code when a distinct procedure is prescribed by the Provincial Insolvency Act.) (1937) AIR 1937 Nag 31 (32): 1 L R (1937) Nag 512. (High Court in revision is entitled to act *motu* on facts being brought to its notice at the instance of creditor.) (1936) AIR 1936 All 489 (489). (Scope of revision under S. 75 is much wider than that under S. 115, C. P. Code.) (1937) AIR 1937 All 4 (5). (High Court has very wide powers of revision under Insolvency Act—Whether second appeal from order by Insolvency Court is treated as appeal or revision is immaterial.) (1938) AIR 1938 All 59 (61): 1 L R (1938) All 84. (In exercising revisional jurisdiction under the Insolvency Act the High Court has got wider powers than the powers vested in that Court by Section 115.) (1937) AIR 1937 Rang 189 (190). (Petition under S. 9 (1), Provincial Insolvency Act—Act of insolvency not set out with precision—Ground not raised in lower Court even in revision—Debtors not themselves raising it—Exercise of discretionary powers in revision held not proper.) (1937) AIR 1937 Mad 930 (932). (Powers of High Court under S. 75 are wider but High Court will not interfere on questions of fact unless there has been a patent miscarriage of justice.) 10. (1938) AIR 1938 Oudh 262 (262). (Order under S. 3, Charitable and Religious Trusts Act, is reversible.)
- [See also (1905) 1905 All W N 85 (86).] 1. (1931) 3 All 508 (509). (Do.)

particulars of charges as in a case for perjury, and forgery⁵ or to consider a case on its merits⁶ constituted a material irregularity. Similarly, where sanction is given on facts which do not establish any offence⁷ or on evidence legally inadmissible,⁸ the order is reversible.

But though the applications in all such cases lie on the *civil revisional* side of the High Court and not on the *criminal revisional* side, the Chief Justice could, under Section 108 of the Government of India Act of 1915, direct a Bench exercising criminal jurisdiction to deal with the case.⁹ The procedure prescribed would however be one under the Civil Procedure Code.¹⁰

When action under Section 476, Criminal Procedure Code, is taken by a subordinate *Criminal* Court, the High Court may revise the proceedings under Section 439, Criminal Procedure Code.¹¹

Having regard to the view that revision against an order granting sanction to prosecute is under Section 115, it is competent to the Court to award costs of the petition.¹² Some recent cases of the Calcutta High Court have taken the view that Section 195, Criminal Procedure Code, creates a special jurisdiction and provides in clause 6 the machinery for the correction of possible errors committed by the primary Court and consequently the party who seeks relief must have recourse only to such machinery and cannot invoke the aid of this Section.¹³ In a recent Full Bench decision¹⁴ the Bombay High Court has held, agreeing with the undermentioned decision of the Lahore High Court,¹⁵ that an application in revision from an order under Section 476B of the Criminal Procedure Code by a Civil Court to the High Court should be heard and decided by the High Court in accordance with the provisions of Section 439 of the Criminal Procedure Code.

31. Orders under the Provincial Small Cause Courts Act. — See Note 29.

32. Appeal and review. — By Clause 15 of the present Letters Patent no.

appeal lies from an order made in the exercise of revisional jurisdiction or of the powers of superintendence under Section 107 of the Government of India Act by a High Court.¹ The words to that effect restricting a right of appeal were introduced

(95) AIR 1935 All 696 (696) : 58 All 85. (Munsif making complaint after deciding case—S. 439, Cr. P. C., does not apply but S. 115, C. P. C., applies.)
[See (31) AIR 1931 Pat 411 (412).]
[See also (24) AIR 1924 All 684 (686) : 46 All 611.]
[But see (17) AIR 1917 Mad 158 (158).]
(26) AIR 1926 Sind 215 (216) : 20 Sind LR 90.
[Where it was not held to be a case.]
5. (17) AIR 1917 All 425 (426) : 38 All 695.
(05) 15 Mad LJ 221 (222).
6. (11) 9 Ind Cas 706 (706) (Cal).
7. (11) 11 Ind Cas 616 (616) (All).
(12) 13 Ind Cas 283 (284) (All).
[See (37) 170 Ind Cas 125 (125) (All). (District Judge considering evidence and directing complaint to be made for prosecution under S. 193, Penal Code—*Held*, no case made out for revision under Section 115.)]
[See also (36) AIR 1936 Pat 382 (383). (Trial Court directing prosecution under S. 476, Cr. P. C. — Appellate Court not satisfied with case of prosecution can direct withdrawal of complaint — High Court will not interfere under S. 115 with its order.)]

8. (23) AIR 1928 All 601 (602). (Sanction based on report of handwriting expert not proved and not examined.)
9. (13) 19 Ind Cas 197 (204) : 40 Cal 477. (FB).
10. (27) AIR 1927 Cal 98 (100) : 58 Cal 827.
11. (13) 19 Ind Cas 197 (204) : 40 Cal 477. (FB).
(09) 3 Ind Cas 934 (936) : 33 Mad 48 (FB).
(35) AIR 1935 Oudh 59 (61) : 10 Luck 335.
12. (23) AIR 1928 Oudh 119 (121).
13. (16) AIR 1916 Cal 103 (104) : 43 Cal 597. (18) AIR 1918 Cal 850 (856) : 44 Cal 816.
(28) AIR 1923 Cal 45 (48). (S. 115, C. P. C., obviously refers to civil matters and civil matters only. It is found in C. P. C., and can have no application in criminal matters.)
14. (38) AIR 1938 Bom 225 (227) : 1 L R (1938) Bom 331 (FB).
15. (31) AIR 1931 Lah 761 (762) : 13 Lah 342 (FB).

Note 32

1. (21) AIR 1921 Cal 217 (219).
(31) AIR 1931 Pat 292 (293) : 10 Pat 428.
(28) AIR 1928 Mad 169 (170) : 51 Mad 165.
(35) AIR 1935 All 889 (891).

only in the year 1919. Before that, the decisions were not uniform as the original Clause allowed an appeal to the High Court from the judgment of a single Judge or of one Judge of a Division Bench in pursuance of Section 13 of the Charter Act. By Section 13 the High Courts are empowered to exercise original and appellate jurisdiction. The question then arose whether revisional jurisdiction was a part of the appellate jurisdiction vested by Section 13 of the High Courts Act. If it did include it, then an appeal was held to lie from an order of a single Judge made under this Section, provided it amounted to a "judgment." The Allahabad² and Bombay³ High Courts took the view that an order refusing to send for the records of a case did not amount to a judgment, as Clause 15 of the Letters Patent referred only to judgments passed in civil *original* suits and to orders passed by a single Judge disposing of *original* and appellate work. Obviously it was thought that "appellate" powers did not include revisional jurisdiction. The Madras High Court⁴ interpreted the words "appellate jurisdiction" referred to in Section 13 of the Charter Act as exhaustive and so inclusive of revisional powers. Consequently an appeal was held to lie from a *judgment* of a single Judge under this Section. The *rejection* of a petition⁵ under this Section was held not to amount to a "judgment" as the Court does not enter into the controversy between the parties, but only declines to interfere.⁶ But later cases of the High Court of Madras took the view that even if the single Judge declined to interfere in revision his order amounted to a "judgment" and was hence held to be appealable.⁷ As has been noticed before, under the present Letters Patent no such appeal lies. There can be no review or re-hearing of an application for revision dismissed for default.⁸ The proper course is to prefer a second application for revision.⁹ An application for review may also be treated as one for revision.¹⁰

2. ('92) 14 All 226 (232) (FB).
('92) 1892 All W N 31 (31).
- ('93) 15 All 373 (374). (Under S. 25, Provincial Small Cause Courts Act, 1887.)
('05) 28 All 133 (134).
3. ('97) 22 Bom 891 (892). (Application under S. 25, Provincial Small Cause Courts Act.)
4. ('99) 22 Mad 68 (82, 84) (FB).
('12) 35 Mad 1 (9, 21).
5. ('16) AIR 1916 Cal 838 (840).
('16) AIR 1916 Cal 642 (644).
('15) AIR 1915 Cal 695 (695).
('99) 22 Mad 109 (110).
(1900) 23 Mad 169 (170).

- ('04) 27 Mad 340 (340).
('04) 27 Mad 432 (434).
6. ('94) 17 Mad 100 (102).
('14) AIR 1914 Cal 388 (389, 390) : 41 Cal 323.
7. ('07) 30 Mad 311 (312).
('15) AIR 1915 Mad 480 (481).
('16) AIR 1916 Mad 1220 (1221) : 39 Mad 235 (FB).
8. (01) 1901 Pun Re No. 54, page 172.
('81) 1881 Pun Re No. 75, page 169.
9. ('28) AIR 1928 Lah 550 (551).
('01) 1901 Pun Re No. 54, page 172.
('37) AIR 1937 Lah 685 (686).
10. ('01) 1901 Pun Re No. 54, page 172.

PART IX.

SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS

116. [S. 631.] This Part applies only to High Courts which are, or may hereafter be, constituted by His Majesty by Letters Patent.

Part to apply only to certain High Courts.

3. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915."

1. Amendment after 1908. — See foot-note (a) to the text of the Section.

117. [S. 632.] Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

[1877, S. 632. See Ss. 120, 129 and O. 49 R. 3.]

Synopsis

1. Scope of the Section.
2. Rules include forms.
3. Security for costs in Letters Patent Appeals.
4. Review in Letters Patent Appeals.
5. Letters Patent appeals—See Section 104, Note 6 and Notes on Clause 15 of the Letters Patent (Madras, Bombay and Calcutta).

1. Scope of the Section. — This Section declares that the provisions of the Code shall apply to Chartered High Courts also save as otherwise provided in Parts IX and X of the Code or in rules.¹ Thus, Sections 16, 17, and 20 of the Code are declared by Section 120 in this Part (IX) to be inapplicable to the High Court in the exercise of its original civil jurisdiction. Again, under Section 129 of the Code, the High Court can make rules as to its own procedure in the exercise of its original civil jurisdiction and such rules will prevail over the provisions of the Code.² For rules not applicable to Chartered High Courts, see O. 49 R. 3. See also Notes to Section 114.

2. Rules include forms. — "Rules" means rules and forms contained in the First Schedule or made under Section 122 or Section 125. See Section 2 (18), *ante*.

3. Security for costs in Letters Patent Appeals. — It follows from what has been said in Note 1 above that O. 41 R. 10 will apply to Letters Patent appeals

Section 117 — Note 1

1. ('28) AIR 1928 Mad 385 (386).
2. See Notes to Section 129.

also unless the High Court has, under Section 129, made a rule inconsistent with it.¹ The Bombay High Court has framed such a rule (being Rule 725 of the Bombay High Court Rules) and therefore O. 41 R. 10 has been held not to apply to Letters Patent appeals in the Bombay High Court.²

4. Review in Letters Patent Appeals. — It has been seen in Note 1 to Section 114 that there is a difference of opinion among the several High Courts in India on the maintainability of an application for review of decrees in appeals under the Letters Patent. In cases where such review lies, appeals from orders passed on such applications for review are governed by the provisions of Order 47 Rule 7.¹

5. Letters Patent Appeals. — See Section 104, Note 6 and Notes on Clause 15 of the Letters Patent (Madras, Bombay and Calcutta).

118. [S. 634.] Where any such High Court considers it

Execution of decree
before ascertainment of
costs.

necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

1. Taxation of costs and limitation.—Where a decree provides for payment of costs “when taxed and noted”, limitation for the execution of the decree as to costs runs from the date of such taxation.¹

119. [S. 635.] Nothing in this Code shall be deemed to

Unauthorized persons
not to address Court.

authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

[1877, S. 635. See Letters Patent.]

Note 3

1. ('21) AIR 1921 P O 80 (84) : 48 Cal 481 : 48 Ind App 76 (P O).
- ('17) AIR 1917 Cal 626 (626) : 43 Cal 243 (246).
- ('25) AIR 1925 Mad 1132 (1139).
2. ('12) 17 Ind Cas 739 (740) : 37 Bom 572.

Note 4

1. ('89) 16 Cal 788 (793). (Not maintainable.)
- ('88) 12 Bom 171 (173).
- ('86) 9 Mad 253 (255, 256).

Section 118 — Note 1

1. See ('32) AIR 1932 Bom 378 (385).

Synopsis

1. Scope of the Section.

2. Right of Advocates to appear and plead on any side.

3. Right of Vakils to appear or plead or act on the original side.

4. Vakils' right to practise in the Presidency Small Cause Courts.

5. Attorney's right to address Court.

6. Recognised agent.

1. Scope of the Section.—It has been held that the words "the power of the High Court" to make rules concerning "advocates, vakils and attorneys" in this Section are not limited to the power of the High Court under Clauses 9 and 10 of the Letters Patent to make rules for the admission of advocates, vakils and attorneys and to their professional conduct, and that they also include the power of the High Court under the Government of India Act, 1915, to make rules regulating the practice of the Court.

2. Right of Advocates to appear and plead on any side. — See Letters Patent, Clauses 9 and 10.

3. Right of Vakils to appear or plead or act on the original side. — See Letters Patent, Clauses 9 and 10.

4. Vakils' right to practise in the Presidency Small Cause Courts. — See Letters Patent, Clauses 9 and 10.

5. Attorney's right to address Court.—See Letters Patent, Clauses 9 and 10.

6. Recognised agent. — See Note 5 to Clause 10, Letters Patent (Calcutta).

120. [S. 638.] (1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

Provisions not applicable to High Court in original civil jurisdiction.

[1877, S. 638. As to rules, see O. 49 R. 3.]

Synopsis

1. Amendments made after 1908.

2. Scope of the Section.

3. Original civil jurisdiction.

1. Amendments made after 1908.—Originally this Section had another sub-section which corresponded to Section 639 of the old Code. It ran as follows:—

"(3) Nothing in this Code shall extend or apply to any Judge of the High Court in the exercise of jurisdiction as an Insolvent Court."

That sub-section was repealed by the Presidency Towns Insolvency Act, III of 1909, Section 127 and Schedule III thereof.

2. Scope of the Section. — This Section declares that Sections 16, 17 and 20 of the Code shall not apply to the Chartered High Courts in the exercise of their

PART X.

RULES

121. [New.] The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

Effect of rules in First Schedule.

1. Rules.—The re-arrangement of the Code into the "body of the Code" and "Rules," is for the purpose of giving a much needed elasticity to judicial procedure, and to enable minor defects to be remedied, as they arise, without resort to the Legislature.¹ But, except for the fact that the rules in the First Schedule can be amended, annulled or added to by the High Courts, such rules have the same force as if enacted in the body of the Code and it is incorrect to say that they are not so imperative as the Sections in the body of the Code.²

The whole of this Part is new except Sections 129, 130 and 131 which correspond to Section 652 of the old Code.

The rules passed in accordance with the procedure in this Part, are not on the same footing as the circulars in the Manual of Civil Circulars issued by the High Court. Unless the latter is passed under some enactment which gives it the force of law, it would not have the force of law.³

See Section 124 for annulment and alteration of rules.

122. High Courts constituted by His Majesty by Letters Patent and the Chief Court of Oudh may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

[1882, cf. S. 652, first para.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915."

b. Inserted by the Oudh Courts (Supplementary) Act, XXXII of 1925, Section 2 and Schedule.

Synopsis

1. Amendments after 1908.
2. Scope and object of the Section.
3. Extent of High Court's power to make rules.
4. High Courts to which the Section applies.

Section 121 — Note 1

of reasons for admission of additional evidence in Appellate Court is illegal.)

3. ('26) AIR 1926 Bom 548 (549) : 50 Bom 793-1. See Report of the Select Committee.

2. ('37) AIR 1937 Pat 307 (310). (Non-recording

provisions of the Letters Patent.¹ Similarly, they cannot vary the period of limitation fixed by the Limitation Act for any proceeding.² Thus, a rule requiring a copy of the *trial* Court's judgment to be filed along with the memorandum of second appeal will not entitle the appellant to exclude the time requisite for obtaining such judgment.³ Nor will a rule dispensing with the necessity of filing a copy of *judgment appealed from* along with the memorandum of appeal disentitle the appellant from excluding the period requisite for obtaining a copy of the judgment.⁴ But a rule extending the provisions of Section 5 of the Limitation Act to applications under Order 9 Rule 9⁵ or Rule 13⁶ of the Code is not *ultra vires*. The reason is that Section 5 of the Limitation Act expressly applies to any application to which it may be made applicable by any enactment or *rule* for the time being in force.

The rule-making power of the High Courts is confined to the regulation of *procedure*.⁷ It was held by a Full Bench of the Rangoon High Court that proviso (b) to O. 21 R. 90 introduced by the Rangoon High Court, as such proviso stood before 27th January 1937, took away an existing right and as such was *ultra vires*.⁸

4. High Courts to which the Section applies.—The Section as it stood prior to its amendment by the Government of India (Adaptation of Indian Laws) Order of 1937, applied to High Courts established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the Chief Court of Oudh.⁹ A High Court within the meaning of the Government of India Act, 1915, is a High Court established in British India by Letters Patent. (See Government of India Act, 1915, Section 10.) The Patna High Court being such a Court, Section 122 applies to it.² In an earlier decision of the Patna High Court it was however held that the Section does not apply to the Patna High Court.³ The reason given was that the Patna High Court was not a High Court established under the Indian High Courts Act, 1861. Apparently their Lordships' judgment is based on the Section as it stood prior to the amendment by Act XIII of 1916. At that time, the Section did not contain the expression "or the Government of India Act, 1915." It was inserted in the Section by the Amending Act XIII of 1916. Their Lordships' attention does not seem to have been drawn to this amendment. Since the amendment of the Section by the Adaptation of Indian Laws Order of 1937, the Section clearly applies to all High Courts constituted by His Majesty by Letters Patent.

123. [New.] (1) A Committee, to be called the Rule Committee, shall be constituted at the town which is the usual place of sitting of each of the High Courts and of the Chief Court referred to in section 122.

Constitution of Rule Committees in certain Provinces.

- Note 3**
1. ('26) AIR 1926 Rang 1 (2) : 3 Rang 546 (FB).
 2. ('30) AIR 1930 All 558 (559).
 3. ('18) AIR 1918 All 389 (390) : 40 All 1 (FB).
 4. ('28) AIR 1928 Lah 96 (96).
 5. ('29) AIR 1929 Bom 262 (263, 264) : 53 Bom 458.
 6. ('25) AIR 1925 Mad 14 (17) : 47 Mad 824.
 7. ('37) AIR 1937 Rang 419 (420) : 1937 Rang LR 268 (FB).
 8. ('37) AIR 1937 Rang 419 (420) : 1937 Rang LR 268 (FB).
 9. ('21) AIR 1921 Pat 509 (510).
 10. ('21) AIR 1921 Pat 509 (510).
 11. ('21) AIR 1921 Pat 509 (510).
 12. ('21) AIR 1921 Pat 509 (510).
 13. ('21) AIR 1921 Pat 509 (510).
 14. ('21) AIR 1921 Pat 509 (510).
 15. ('21) AIR 1921 Pat 509 (510).
 16. ('21) AIR 1921 Pat 509 (510).
 17. ('21) AIR 1921 Pat 509 (510).
 18. ('21) AIR 1921 Pat 509 (510).
 19. ('21) AIR 1921 Pat 509 (510).
 20. ('21) AIR 1921 Pat 509 (510).
 21. ('21) AIR 1921 Pat 509 (510).
 22. ('21) AIR 1921 Pat 509 (510).
 23. ('21) AIR 1921 Pat 509 (510).
 24. ('21) AIR 1921 Pat 509 (510).
 25. ('21) AIR 1921 Pat 509 (510).
 26. ('21) AIR 1921 Pat 509 (510).
 27. ('21) AIR 1921 Pat 509 (510).
 28. ('21) AIR 1921 Pat 509 (510).
 29. ('21) AIR 1921 Pat 509 (510).
 30. ('21) AIR 1921 Pat 509 (510).
 31. ('21) AIR 1921 Pat 509 (510).
 32. ('21) AIR 1921 Pat 509 (510).
 33. ('21) AIR 1921 Pat 509 (510).
 34. ('21) AIR 1921 Pat 509 (510).
 35. ('21) AIR 1921 Pat 509 (510).
 36. ('21) AIR 1921 Pat 509 (510).
 37. ('21) AIR 1921 Pat 509 (510).
 38. ('21) AIR 1921 Pat 509 (510).
 39. ('21) AIR 1921 Pat 509 (510).
 40. ('21) AIR 1921 Pat 509 (510).
 41. ('21) AIR 1921 Pat 509 (510).
 42. ('21) AIR 1921 Pat 509 (510).
 43. ('21) AIR 1921 Pat 509 (510).
 44. ('21) AIR 1921 Pat 509 (510).
 45. ('21) AIR 1921 Pat 509 (510).
 46. ('21) AIR 1921 Pat 509 (510).
 47. ('21) AIR 1921 Pat 509 (510).
 48. ('21) AIR 1921 Pat 509 (510).
 49. ('21) AIR 1921 Pat 509 (510).
 50. ('21) AIR 1921 Pat 509 (510).
 51. ('21) AIR 1921 Pat 509 (510).
 52. ('21) AIR 1921 Pat 509 (510).
 53. ('21) AIR 1921 Pat 509 (510).
 54. ('21) AIR 1921 Pat 509 (510).
 55. ('21) AIR 1921 Pat 509 (510).
 56. ('21) AIR 1921 Pat 509 (510).
 57. ('21) AIR 1921 Pat 509 (510).
 58. ('21) AIR 1921 Pat 509 (510).
 59. ('21) AIR 1921 Pat 509 (510).
 60. ('21) AIR 1921 Pat 509 (510).
 61. ('21) AIR 1921 Pat 509 (510).
 62. ('21) AIR 1921 Pat 509 (510).
 63. ('21) AIR 1921 Pat 509 (510).
 64. ('21) AIR 1921 Pat 509 (510).
 65. ('21) AIR 1921 Pat 509 (510).
 66. ('21) AIR 1921 Pat 509 (510).
 67. ('21) AIR 1921 Pat 509 (510).
 68. ('21) AIR 1921 Pat 509 (510).
 69. ('21) AIR 1921 Pat 509 (510).
 70. ('21) AIR 1921 Pat 509 (510).
 71. ('21) AIR 1921 Pat 509 (510).
 72. ('21) AIR 1921 Pat 509 (510).
 73. ('21) AIR 1921 Pat 509 (510).
 74. ('21) AIR 1921 Pat 509 (510).
 75. ('21) AIR 1921 Pat 509 (510).
 76. ('21) AIR 1921 Pat 509 (510).
 77. ('21) AIR 1921 Pat 509 (510).
 78. ('21) AIR 1921 Pat 509 (510).
 79. ('21) AIR 1921 Pat 509 (510).
 80. ('21) AIR 1921 Pat 509 (510).
 81. ('21) AIR 1921 Pat 509 (510).
 82. ('21) AIR 1921 Pat 509 (510).
 83. ('21) AIR 1921 Pat 509 (510).
 84. ('21) AIR 1921 Pat 509 (510).
 85. ('21) AIR 1921 Pat 509 (510).
 86. ('21) AIR 1921 Pat 509 (510).
 87. ('21) AIR 1921 Pat 509 (510).
 88. ('21) AIR 1921 Pat 509 (510).
 89. ('21) AIR 1921 Pat 509 (510).
 90. ('21) AIR 1921 Pat 509 (510).
 91. ('21) AIR 1921 Pat 509 (510).
 92. ('21) AIR 1921 Pat 509 (510).
 93. ('21) AIR 1921 Pat 509 (510).
 94. ('21) AIR 1921 Pat 509 (510).
 95. ('21) AIR 1921 Pat 509 (510).
 96. ('21) AIR 1921 Pat 509 (510).
 97. ('21) AIR 1921 Pat 509 (510).
 98. ('21) AIR 1921 Pat 509 (510).
 99. ('21) AIR 1921 Pat 509 (510).
 100. ('21) AIR 1921 Pat 509 (510).

Note 4

- (b) By the Repealing and Amending Act XVII of 1919, the words "of the Chief Court" were substituted for the words "Chief Courts." The said words, namely, "of the Chief Court" were, however, repealed by Act XI of 1923. By Act XX of 1925, the words "and of the Chief Court" were again inserted in the Section after the words "High Courts." By Act XXXIV of 1926, the words "Chief Courts" have again been substituted for the words "of the Chief Court."
- (c) In sub-section (2) (a) after the words "District Judge or" the words "in the Punjab or Burma" originally occurred. They were substituted by Act XVIII of 1919 by the words "in Burma." These latter words were also repealed by Act XI of 1923.

124. [New.] Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to amend, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

1. Report of the Rule Committee.—The Rule Committee referred to in the Section is the Rule Committee constituted under Section 123.¹ This Section shows that a rule can be passed under Section 122 only after the opinion of the Rule Committee is taken into consideration. It has been held by the Patna High Court that Section 123 as it originally stood did not apply to the Patna High Court² and that a rule framed by it without reference to a Rule Committee, at a time when there was no Rule Committee in existence, is not *ultra vires*.³ A contrary view has, however, been taken in a later case of the same High Court.⁴ See Note 4 to Section 122.

125. [New.] High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the Provincial Government may determine:

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the words "in the case of the Court of the Judicial Commissioner of Coorg, the Governor-General in Council, and in other cases the Local Government."

Section 124—Note 1.

1. (21) AIR 1921 Pat 83 (84); 2 Pat L.Jour 719. 3. (21) AIR 1921 Pat 83 (84, 85); 5 Pat L.Jour 719.

2. See Note 1 to Section 123.

4. (21) AIR 1921 Pat 509 (510).

same approval is made necessary for rules under the provisions in this part of the Code. Neither this Section nor Section 107 of the Government of India Act applies to rules framed by the High Court for the conduct of *its own business*. Such rule, therefore, need not be sanctioned as required by the Section.¹

127. [New.] Rules so made and approved shall be published in the *Official Gazette* . . . , and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1987, Para. 4 (1) for "Gazette of India or in the Local Official Gazette, as the case may be." As under Para. 4 (1) the words "Official Gazette" have to be substituted for "Gazette of India" and also for "Local Official Gazette," the substitution will strictly read "Official Gazette or in the Official Gazette, as the case may be." But the last words are omitted as being redundant.

1. Amendments after 1908.—By Act XXIV of 1917, the word "approved" was substituted for the word "sanctioned" which occurred in the Section as it originally stood.

128. [New.] (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1) such rules may provide for all or any of the following matters, namely:—

(a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service; (b) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and the proceeds of such sale;

(c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction;

1. Scope of the Section.—This Section enacts that the rules framed under the provisions of this Part may provide for any matter relating to the procedure of Civil Courts and it indicates the sort of rules that may be framed. A rule extending the provisions of Section 5 of the Limitation Act to applications under O. 9 R. 13 of the Code is a matter of procedure and is not *ultra vires*.¹ But a new rule in lieu of O. 34 R. 2, limiting the right of the mortgagee to recover interest at the mortgage rate for the whole period allowed for redemption is one dealing with *substantive rights* and is not a rule of procedure. Such a rule will be *ultra vires*.²

A rule framed under the provisions of this part must not be inconsistent with the provisions in the body of the Code.³ The words "consistent with the body of the Code" mean "consistent with the Sections of the Code" and not with the Rules in the First Schedule which can be altered by the High Court.⁴

This Section relates only to rules to be made under the Code by the High Courts with the advice of the Rule Committee constituted under Section 123. It does not affect the validity of rules framed under the previous Code.⁵

2. Defendant claiming indemnity against third party — Clause (e).— Under this clause rules may be framed relating to procedure when the defendant claims to be entitled to contribution or indemnity against any person whether a party to the suit or not. In England, rules have been framed restricting third party procedure to the cases referred to in Section 128 (2) (e), namely to cases of contribution and indemnity.¹

3. Suit for debts — Summary procedure — Clause (f).— A suit on a negotiable instrument provided for under Order 37 of the Code also falls under the category of suits of the nature referred to in this clause.¹ The period of limitation for a suit under the summary procedure under this clause is six months from the date when the debt or liquidated demand becomes payable or the property becomes recoverable.² Similarly, the period of limitation for an application for leave to defend such a suit is 10 days from the date when the summons is served.³

4. Originating summons — Clause (i).— An originating summons means every summons other than a summons in a pending cause or matter.¹ Where the disputed facts are complex and involve a considerable amount of oral evidence, an originating summons is not the proper procedure to be taken.²

Section 128 — Note 1

1. ('25) AIR 1925 Mad 14 (17): 47 Mad 824 (FB).
(17) AIR 1917 Mad 957 (957): 40 Mad 105.

2. ('11) 12 Ind Cas 18 (20) (Low Bur).

3. ('21) AIR 1921 PC 80 (88): 48 Cal 481: 48 Ind App 76 (PC).

(25) AIR 1925 Oudh 492 (492): 26 Oudh Cas 169.

(09) 4 Ind Cas 1154 (1155): 3 Sind L R 171.

(30) AIR 1930 All 558 (560).

(34) AIR 1934 Mad 692 (694): 58 Mad 285. (Rule 178 of Madras Civil Rules of Practice which prohibits the sale of a decree in execution of another decree is not *ultra vires* because under S. 51 of the Code the power to order the sale of any property is subject to any limitations that may be prescribed by rules.)

4. ('14) AIR 1914 Mad 652 (654): 37 Mad 17 (21).

(27) AIR 1927 Bom 599 (600).

1. See R. S. C., O. 71 R. 1A.

2. ('19) AIR 1919 Bom 29 (30).

Note 4

1852, are still maintainable in British India.)
the time of the Common Law Procedure Act, suits as were maintainable in respect of debts at 4. ('10) 34 Bom 192 (198). (Under S. 128 such

3. See Article 159 of the Limitation Act.

2. See Article 5 of the Limitation Act.

1. ('27) AIR 1927 Sind 90 (92): 21 Sind L R 257.

Note 3

1. ('19) AIR 1919 Cal 189 (189): 46 Cal 48.

Note 2

Mad 17 (21) (FB).]

[See also ('14) AIR 1914 Mad 652 (653, 654): 37

5. ('29) AIR 1929 Mad 641 (650): 52 Mad 563 (FB).
(21) AIR 1921 Lah 73 (73): 2 Lah 227.

5. Delegation of judicial duties — Clause (i). — Under Section 637 of the old Code any *non-judicial* or *quasi-judicial* act required to be done by a Judge may be done by the Registrar of the Court or by such other officer of the Court as the Court may direct to do such act.¹ Under the present Section rules may be framed for the delegation of any judicial and non-judicial duties. It is doubtful whether a rule under the old Code delegating *judicial* duties to the Registrar and which was, therefore, *ultra vires* under the old Code is validated by this Section.²

6. Counter claims. — See Order 8 Rule 6, Note 15.

129. [S. 652, para. 3.] Notwithstanding anything in this Code, any High Court *constituted by His Majesty by Letters Patent* may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

Power of Chartered High Courts to make rules as to their original civil procedure.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915."

Synopsis

1. Amendments after 1908.
2. Scope of the Section.
3. Letters Patent.

1. Amendments after 1908.—By the Amending Act XIII of 1916, the words and figures "or the Government of India Act, 1915," were inserted, after the words "established under the Indian High Courts Act, 1861" which originally occurred in the Section. The words "constituted by His Majesty by Letters Patent" have been substituted by the Government of India (Adaptation of Indian Laws) Order of 1937 for the words "established under the Indian High Courts Act, 1861 or the Government of India Act, 1915."

2. Scope of the Section. — Under this Section, a Chartered High Court may make rules to regulate its own procedure in the exercise of its *original civil jurisdiction*. Such rules need *not be consistent* with the provisions in the body of the Code but *must be consistent* with the Letters Patent, establishing the High Court.¹

Note 5

1. ('16) AIR 1916 Cal 488 (492) : 43 Cal 903 (928, 931) (F B).
- ('07) 5 Cal L Jour 405 (412) : 34 Cal 619. (Granting of leave under Cl. 12 of the Charter is a judicial act which cannot be delegated to a ministerial officer.)
- ('91) 15 Bom 93 (98). (Grant of leave to sue is a judicial act and cannot be delegated.)
- [See also ('95) 18 Mad 236 (246, 248) (F B). (Which was a case under the Presidency Small Cause Courts Act, Ss. 18, 33.)]

2. ('18) AIR 1918 Cal 681 (682).

Section 129 — Note 2

1. ('07) 5 Cal L Jour 405 (410) : 34 Cal 619.
- ('32) AIR 1932 Cal 1 (1, 2) : 59 Cal 370. (Order 3, Rule 4 (5) being contrary to rules under Cl. 37, Letters Patent, latter prevail though the former was enacted by the Legislature.)
- ('36) AIR 1936 Lah 369 (370). (S. 129, C. P. Code, expressly authorizes the Bombay High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction. A pay-

Where a rule passed under this Section is inconsistent with the provisions of the Code (*e. g.*, O. 41 R. 10) the former rule prevails over the latter.² A resolution of the High Court in regard to the mode of calculation of Counsel's fee, is not binding as a rule.³ The Section enacts that it shall not affect the validity of rules in force at the commencement of the Code.⁴

3. Letters Patent.—The Letters Patent referred to in the Section may be legitimately read as referring to the Letters Patent of 1865 which was in force at the time of the passing of the Code.¹

130. A High Court not constituted by His Majesty by Letters Patent may, with the previous approval of the Provincial Government, make with respect to any matter other than procedure, Powers of other High Courts to make rules as to matters other than procedure.

section 224 of the Government of India Act, 1935, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.

n. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original Section.

1. Amendments after 1908.—

By the Amending Act XIII of 1916 the following changes were introduced in the Section:—

(a) The words and figures "or the Government of India Act, 1915" were added after the words "established by the Indian High Courts Act, 1861," which originally occurred in the Section.

(b) The Section as it stood originally, spoke of only the rules that might be made under Section 15 of the Indian High Courts Act of 1861. After the amendment of 1916, it mentioned rules that might be made by High Courts under Section 15 of the Indian High Courts Act of 1861 or under Section 107 of the Government of India Act, 1915.

By the Repealing and Amending Act XXIV of 1917 the word "approval" was substituted for the word "sanction."

The whole Section was replaced by the present Section by the Government of India (Adaptation of Indian Laws) Order, 1937.

ment order under R. 874 in favour of a solicitor when validly made can be executed as a decree.)

Side Rules are framed by High Court under this Section in this matter.)

3. (05) 1905 All W N 83 (84).

4. (10) 37 Cal 853 (855).

Note 3

1. (24) AIR 1924 Cal 1025 (1027) : 51 Cal 905. (Order 21 Rule 86, not applicable where, Original (30) AIR 1930 Cal 324 (324, 325) : 57 Cal 106. (25) AIR 1925 Mad 1132 (1133).

2. (13) 37 Bom 572 (574).

131. [S. 652, para. 4.] Rules made in accordance with section 129 or section 130 shall be published in the *Official Gazette* and shall from the date of publication or from such other date as may be specified have the force of law.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India or in the local official Gazette, as the case may be." See also foot-notes to Section 127 *ante*.

1. Scope of the Section.— Rules made by the High Court under Sections 129 and 130 and published in the Official Gazette have the force of law¹ from the date of publication or from such other date as may be specified.²

Section 131 — Note 1

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|---|---|
| <p>1. ('09) 6 All L Jour 45 (48).
 ('01) 4 Oudh Cas 303 (305).
 ('03) 5 Bom L R 394 (395).
 ('04) 27 Mad 121 (123). (High Court may require</p> | <p>security for costs of appeal, if the rules framed by it under Sec. 652 old (now Ss. 122, 129, 131) authorise it.)
 2. ('28) AIR 1928 All 708 (708) : 50 All 865.</p> |
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PART XI.

MISCELLANEOUS

132. [S. 640.] (1) Women who, according to the customs

and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

[1877, S. 640; 1859, S. 21. See O. 26 R. 1.]

Synopsis

1. Customs and manners of the country.
2. "Shall be exempt from personal appearance in Court."
3. Sub-section (2) — Exemption of women from arrest in execution.

1. Customs and manners of the country. — This Section applies to women, who according to the customs and manners of the country, ought not to be compelled to appear in public, *e. g.*, *pardashin* ladies.¹ The custom set up must not be one of a varying or uncertain character.² The right conferred by the Section does not depend on the rank or station in life of a lady,³ and cannot be refused on the ground that the lady has appeared in public before⁴ or a charge of immorality is made against her.⁵ Even though a lady may have given up the use of the *pardah* she is entitled to the benefit of the Section, if, having regard to her social position and the feelings of her class, the Court is satisfied that she should not be compelled to appear in the witness-box.⁶ But a lady may completely alter her mode of life and cease to be included in the statutory description of a woman "who, according to the customs and manners of the country, ought not to be compelled to appear in public." When this transformation has taken place, she can no longer claim, as of right, the statutory exemption formulated in Section 132.⁷

Section 132 — Note 1

1. (10) S Ind Cas 418 (421) (Oudh).
- (27) AIR 1927 Mad 524 (524). (Hindu widow — *Held* no custom provided that she should remain in seclusion for more than one year from her husband's death.)
- (99) 1899 Pun Ro No. 19, page 114. (A *Khatri* woman is entitled to the benefit of this Section.)
- 2 Hyde 88. (Though a lady may not belong to the *pardashin* class Court may extend the privilege to her if she is not accustomed to appear in public.)
2. (90) 14 Bom 584 (586). (Parsi woman — Sec-

- tion 132 does not apply.)
3. (75) 24 Suth W R 375 (375). (A lady of humble rank may be entitled to exemption.)
- (67) 8 Suth W R 282 (283). (All women of high rank not necessarily entitled to exemption.)
4. (99) 26 Cal 650 (652).
- (99) 26 Cal 651n (652n).
- (99) 3 Cal W N 753 (753).
- [See (88) 15 Cal 775 (779). (Case decided with reference to Sec. 503, Cr. P. Code.)
5. (01) 5 Cal W N (four) 232 (232).
6. (18) AIR 1918 Cal 111 (112) : 45 Cal 492.
7. (18) AIR 1918 Cal 743 (744) : 45 Cal 697.

2. "Shall be exempt from personal appearance in Court." — The exemption from personal appearance under this Section is a right which no Court has power to refuse,¹ and applies to *parties* as well as witnesses.² According to the Calcutta High Court the exemption is only in respect of *appearance* and not *attendance* in Court. Women can be compelled to come to Court, so long as they do not become visible to the public gaze.³ The High Court of Allahabad has, however, held that the words "personal appearance" used in the Section mean "personal attendance" and that an exempted person cannot be compelled to *attend* Court.⁴ The Sind Judicial Commissioner's Court has also taken the same view.⁵ If a commission is issued for the examination of a woman entitled to the benefit of this Section, she cannot decline to be examined at any place other than of her own choice.⁶

As to exemption from personal appearance in Court in criminal cases, see Criminal Procedure Code, Section 503 and the undermentioned cases.⁷ See Sections 20 and 32 (ii) of the C. P. Land Revenue Act (II of 1917) and Section 53 (2) of the Bombay Salt Act (II of 1890) for the application of this Section and Section 133 to proceedings under the said Acts.

3. Sub-section (2). — Exemption of women from arrest in execution. — The Code exempts women from arrest in execution of money decrees (see Section 56) and decrees for restitution of conjugal rights (see O. 21 R. 32).

133. [S. 641.] (1) The ^a*Provincial Government* may, by notification in the ^b*Official Gazette*, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the ^a*Provincial Government* and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

Note 2

1. ('28) AIR 1928 Cal 814 (815).

('38) AIR 1933 All 551 (553, 554) : 55 All 666.

(Pardanashin lady examined on commission — Allegation of tutoring by somebody from behind — If true, proper course is exclusion of such evidence and not order personal attendance.)

('01) 24 All 172 (173). (Pauper appeal may be presented by duly authorised agent.)

('25) AIR 1925 Mad 905 (906). (Even though the pleader undertakes to produce her in Court.)

('71) 15 Suth W R 129 (130). (Residing in the town where Court sits and willing to admit the Court to an interview at her residence.)

('35) AIR 1935 Sind 205 (206) : 25 Sind L R 298.

2. ('11) 11 Ind Cas 668 (668) (Mad).

('38) AIR 1933 All 551 (553) : 55 All 666.

3. ('29) AIR 1929 Cal 528 (528) : 56 Cal 865.

('72) 18 Suth W R 230 (230).

4. ('33) AIR 1933 All 551 (553) : 55 All 666.

5. ('35) AIR 1935 Sind 205(206); 25 Sind L R 298.

6. ('21) AIR 1921 Cal 229 (231) : 48 Cal 448.

7. ('79) 4 Cal 20 (22).

('90) 12 All 69 (72). (Although there is no provision in Cr. P. Code to protect pardanashin ladies, reasonable safeguards to decency is adopted by Criminal Courts.)

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

[1877, Ss. 641, 93; 1859, Ss. 22 and 23. See O. 26, R. 1.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."
b. Substituted by ibid for "local official Gazette."

Synopsis

1. Legislative changes.
2. Scope of the Section.

1. Legislative changes. — The words "and may, by like notification, withdraw such privilege" which occurred in the corresponding Section 641 of the former Code have been omitted in the present Section.

2. Scope of the Section. — No person, of whatever position and respectability he may be, is entitled to exemption from personal appearance under this Section in the absence of a notification by the Government, even though it may be derogatory to his dignity to attend personally in Court as a witness.¹ But where a notification under this Section exists, the exemption is absolute and not even the Court *suo motu* can compel personal attendance.² See also Notes under Order 26 Rule 1.

134. [New.] The provisions of sections 55, 57 and 59 Arrest other than in execution of decree. shall apply, so far as may be, to all persons arrested under this Code.

1. Scope of the Section. — Sections 55, 57 and 59 refer in terms to the arrest of a *judgment-debtor*, i. e., to arrest in execution of a decree. The present Section makes the provisions of those Sections applicable to all arrests under the Code.

135. [S. 642 and compare Ss. 572 and 573.] (1) No Judge, Magistrate or other judicial officer shall be Exemption from arrest liable to arrest under civil process while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal⁶ having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties⁷ thereto, their pleaders, mukhtars, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process⁸

Section 133 — Note 2

1. (15) AIR 1915 Mad 915 (919). (Pandara (17) AIR 1917 Bom 155 (157) : 42 Bom 136. Samnadh as such, not exempt.)
2. Marsh 627.

other than process issued by such tribunal for contempt of Court³ while going to or attending⁵ such tribunal for the purpose of such matter, and while returning from such tribunal.⁴

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

[1877, S. 642.]

Synopsis

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|--|---|
| 1. Legislative changes. | 6. "Tribunal," meaning of. |
| 2. Scope and object of Section. | 7. Parties. |
| 3. No exemption in case of process for contempt of Court. | 8. Civil process. |
| 4. "While going to or attending such tribunal and while returning from such tribunal." | 9. Remedies of exempted person on being illegally arrested. |
| 5. Arrest of person while in custody or while returning home on release from custody. | 10. Appeal. |

Other Topics (miscellaneous)

Ground of exemption from arrest. See Note 2.

Duration of privilege of exemption from arrest. See Note 4.

1. Legislative changes. — The following changes should be noted :

- (a) The words "and except as provided in section 337 A, sub-section (5) and sections 256 and 643" which occurred in the beginning of sub-section (2) of the corresponding Section 642 of the Code of 1882 have been omitted.
- (b) The words "other than process issued by such tribunal for contempt of Court" in sub-section (2) are new. See Note 3.
- (c) Sub-section (3) is new.

2. Scope and object of Section. — The exemption conferred by this Section is not for the personal benefit of the individual, but for the furthering of public interest and the better administration of justice.¹

The privilege is really that of the Court and the principle on which it is founded is that freedom from the fear of arrest encourages willing attendance and thus tends to the advancement of justice.²

In cases in which this Section does not, in terms apply, the English law should be followed. The English law in this respect is approximately the same as the law under the Section.³

3. No exemption in case of process for contempt of Court. — It was held by the Calcutta High Court that the exemption created does not apply in the case of process issued for contempt of Court.¹ The Section has been amended in the present Code so as to give effect to that ruling.

Section 135 — Note 2

1. ('29) AIR 1929 Oudh 426 (426) : 5 Luck 302 (F B).
 ('90) 13 Mad 150 (158).
 ('75) 14 Beng L R App 13 (14).
 ('76) 1 Cal 78 (91).

2. ('09) 3 Ind Cas 46 (47) : 32 All 3.

('31) AIR 1931 Bom 175 (175) : 55 Bom 612.

3. ('80) 5 Cal 106 (108). (Arrest under a writ from a Small Cause Court—English law followed.)

Note 3

1. ('70) 4 Beng L R O C 90 (91).

- 9. Remedies of exempted person on being illegally arrested.**—A person who is arrested in contravention of this Section has various remedies:
- (1) He can apply for his release to the Court which ordered his arrest¹ or to the High Court under S. 491 (1) (b) of the Criminal Procedure Code.²
 - (2) On being released from such illegal arrest, he is entitled to a refund of the sum paid by him to obtain his release.³
 - (3) He cannot, however, maintain a suit for damages for illegal arrest in the absence of proof of malice and want of reasonable and probable cause.⁴
 - (4) He can prosecute the person causing the arrest for an offence under Section 342 of the Indian Penal Code.⁵
- 10. Appeal.**—An order disallowing a claim to exemption from arrest under this Section is one falling under Section 47 and as such is appealable.¹

135A.

(1) No person shall be liable to arrest or detention in prison under civil process —

(a) if he is a member of a unicameral Legislature or of either Chamber of a bicameral Legislature constituted under the Government of India Act, 1935, during the continuance of any meeting of such Legislature or Chamber;

(b) if he is a member of any committee of such Legislature or Chamber, during the continuance of any meeting of such committee;

(c) if he is a member of either Chamber of such a bicameral Legislature, during the continuance of a joint sitting, meeting, conference or joint committee of the Chambers of that Legislature;

and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have

Note 9

1. [See (10) 20 Mad L Jour 186 (137).]
2. (179) 5 Cal L Rep 170 (171). (In view of the express enactment of S. 491, Cr. P. Code the decisions in 1 Cal 78 and 5 Cal L Rep 170 pronounced before the Cr. P. Code was enacted are not of much importance.)
3. (129) AIR 1929 Oudh 426(426):5 Luck 302 (PB).
4. (30) AIR 1930 Rang 131 (132) : 7 Rang 593.
5. (16) AIR 1916 Lah 318 (319, 320).

Note 10

1. (24) AIR 1924 Mad 900 (900).
 - (10) 5 Ind Cas 909 (910) (Mad).
 - (10) 32 All 3 (c).
- [But see (35) AIR 1935 Cal 551 (551). (Held in this case that the peon who arrests does not commit any offence).]

been liable if he had not been released under the provisions of sub-section (1).

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original clause.

b. Substituted by *ibid* for "Chamber or Council."

c. Substituted by *ibid* for the original clause.

1. Scope. — This Section is new. It was inserted into the Code by Act XXIII of 1925. Its object is to confer on members of the Imperial and Provincial Legislatures immunity from arrest and imprisonment under civil process to the extent necessary to enable them to discharge their duties as members of such Legislatures.

136. [S. 648.] (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such

Procedure where person to be arrested or property to be attached is outside district.

property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of the

at Fort William in Bengal or at Madras or at Bombay, * * * the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras or Bombay, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

[1877, S. 648.]

a. The words "or of the Chief Court of Lower Burma" repealed by the Government of India. (Adaptation of Indian Laws) Order, 1937.
b. Substituted by *ibid* for "Bombay or Rangoon."

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. The person to be arrested or property to be attached must be outside the Courts' jurisdiction. 2. Jurisdiction of District Court to which the warrant or order is sent. 3. Power of Court to order attachment before judgment of property situated outside its jurisdiction. | <ol style="list-style-type: none"> 1. Legislative changes. 2. The arrest or attachment must be under any provision of the Code. 3. Such arrest or attachment to be otherwise than in execution of a decree. 4. Order of arrest for contempt of Court. |
|---|---|

1. Legislative changes.—

This Section corresponds to Section 648 of the former Code. The chief alteration made is that the words "where an application is made" have been substituted in the place of the words "where any Court desires." As to the effect of this alteration, see Note 7.

Alterations prior to Code of 1908 :

The words in the Code of 1877, "outside the district within which the Court issuing the warrant of arrest or making the order of attachment is situated" were converted in the Code of 1882 into the words "outside the local limits of its jurisdiction." As to the effect of this alteration, see Note 5. It may be noted that there is no material change in this respect in the present Code.

2. The arrest or attachment must be under any provision of the Code.

— This Section in terms applies only to cases in which the arrest or attachment has been ordered under any provision of the Code. Hence it applies to an order for arrest under O. 39 R. 2 for disobedience of a temporary injunction.¹ As to order for arrest for contempt of Court, see Note 4.

3. Such arrest or attachment to be otherwise than in execution of a decree.

— The Section expressly provides that the procedure laid down by it does not apply to arrest or attachment in execution of a decree. The procedure to be followed in such cases is laid down in Section 39, *ante*.

4. Order of arrest for contempt of Court.— An order for arrest for contempt of Court passed by a Judge on the original side of the High Court is not one

Section 136 — Note 2

1. (26) AIR 1926 Mad 574 (575).
(28) AIR 1928 Cal 462 (463) : 55 Cal 777.
(31) AIR 1931 Cal 279 (280) : 57 Cal 1280. (*Semble*)
(37) AIR 1937 Cal 172 (174).
(34) AIR 1934 Cal 818 (819) : 61 Cal 971.
of temporary injunction against party, resident outside jurisdiction.

— Enforcement under this Section of an order

7. Power of Court to order attachment before judgment of property situated outside its jurisdiction. — Under the former Code there was a conflict of decisions as to whether a Court had the power to order the attachment before judgment of property outside its jurisdiction. On the one hand it was held that under Sections 483 and 484 (corresponding to the present O. 38 R. 5) a Court could not attach before judgment property outside its jurisdiction. It was further held that the old Section 648 (corresponding to Section 136) did not enlarge the Court's power in this respect and that that Section applied only where the Court had power to order such attachment under any other provision of the Code.¹ On the other hand, it was held that under Section 648 a Court did have the power to order the attachment before judgment of property situated outside its local jurisdiction.² Under the present Code, the words in the old Sections 483 and 484 which imposed the restrictions as to the property being within the Court's jurisdiction have been omitted in O. 38 R. 5 and the words "where any Court desires" in Section 648 have been replaced in the present Section by the words "where an application is made." Hence, there is no room for doubt under the present Code that Section 136 read with O. 38 R. 5 (1) (a) empowers a Court to order the attachment before judgment of property situated outside its jurisdiction.³

137. [S. 645 and compare Ss. 49, 200, 201.] (1) The language of sub-ordinate Courts. Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the *Provincial Government* otherwise directs.

(2) The *Provincial Government* may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than

the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

1. Sub-section (3). — This Section corresponds to Section 645 of the former Code. Sub-section (3) is new. It deals with writings other than the *record of evidence*. Hence pleadings and applications may be in English subject to a translation being supplied to the other side where necessary. Compare Section 138 and O. 18 R. 9.

Note 7

2. ('08) 31 Mad 502 (504, 505).

3. ('08) 7 Cal W N 216 (218).

3. ('11) 10 Ind Gas 794 (796) (Low Bur).

('31) AIR 1931 Rang 279(280):9 Rang 561. (Court ordering attachment under this Section has power to remove it.)

(702) 1 Low Bur Rui 310 (311).

('85) 8 Mad 20 (21).

('07) 1907 Upp Bur Rui 13.

1. ('03) 5 Bom L R 570 (574).

138. [S. 185A.] (1) The High Court may, by notification in the *Official Gazette*, direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "local official Gazette."

1. Amendment after 1908. — The words "High Court" were substituted for the words "Local Government" by Section 2 and Schedule, Part I, of the Decentralisation Act (IV of 1914).

139. [S. 197.] In the case of any affidavit under this Code —

- (a) any Court or Magistrate, or
- (b) any officer or other person whom a High Court may appoint in this behalf, or
- (c) any officer appointed by any other Court which the *Provincial Government* has generally or specially empowered in this behalf, may administer the oath to the deponent.

[1877, S. 197. See O. 19.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

Synopsis

1. Legislative changes.
2. Scope of the Section.
3. "Any Court or Magistrate." — Clause (a).
4. Any officer or other person appointed by the High Court — Clause (b).

1. Legislative changes. — The words "or other persons" in clause (b) are new. See Note 4, *infra*.

2. Scope of the Section. — An affidavit is a declaration as to facts, made in writing and sworn before a person having authority to administer an oath.¹ Order 19

Section 139 — Note 2

1. ('10) 8 Ind Cas 897 (897) : 4 Sind L R 88.

[See also ('32) AIR 1932 Cal 160 (160) : 58 Cal 1389. (Affidavit differentiated from solemn affirmation.)]

lays down the circumstances under which affidavits may be used as a mode of proof. The present Section declares the persons who are competent to administer the oath to the deponent in cases where affidavits can be used as a mode of proof.

3. "Any Court or Magistrate"—Clause (a).—"The person before whom an affidavit is sworn must be acting in the capacity of a Court or of the officer authorized to administer an oath." Hence, an affidavit sworn in the Bar Library before a pleader who is also an Honorary Magistrate is not admissible under this Section.²

A Village Munsif under the Madras Village Courts Act (1888) is a Court within the meaning of this clause.³

4. Any officer or other person appointed by the High Court—Clause (b).—"The expression "other person" shows that the person appointed by the High Court need not necessarily be an officer.

See also the undermentioned case.¹

140. [S. 645A.] (1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

1. Legislative changes. — The words "or as may be prescribed" in sub-section (1) are new.

141. [S. 647, Para. 1.] The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Synopsis

<p>1. Legislative changes. 2. To what proceedings the Section applies. 3. Appeals in execution matters. 4. Proceedings for restitution. 5. Letters Patent Appeal.</p>	<p>6. "Court of Civil jurisdiction." 7. "Procedure provided in this Code." 8. "In regard to suits." 9. "As far as it can be made applicable."</p>
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Note 3

1. (710) 8 Ind Cas 897 (898) : 4 Sind L R 88.
2. (710) 5 Ind Cas 537 (538) (Cal).

Note 4

3. (704) 27 Mad 228 (227).
See also R. 34 of the Madras Civil Rules of Practice.
1. (733) AIR 1933 Pat 713 (714).

Other Topics (miscellaneous)

- Appeals. See Note 8.
 Execution proceedings. See Note 2.
 Miscellaneous proceedings under C. P. C., S. 144, O. 9 and O. 21. See Note 2.
 Proceedings in Small Cause Court. See Note 2.
 Proceedings under the Arbitration Act. See Note 2.
 Proceedings under the Bengal Tenancy Act. See Note 2.
 Proceedings under the Companies Act. See Note 2.
 Proceedings under the Guardians and Wards Act. See Note 2.
 Proceedings under the Indian Divorce Act. See Note 2.
 Proceedings under the Land Acquisition Act. See Note 2.
 Proceedings under the Legal Practitioners' Act. See Note 2.
 Proceedings under the Lunacy Act. See Note 2.
 Proceedings under the Probate and Administration Act. See Note 2.
 Proceedings under the Registration Act. See Note 2.
 Proceedings under the Religious Endowments Act. See Note 2.
 Reference under O. 46 R. 1. See Note 7.
 Succession Certificate Act. See Note 9.

1. Legislative changes. —

- (1). The words "herein prescribed" have been changed into "provided in this Code in regard to suits."
 (2). The words "other than suits and appeals" have been omitted.

2. To what proceedings the Section applies. — The corresponding Section of the former Code (Section 647) as it originally stood ran as follows :

"The procedure herein prescribed shall be followed, so far as it can be made applicable, in all proceedings in any Court of civil jurisdiction *other than suits or appeals*."

In interpreting this Section there arose a conflict of views as to whether proceedings in *execution* were "proceedings *other than suits or appeals*" to which this Section could be applied.¹ In order to set this conflict at rest the Legislature, by Act VI of 1892, added an Explanation to the Section as follows :

"*Explanation.* — This Section does not apply to applications for the execution of decrees which are proceedings in suits."

In the year 1894, however, the Privy Council had occasion to deal with the question in a case² which arose before the explanation was added to the Section and their Lordships observed as follows :

"Their Lordships think that the proceedings spoken of in Section 647 include *original matters* in the nature of suits such as proceedings in probates, guardianships and so forth and do not include executions Their Lordships' attention has been called to the recent Act VI of 1892 which would appear to have been passed in order to avoid the disturbance of practice caused by the Allahabad rulings their Lordships have thought it right to state their opinion that the Act of 1892 does nothing more than express the true meaning of the Civil Procedure Code."

Section 141 — Note 2**1. Applicable :—**

- ('67) 8 Suth W R 64 (64).
 ('69) 12 Suth W R 428 (429).
 ('81) 5 Bom 680 (681).
 ('82) 6 Bom 681 (683).
 ('90) 12 All 179 (183). (S. 373 of Act of 1877.)
 ('98) 22 Bom 778 (781, 782).
 ('90) 12 All 392 (395) (FB). (S. 373 of Act of 1859.)
 ('89) 11 All 228 (232). (S. 375 of Act of 1877.)
 ('88) 10 All 71 (76).
 ('76) 1 All 180 (181) (FB).
 ('72) 4 N W P H C R 10 (10).
 ('73) 5 N W P H C R 164 (165).
 ('76) 1 All 178 (179) (FB). (Power of Appellate Court to stay execution.)
 ('85) 7 All 359 (361, 362).
 ('84) 10 Cal 416 (422, 423). (Restoration of execution proceedings dismissed for default.)

- ('84) 10 Cal 538 (540).
 ('69) 11 Suth W R 567 (569). (Striking of execution proceedings.)
 ('85) 8 Mad 548 (550) (FB).
 ('94) 17 Mad 67. (68). (Amendment of execution application.)
 ('73) 10 Bom H C R 19 (20).
 ('81) 7 Cal 163 (165).
 ('88) 10 All 119 (122).
 ('68) 10 Suth W R 450 (451).

Not applicable :—

- ('69) 11 Suth W R 494 (494).
 ('91) 18 Cal 462 (466).
 ('91) 18 Cal 515 (518).
 ('92) 15 Mad 240 (241).
 ('88) 15 Cal 177. (179).
 ('91) 18 Cal 635 (638, 639).
 2. ('95) 17 All 106 (111) : 22 Ind App 44 (PC).
 (On appeal from 12 All 179.)

The explanation and the words "other than suits and appeals" were thus rendered superfluous and unnecessary and have accordingly been omitted from the present Section. As a result it would therefore seem to be clear that Section 141 does not apply to *any* proceedings in execution" but only to proceedings which are *original* matters in the nature of suits. There has however been a conflict of opinion in respect of the following points, due to different interpretations of the said Privy Council decision:

- (1) Whether proceedings under Order 21 Rules 89, 90, 91, 97 and 100 are proceedings in execution or *original* matters in the nature of suits?
- (2) Whether an application to restore a suit dismissed for default is an original matter in the nature of a suit?

whether original or not, provided they are not execution proceedings? On the first point all the Courts except the High Court of Patna and the Chief Court of Oudh have held that such proceedings are proceedings in execution, and that.

See also the following cases decided on the basis of the Privy Council decision and the explanation to Section 647 :

- (95) 18 Mad 181 (183). (O. 17 Rr. 2 and 3.)
(92) 1892 Pnn Re No. 87, p. 148. (O. 28 Rr. 1 and 2.)
(86) 10 Bom 62 (64, 65). (Do.)
(702) 26 Bom 76 (82).
(25) AIR 1925 Cal 812 (813); 52 Cal 559 (Sch. 2).
(17) AIR 1917 Mad 185 (186); 40 Mad 780. (O. 2; R. 2 and S. 11 Expt. 4 not applicable.)
(14) AIR 1914 Cal 126 (127); 41 Cal 1. (O. 9 R. 13. not applicable to application under O. 21 R. 100.)
(17) AIR 1917 Cal 31 (32). (O. 9 R. 9 not applicable.)
(18) AIR 1918 Mad 1011 (1012). (O. 9 does not apply to execution proceedings at all.)
(23) AIR 1923 All 460 (460); 45 All 148. (O. 9 R. 9 not applicable—AIR 1914 Cal 126 and AIR 1918 Pat 67, Followed.)
(21) AIR 1921 Lab 67 (67); 2 Lab 66. (O. 9 R. 9 does not apply.)
(15) AIR 1915 Cal 539 (540). (O. 9 R. 9 not applicable to application under O. 21 R. 90.)
(23) AIR 1923 Nag 18 (19). (O. 9 R. 9 not applicable.)
(25) AIR 1925 Cal 360 (360). (Proceeding under O. 21 R. 90.)
(25) AIR 1925 Cal 510 (511). (Application under O. 21 R. 90. Dissenting from AIR 1916 Cal 618; AIR 1916 Cal 221 and A I R 1917 Cal 548 and following A I R 1919 Pat 192 (R.B.).)
(29) AIR 1929 All 485 (487). (Setting aside sale under O. 21 R. 91—O. 9 R. 13 not applicable.)
(23) AIR 1923 All 544 (544). (Application under S. 47 for cancellation of sale—Following AIR 1923 All 460.)
(24) AIR 1924 Pat 346 (347). (Application to set aside execution sale under O. 21 R. 90.)
(25) AIR 1925 Mad 126 (127). (Application to set aside sale under O. 21 R. 90—21 Ind Cas 32 and AIR 1919 Pat 192 (R.B.), Relied on.)
(21) AIR 1921 Sind 55 (56); 17 Sind L R 105. (Proceedings under O. 21 R. 90.)
(26) AIR 1926 Bom 377 (378); 50 Bom 457. (Application under O. 21 R. 89—A I R 1914 Cal 126, Followed and A I R 1917 Cal 548 and A I R 1916 Cal 618, Dissented from.)

Section 141 cannot be applied thereto.⁴ A Full Bench decision of the Patna High Court⁵ has held that a proceeding under O. 21 R. 90 is one in execution. But in the undermentioned decisions of the same High Court⁶ it has been held, distinguishing the Full Bench case, that a proceeding under O. 21 R. 100 is an original matter in the nature of suits to which Section 141 can be applied. The Oudh Chief Court has held that a proceeding under O. 21 R. 90 is an original matter and that Section 141 applies thereto.⁷

On the *second* point the High Courts of Madras⁸ and Lahore,⁹ the Chief Court of Oudh¹⁰ and the Judicial Commissioner's Court at Nagpur¹¹ hold that such a proceeding is an original matter and that therefore an application under O. 9 R. 9, will lie to restore a petition under O. 9 R. 9, which is itself dismissed for default. The Allahabad,¹² Calcutta¹³ and Patna¹⁴ High Courts are inclined to the view that such a proceeding is not an original proceeding to which Section 141 applies. See also Note 2 to Order 9 ("General") and Note 2 to Section 151, *infra*.

('26) AIR 1926 Cal 773 (777) : 53 Cal 679. (Application to set aside sale — AIR 1916 Cal 221; 12 Cal L Jour 6 and AIR 1917 Cal 548 held wrongly decided.)

('26) AIR 1926 Lah 109 (109). (Objection under O. 21 R. 90.)

('19) AIR 1919 Pat 192 (193) : 4 Pat L Jour 135 (FB). (Proceedings under O. 21 R. 90.)

('29) AIR 1929 Mad 757 (762): 52 Mad 899. (Proceedings under C. P. O., O. 21 Rr. 97 and 100.)

('08) 4 Low Bur Rul 75 (75). (Objection to attachment.)

('09) 2 Ind Cas 105 (106) (All). (Do.)

('94) 1894 Pun Re No. 62. (Do.)

('20) AIR 1920 Cal 914 (915). (Proceedings under O. 21 R. 2.)

In the following cases, the procedure provided by the Code in regard to suits was applied to execution proceedings despite the explanation to Section 647. They must be regarded as not rightly decided, so far as effect of S. 141 is concerned :

('93) 15 All 49 (53, 54). (O. 17 R. 3 applied to execution proceedings.)

('94) 17 Mad 67 (68). (O. 6 R. 17 applied to execution proceedings.)

The opposite view held in the following cases that S. 141 applies to execution proceedings is no longer law :

('12) 13 Ind Cas 859 (860) (Lah).

('84) 10 Cal 416 (422).

('88) 10 All 119 (122).

('85) 7 All 359 (361).

('82) 6 Bom 681 (682).

('10) 7 Ind Cas 241 (241) (Cal).

[See ('35) AIR 1935 Lah 145 (145). (An application under Sec. 292, Succession Act (1925) is really made in proceedings in the nature of execution and is no bar to a fresh application being entertained in the exercise of inherent jurisdiction when the first application had been dismissed in default and not on merits : 17 All 106 (P C), Distinguished.)]

4. ('14) AIR 1914 Cal 126 (127): 41 Cal 1. (Order 21 Rules 100 and 101.)

('15) AIR 1915 Cal 539 (540). (Order 21 Rule 90.)

('25) AIR Cal 360 (360). (Do.)

('25) AIR 1925 Cal 510 (511). (Order 21 Rule 90

—Dissenting from AIR 1916 Cal 613; AIR 1916 Cal 221; AIR 1919 Cal 50 and following AIR 1919 Pat 192 (FB).)

('26) AIR 1926 Cal 773 (777): 53 Cal 679. (Order 21 R. 90—AIR 1916 Cal 221; 12 Cal L Jour 6 and AIR 1919 Cal 50 held wrongly decided—In view of this decision and of AIR 1925 Cal 510, the decision in 2 Ind Cas 156 (Cal) and 3 Cal W N 344 must also be held to be not correct.)

('29) AIR 1929 All 485 (487). (O. 21 R. 91.)

('25) AIR 1925 Mad 126 (127). (O. 21 R. 90.)

('26) AIR 1926 Bom 377 (378) : 50 Bom 457. (O. 21 R. 89.)

('21) AIR 1921 Sind 55 (56) : 17 Sind L R 105. (Order 21 R. 90.)

('29) AIR 1929 Mad 757 (762): 52 Mad 899 (FB). (Order 21 Rr. 97 and 100.)

('26) AIR 1926 Lah 109 (109). (O. 21 R. 90.)

('31) AIR 1931 All 594 (594). (Order 9 does not apply to proceedings under O. 21 R. 90 dismissed for default but the Court may act under inherent power.)

5. ('19) AIR 1919 Pat 192 (193) : 4 Pat L Jour 135 (FB).

[See also ('24) AIR 1924 Pat 346 (347). (Proceedings under O. 21 R. 90—Point not decided.)]

6. ('23) AIR 1923 Pat 239 (241) : 2 Pat 372.

('18) AIR 1918 Pat 486 (487) : 3 Pat L Jour 250.

7. ('20) AIR 1920 Oudh 177 (178) : 23 Oudh Cas 349. (Follows AIR 1916 Cal 613 which has been dissented from in later Calcutta decisions.)

8. ('26) AIR 1926 Mad 325 (326).

('26) AIR 1926 Mad 654 (654).

9. ('23) AIR 1923 Lah 302 (303).

10. ('23) AIR 1923 Oudh 146 (146).

('37) AIR 1937 Oudh 344 (346) : 13 Luck 246. (Order of rejection is appealable under O. 43 R. 1 (c) read with Sec. 141.)

11. ('23) 72 Ind Cas 547 (548) (Nag). (Semble.)

[But see ('32) AIR 1932 Nag 101 (102) : 28 Nag L R 83.]

12. ('24) AIR 1924 All 503 (504) : 46 All 319. (Semble.)

13. ('27) AIR 1927 Cal 534 (535) : 54 Cal 405. (Decision in AIR 1917 Cal 548 held to be wrong.)

14. ('22) AIR 1922 Pat 121 (121) : 4 Pat L Jour 287.

- (3) Proceedings under the Companies Act, 1882 and under the Companies Memorandum of Association Act, 1895.²¹
 - (4) Application for the appointment of a common manager under Section 93 of the Bengal Tenancy Act, 1885.²²
 - (5) Applications under Section 158 of the Bengal Tenancy Act, 1885.²³
 - (6) Application to file an agreement to refer to arbitration under Paragraph 17 of Schedule II of the Code²⁴ or to file an award under the Arbitration Act, 1899.²⁵
 - (7) Application to a District Judge for sanction to lease wakf properties.²⁶
 - (8) Application to the High Court for the exercise of its extraordinary jurisdiction under Regulation II of 1927.²⁷
 - (9) Reference to the Court under the Land Acquisition Act, 1894.²⁸
 - (10) Proceedings to compel registration.²⁹
 - (11) Application under Section 18 of the Religious Endowments Act, 1863, for leave to sue.³⁰
 - (12) Proceedings in revision before the High Court.³¹
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- (‘33) AIR 1933 Nag 62 (64 to 66): 28 Nag L R 332. (O. 39 R. 2, sub-rule (3) applied to disobedience of interim injunction restraining marriage under S. 12 of the Guardians and Wards Act.)
- (‘05) 1905 All W N 104 (105). (Evidence to be recorded as in suits.)
- (‘81) 6 Cal 762 (763). (Case under Minors Act, Bengal Act XL of 1858—Depositions to be recorded as provided by Ss. 182 and 183 of the Code of 1877.)
- (‘12) 11 Ind Cas 554 (557): 36 Bom 20. (Receiver may be appointed in such proceeding.)
- (‘25) AIR 1925 Lah 489 (489). (Do.)
- (‘29) AIR 1929 Nag 273 (273). (Appeal lies from order under O. 39 R. 2 in proceedings under the said Act.)
21. (‘08) 27 Bom 415 (418). (Companies Memorandum of Association Act.)
- (‘87) 9 All 180 (182, 183). (S. 24, C. P. Code, applies to cases of winding up of companies.)
- (‘20) AIR 1920 Lah 51 (53): 1 Lah 187. (O. 9 R. 13 applies *mutatis mutandis* to ex parte orders of Court under Companies Act.)
- (‘36) AIR 1936 All 826 (829): 58 All 742 (F.B). (Proceedings under S. 187, Companies Act are proceedings in a Court of civil jurisdiction—S. 86 is therefore applicable to such proceedings—Per Thom, J.)
- (‘37) AIR 1937 Lah 82 (83). (Company law does not affect power of review especially when by S. 141, C. P. C., provisions of Code are to be followed in proceedings under the Company law—*Obtiter*.)
- (‘37) AIR 1937 Oudh 62 (63). (Civil Court can review its order passed under S. 120, Companies Act.)
- (‘28) AIR 1928 Lah 376 (377). (Liquidation Court can order attachment before judgment.)
22. (‘16) AIR 1916 Cal 427 (427): 43 Cal 986. (Receiver may be appointed under O. 40 R. 1 pending the application.)
- (‘26) 91 Ind Cas 741 (741) (Cal). (O. 9 R. 13 applies to the proceeding.)
- (‘99) 3 Cal W N 344 (345). (A proceeding under S. 174 does not come under Explanation to S. 647 of the Code of 1882.)
23. (‘97) 24 Cal 197 (206). (S. 45 of the Code of 1882 (now O. 2 R. 3) applies to the case.)
24. (‘11) 9 Ind Cas 655 (656): 1911 Pun Re No. 35. (O. 2 R. 3 applies.)
25. (‘09) 4 Ind Cas 609 (610): 3 Sind L R 128. (Court can issue a temporary injunction in such cases.)
- (‘24) AIR 1924 Sind 56 (56). (O. 9 R. 13 applies to ex parte order for filing award.)
- (‘22) AIR 1922 Sind 6 (7): 16 Sind L R 79. (C. P. Code, S. 10 applies to such case—This case was doubted in AIR 1928 Sind 169.)
26. (‘24) AIR 1924 Cal 327 (328). (The fact that the Civil Procedure Code regulates its procedure does not make an order thereon appealable.) [See also (‘20) AIR 1920 Cal 129 (130): 47 Cal 592.]
27. (‘68) 5 Bom H C R A C J 215 (216).
28. (‘89) 16 Cal 31 (32).
- (‘05) 2 Cal L Jour 359 (368). (Objection of respondent can be dismissed for default of appearance—O. 9 Rr. 8 and 9 apply.)
29. (‘77) 2 Cal 131 (139).
30. (‘01) 24 Mad 685 (689). (Provisions of C. P. Code as to verification and presentation should be followed.)
- (‘16) AIR 1916 Mad 268 (271). (The decision in this case that proceedings under S. 10 of the Religious Endowments Act are not judicial proceedings and hence S. 141 does not apply to them is no longer law in view of the decision of the Privy Council in AIR 1917 P C 71.)
31. (‘07) 1907 Pun Re No. 97, p. 455. (O. 9 R. 9 applies to revision proceedings.)
- (‘92) 16 Bom 550 (551). (Order in revision to be executed by lower Court.)
- (‘91) 13 All 533 (537). (Revision under Provincial Small Cause Courts Act, S. 25—High Court can remand case under S. 562, C. P. C.)
- (‘07) 17 Mad L Jour 62 (63). (Memo of cross-objections can be filed.)

(13) Application to sue in *forma pauperis*.³²

(14) A proceeding under the Lunacy Act.³³

(15) A proceeding under the Indian Divorce Act.³⁴

(16) Issue sent by a Revenue Court for decision, under Section 271 of the Agrar Tenancy Act, 1926.³⁵

See also the undermentioned cases.³⁶

- The following are not proceedings of the kind contemplated by the Section —
- (1) Application for review of order dismissing execution application.³⁷
 - (2) Proceedings under Order 21 Rule 58.³⁸

But independent of this Section some of the provisions of the Code may apply directly and of their own force to matters which do not come within the meaning of the word "proceedings" as defined by the Privy Council.³⁹ Thus, a proceeding in execution can be reviewed under O. 47 R. 1 by force of its own language and not by virtue of Section 141.⁴⁰

In the undermentioned decision⁴¹ the Sind Judicial Commissioner's Court expressed the view that the provisions of Order 7 apply, by reason of this Section, to memoranda of appeals and that an appeal can be rejected under O. 7 R. 11. It is submitted that the view is not correct as an appeal is not an original proceeding. But, O. 7 R. 11 will apply to appeals by reason of the provisions of Section 107 *ante*. (See Notes to Section 107.)

3. Appeals in execution matters.—As Section 141 does not apply to execution proceedings but only to *original* matters in the nature of suits, it is conceived that it does not apply to appeals from orders in execution.¹ But *independently* of Section 141,

32. (14) AIR 1914 Mad 256 (258). (Amendment can be ordered under O. 6 R. 17.)
- (38) AIR 1938 Mad 5 (5, 6). (O. 9 R. 9 applied.)
- (29) AIR 1929 Sind 186 (186). (Applicability of Order 22 to said applications.)
- [But see (13) 20 Ind Cas 640 (641) : 7 Low Bur

- Rul 60.]
33. (18) AIR 1918 Cal 353 (355). (Application under, to be verified as provided in C. P. Code.)
34. (82) 6 Bom 416 (434). (S. 141 applied with-out reference to the Section.)
35. (34) AIR 1934 All 86 (86) : 56 All 390. (Order 9 applicable.)
36. (39) AIR 1939 All 507 (509) : 1 L R (1939) All 587. (A proceeding under the U. P. Encum-bered Estates Act is a proceeding in the nature of a suit to which the provisions of O. 32 R. 3, C. P. O., are applicable by virtue of R. 6 of the Rules made under Encumbered Estates Act and of S. 141, C. P. O. Where a creditor happens to be a minor, the failure to follow the mandatory provisions of O. 32 R. 3, C. P. O., necessarily vitiates the whole proceeding so far as the minor is concerned.)

- (36) AIR 1936 Lab 388 (389). (An application under O. 34 R. 6, C. P. O., is not an application in execution but a substantive original application for a new decree in the suit. The procedure applying to this application would be governed by S. 141, C. P. O. Where, therefore, a definite application had been made for a decree under O. 34 R. 6 and no prayer was granted by the Court for

1. The contrary decisions in 1 All 178 (179); 2 Beng L R A C 110 and 10 South W R 450 are not good law as they are based on the obsolete view that S. 141 applies to execution proceedings.) [See (01) 25 Bom 478 (484). (Doubtful whether it applies.)]

Note 3

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41. (39) AIR 1939 Sind 221 (221) : 1 L R (1939) 40. (98) 2 Cal W N 606 (607).

See also Note 3 below.

- ceedings—O. 1 R. 10.)
- (Receiver can be made a party to execution pro-

- (23) AIR 1923 Mad 144 (146) : 47 Mad 47. (O. 6) 3 Cal L Jour 276 (279). (Do.)

- (O. 9 R. 13 applies to ex parte orders in execution.)
39. (14) AIR 1914 Mad 162 (169) : 37 Mad 462. (Schedule 2 does not apply to proceedings under

- O. 21 R. 58.)
38. (36) AIR 1936 All 378 (380) : 58 All 797. (See case in foot-note 34.)

- S. 26 F, Bengal Tenancy Act.)
- O. P. O., O. 32 R. 7 applies to proceedings under

- (38) 42 Cal W N 154 (160). (By virtue of S. 141, Encumbered Estates Act.)

- proceedings under S. 78, Madras Hindu Religious

- visions of O. 21 R. 97 to 99 are applicable to

- (36) AIR 1936 Mad 612 (614) : 59 Mad 36. (Pro- granted shall be deemed to have been refused.)

- the result that the relief which was not expressly

- Explanation 5, S. 11, C. P. O., would apply with

- passing of a personal decree, the provisions of

some of the provisions of the Code in regard to appeals may apply directly to appeals from orders in execution. Thus, where an order in execution is appealed from as a decree under Section 47, the Appellate Court may require the appellant to give security for costs under O. 41 R. 10.² Similarly, the Appellate Court can stay execution of the decree under Section 47 independently of Section 141 and of O. 41 R. 5.³

4. Proceedings for restitution. — Section 141 does not make Section 144 of the Code applicable to execution proceedings.¹ As to the *inherent* powers of the Court to order restitution in such cases, see Section 144, Note 34.

5. Letters Patent Appeal. — Letters Patent Appeals are not original proceedings of the kind contemplated by Section 141.¹ But by virtue of Section 117 of the Code, the provisions of the Code are applicable to High Courts except as provided in Part IX or Part X or in Rules. Hence the provisions of the Code may be followed in Letters Patent Appeals.²

6. "Court of civil jurisdiction." — The proceedings to which Section 141 applies are proceedings in a Court of *civil* jurisdiction. A proceeding under the Lunacy Act, 1912, is a "proceeding in a Court of civil jurisdiction." Consequently, the provisions of the Code as to verification of pleadings apply to such a proceeding.¹ Disciplinary proceedings under the Legal Practitioners' Act are, according to the High Courts of Madras² and Calcutta,³ "proceedings in a Court of civil jurisdiction." The High Court of Patna, on the other hand, has held that they are not.⁴ Proceedings under Section 195 of the Criminal Procedure Code for sanction to prosecute are not *civil* proceedings although they may be before the Judge of a Civil Court.⁵ A Revenue Court is a Court of civil jurisdiction.⁶

7. "Procedure provided in this Code." — Section 141 deals with procedure and procedure alone.¹ It does not confer any *substantive right* not expressly given elsewhere by the Code. Thus, a right of appeal² cannot be claimed merely on the strength of Section 141.³ Similarly, the Section does not confer a right to refer to

2. (1900) 24 Bom 314 (316).

3. ('01) 28 Cal 734 (737).

Note 4

1. ('15) AIR 1915 Cal 530 (531).

Note 5

1. ('04) 27 Mad 121 (123).

2. ('17) AIR 1917 Cal 626 (626) : 43 Cal 243.

('21) AIR 1921 P C 80 (82) : 48 Cal 481 : 48 Ind App 76 (P C).

Note 6

1. ('18) AIR 1918 Cal 353 (355).

2. ('03) 26 Mad 596 (597).

3. ('19) AIR 1919 Cal 474 (475). (Distinguishing 6 Ind Cas 327 (Cal).)

(1900) 27 Cal 1023 (1033).

4. ('16) AIR 1916 Pat 115 (116) : 1 Pat L Jour 576. (Inquiry under S. 14 is only administrative.)

5. ('07) 30 Mad 311 (313).

6. See Note 18 to the Preamble. *cf.* Application under S. 105, Bengal Tenancy Act, 1885 is not proceeding in Court of Civil jurisdiction:

('24) AIR 1924 Pat 104 (106) : 3 Pat 67.

Note 7

1. ('28) AIR 1928 Rang 137 (138) : 6 Rang 568.

('73) 19 Suth W R 122 (122).

('86) 10 Bom 433 (434).

2. See the following cases :

('04) 27 Mad 504 (508). (No right of appeal unless given by statute or some authority equivalent to statute.)

('87) 11 Mad 26 (34) : 14 Ind App 160 (P C). (Right of appeal must be conferred by statute or some equivalent authority.)

3. ('04) 27 Mad 504 (508).

('86) 10 Bom 433 (434).

('73) 19 Suth W R 122 (122).

('23) AIR 1923 All 460 (460) : 45 All 148.

('23) AIR 1923 Pat 180 (182).

('24) AIR 1924 Cal 327 (328).

('25) AIR 1925 All 431 (432) : 47 All 741.

('28) 117 Ind Cas 849 (851) (Cal). (O. 43 R. 1 (a) not applicable to order returning memorandum of appeal.)

('25) AIR 1925 Lah 489 (490). (Order appointing receiver in proceeding under Guardians and Wards Act is made under O. 40 R. 1 and therefore within purview of O. 43 R. 1(s). Hence it is appealable.)

Order 43 Rule 1 (c) which provides for an appeal against an order refusing to restore a suit dismissed for default cannot be applied by analogy to cases in which some other proceeding is dismissed for default. Thus there is no right of

arbitration, a right to a review or a right to proceed by way of execution against a surety who is not a party to the proceeding, on the analogy of Section 145 of the Code. On the same principle, the Section does not confer on any Court the power of making a reference to the High Court under O. 46 R. 1 in any case not coming strictly within the purview of that Rule.

Similarly, the principle that a suit against a dead man is not maintainable, is a point of substance and not of procedure, and cannot therefore be applied to an application to set aside an *ex parte* decree, so as to make it incompetent by reason of the fact that the deceased plaintiff's name, instead of his legal representatives, appears in the application as a party.⁸

But Sections 10 and 11⁹ and O. 39 R. 1¹⁰ of the Code are rules of *procedure* and may therefore be applied to "proceedings" within the meaning of Section 141.

8. "In regard to suits."—The word "suits" in Section 141 is used in a comprehensive sense so as to include appeals which are only continuations of suits. Hence, the procedure prescribed by the Code in regard to *appeals* governs appeals arising out of miscellaneous proceedings and miscellaneous proceedings in the nature of appeals.¹

9. "As far as it can be made applicable."—Section 141 does not make the whole of the procedure in regard to suits applicable to proceedings under the Section. Such procedure applies only as far as it can be made applicable.¹ Thus, the appointment of a guardian cannot be referred to arbitration because guardianship is not a matter purely of *private right*.² Similarly, a surety for a guardian cannot be proceeded against in execution under Section 145, Civil Procedure Code, because even

appeal against an order refusing to restore an application to set aside the dismissal of a suit for default. See the following cases:

(122) AIR 1922 Cal 572 (573).
(123) AIR 1923 Lah 802 (803).
(118) AIR 1918 Pat 612 (613) : 2 Pat L Jour 720.
(123) 72 Ind Cas 547 (548) (Nag).
(113) 19 Ind Cas 97 (98) : 9 Nag L R 38.
(132) AIR 1932 Nag 101 (102) : 28 Nag L R 83.
(A I R 1923 Nag 293, Overruled.)

Similarly there is no right of appeal against an order refusing to set aside dismissal of an order, of an application to set aside an *ex parte* decree. See the following cases:

(119) AIR 1919 Cal 125 (125).
(122) AIR 1922 All 337 (337).
(124) AIR 1924 All 682 (683) : 46 All 538.

So also there is no right of appeal against an order refusing to set aside the dismissal for default of an application to set aside an execution sale. See the following cases:

(197) 29 All 596 (597, 598).
(115) AIR 1915 Cal 539 (540).
(110) 6 Ind Cas 148 (148, 149) (Cal).

(104) 31 Cal 207 (209).
(107) 10 Oudh Cas 353 (354).

(177) AIR 1917 Cal 815 (816).
(1900) 27 Cal 414 (415).

(171) AIR 1917 Cal 815 (816).
(The decisions in (1889) 16 Cal 31, (1882) 4 Mad 295 and A I R 1923 Nag 293 which are inconsistent with the above view cannot be supported.)

4. (108) 30 All 137 (140).
(128) AIR 1928 Rang 137 (138) : 6 Rang 563.
(19) AIR 1919 Mad 244 (246).
[But see (15) AIR 1915 All 172 (174) : 37 All 380. (District Judge can reconsider an order granting letters of administration, whether under S. 114 or under the inherent powers of the Court recognised by S. 151 of the C. P. C., apart altogether from the provisions of S. 50 of the Probate and Administration Act.)]
6. (126) AIR 1926 Sind 35 (36) : 19 Sind L R 390. (Observations of Ruppchand, A. J. O.)
7. (11) 10 Ind Cas 879 (880) : 36 Mad 16.
(125) AIR 1925 Cal 391 (392).
8. (127) AIR 1927 Nag 261 (252) : 29 Nag L R 71.
9. (122) AIR 1922 Sind 6 (8) : 16 Sind L R 79.
10. (109) 4 Ind Cas 609 (610) : 3 Sind L R 128.
1. (128) AIR 1928 Lah 488 (489). (Appeal under S. 47, Guardians and Wards Act.)
(179) 3 Bom 204 (205). (Section 98 applicable.)
(1900) 27 Cal 1023 (1033).
Note 9
1. (120) AIR 1920 Cal 743 (745).
(135) AIR 1935 All 195 (197). (O. 2 R. 2 and S. 11, Expt. 4 do not apply to proceedings for restitution.)
(116) AIR 1916 Mad 268 (271, 272).
(88) 10 All 97 (105).
2. (108) 30 All 137 (140).
(24) AIR 1924 Mad 484 (484) : 47 Mad 459.
(28) AIR 1928 Rang 137 (138) : 6 Rang 563.

Note 9

Note 8

the guardian himself cannot be proceeded against in execution in that way.³ So also, though the procedure laid down in Order 22 requiring a plaintiff to bring on record the legal representatives of a deceased defendant may apply to applications to sue in *forma pauperis*, it does not follow that the *penalties* provided in O. 22 R. 4 can, without express provision in that behalf, apply to such applications.⁴

Again, where an express or special procedure is provided for a particular proceeding, Section 141 cannot be applied so as to defeat the operation of such provisions. See the undermentioned cases.⁵

142. [S. 94.] All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

Orders and notices to be in writing.

1. Legislative changes.—The words “and shall be served in the manner hereinbefore provided for the service of summons” which occurred at the end of the old Section have been omitted and reproduced in Order 48 Rule 2. The alteration is merely verbal.

143. [S. 95.] Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made :

Postage.

Provided that the *Provincial Government* may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

[1877, S. 95.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for “Local Government.”

1. Service by post.— See Order 51 Rules 21, 25, 30 and Order 29 Rule 2 (b), *infra*.

3. ('27) AIR 1927 Sind 262 (262).

4. ('29) AIR 1929 Sind 136 (136).

5. ('30) AIR 1930 Mad 105 (107).

('06) 1906 Pun Re No. 143, page 514. (Order appointing guardian is final under the Guardians and Wards Act. No review under S. 114 of the Code therefore can be made thereof.)

('12) 15 Ind Cas 559 (559) : 1912 Pun Re No. 116. (Do.)

('03) 26 Mad 438 (440). (Decree under S. 9, Specific Relief Act—Order in execution of—Not appealable because S. 9 prohibits an appeal from any order in a suit.)

('24) AIR 1924 All 376 (378) : 46 All 372. (Succession Certificate Act provides special procedure. S. 141 does not apply. But see AIR 1927 Sind 187 which dissents from this decision.)

(1900) 27 Cal 484 (487). (Prohibition of second appeal by S. 153 of the Bengal Tenancy Act.)

('13) 20 Ind Cas 640 (641) : 7 Low Bur Rul 60. (Petition in *forma pauperis* not framed as per Rr. 2 and 3 of O. 33—R. 5 requiring rejection of the petition—Amendment cannot be made by resort to S. 141.)

('24) AIR 1924 Pat 104 (106) : 3 Pat 67. (Proceedings under S. 105 Bengal Tenancy Act, S. 107 providing special procedure—S. 141 cannot be applied. Note—The observation that Revenue Courts are not Civil Courts and therefore also S. 141 does not apply is, it is submitted, not correct. See Note 18 to Preamble.)

('12) 16 Ind Cas 675 (676) : 6 Sind L R 67. (Mamlatdar's Courts Act itself providing its summary procedure—S. 141 does not apply.)

Application for
restitution.

144. [S. 583.] (1) Where and in so far as a decree is varied or reversed,³ the Court of first instance¹⁷ shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made¹⁹ as will, so far as may be,²¹ place the parties in the position which they would have occupied²⁰ but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest,²³ damages, compensation and mesne profits,²² which are properly consequential on such variation or reversal.

(2) No suit²⁹ shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

Synopsis

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|---|---|
| <ol style="list-style-type: none"> 19. "Shall cause restitution to be made." 20. "Place the parties in the position which they would have occupied but for such decree as has been varied or reversed." 21. "So far as may be." 22. Mesne profits. 23. Interest. 24. Refund of compensation money in land acquisition cases. 25. Possession of property or money obtained otherwise than in execution. 26. Splitting up claim of restitution. 27. Pecuniary jurisdiction of Court in awarding restitution. See Note 17. 28. Security for restitution. 29. Bar of suit. 30. Nature of proceedings under the Section. 31. Appeal—Tenability of. 32. Court-fee. 33. Limitation. 34. Inherent power of Court to grant restitution. 35. Revenue Court. 36. Revision. | <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and object of the Section. 3. The decree must have been varied or reversed. 4. Modes of variation and reversal. 5. Effect of setting aside ex parte decree and passing the same decree on the merits. 6. Effect of reversal of main decree on dependent decrees. 7. Who may apply for restitution. 8. Persons not actually parties. 9. Party not in possession. 10. Right of auction-purchaser to apply for restitution. 11. Against whom restitution can be granted. 12. Transferee of a decree. See Note 11. 13. Auction-purchaser. 14. Surety — Restitution against. 15. Third persons — Restitution against. 16. Trustee. 17. What Court can grant restitution. 18. Extent of power to grant restitution. |
|---|---|

Other Topics (miscellaneous)

- Directions for restitution in the reversing decree — Need for. See Note 19.
- Restitution — Meaning of. See Note 2.
- Restitution of property sold. See Note 18.

1. **Legislative changes.** — Under the corresponding Section 583 of the Code of 1882 a practice had grown up which was not justified by the language of that Section

Section 144 — Note 1

1. S. 583 of the Code of 1882 ran as follows: — "Where a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court

and the same has now been recast in sub-section (1) of this Section "so as to bring it into closer conformity with that practice."²

Sub-section (2), barring the institution of suits for relief claimable under this Section, is new. It compels litigants to have matters falling within the Section cleared up in proceedings under this Section only.³ It necessarily implies the widest possible construction of sub-section (1).⁴

2. Scope and object of the Section. — It is a cardinal principle of law that the acts of Courts should not be allowed to work injury on the suitors.¹ In the leading English case of *Rodger v. Comptoir D'Escompte de Paris*,² Lord Cairns said :

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to the suitors and when the expression 'the act of the Court' is used it does not mean merely the act of the primary Court or of any intermediate Court of appeal but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter to the highest Court which finally disposes of the case."

The doctrine of restitution is based upon this principle³ and contemplates a case where property has been received by the decree-holder under his decree and the decree is subsequently wholly or partially reversed or varied in other proceedings. In such a case the law raises an *obligation* on the party who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost;⁴ and this obligation, it is the duty of the Courts to *enforce*, unless it is shown that restitution would be clearly contrary to the real justice of the case.⁵

Section 144 only embodies this doctrine of restitution and does not confer any *new* substantive rights which a successful party did not possess under the general law.⁶ It merely *regulates* the *exercise* of the rights and prescribes a convenient *procedure* therefor.⁷

The Section is a salutary provision of law enacted with a view to shorten litigation and to afford speedy relief and should not, therefore, be narrowly construed.⁸

which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for execution of decrees in suits."

2. See the Report of the Select Committee.

3. ('19) AIR 1919 Bom 1 (10) : 43 Bom 433 (FB).

4. ('24) AIR 1924 Sind 101 (102) : 17 Sind L R 73. (Thus, restitution is granted as against auction-purchaser if his sale is not bona fide.)

Note 2

1. ('71) 40 L J P C 1 (3), *Rodger v. Comptoir D'Escompte de Paris*.

2. ('22) AIR 1922 P C 269 (271) : 49 Ind App 351 : 2 Pat 10 (P O).

3. ('29) AIR 1929 Nag 138 (138).

4. ('37) AIR 1937 Bom 173 (175).

2. ('71) 40 L J P C 1 (3, 4).

3. ('38) AIR 1938 Cal 554 (557).

4. 6 Peters, 17. *Bank of United States v. Bank of Washington*. (Followed in 23 Mad 306 (310).)

5. ('32) AIR 1932 All 239 (240). (Decree directing appointment of Receiver reversed in appeal — Party in possession before, can apply under this Section.)

6. ('32) AIR 1932 Cal 29 (32) : 58 Cal 1070.

7. ('33) AIR 1933 Lah 791 (792). (It is also incumbent on the Courts to restore the parties to status quo.)

(1900) 23 Mad 306 (310).

8. ('39) AIR 1939 All 66 (69) : I L R (1939) All 108.

[See ('37) AIR 1937 Bom 101 (102) : I L R (1937) Bom 150.]

[See also ('33) AIR 1933 Lah 798 (800).

5. (1900) 23 Mad 306 (310). (Very purpose of restitution is to redress injustice.)

6. ('68) 9 Suth W R 402 (407) (FB). (Per Peacock, C. J.)

7. ('06) 33 Cal 927 (932, 933).

8. ('72) 17 Suth W R 232 (233).

9. ('03) 27 Mad 504 (507, 508).

10. ('22) AIR 1922 Nag 82 (84) : 18 Nag L R 24.

[See also ('37) AIR 1937 Mad 95 (96).

6. ('12) 16 Ind Cas 966 (966) (Cal). (It merely provides a more convenient procedure.)

7. ('98) 8 Mad L Jour 276 (277).

8. ('21) AIR 1921 Lah 234 (235).

9. ('28) AIR 1928 All 293 (294) : 50 All 767.

10. ('12) 17 Ind Cas 121 (122, 123) (Cal). (Suit for possession decreed in first Court—Plaintiff taking forcible possession—Subsequent reversal of decree — Application for restitution and mesne profits may be entertained.)

11. ('29) AIR 1929 Cal 814 (815) : 57 Cal 226.

The variation or reversal must, of course, have been by a Court of *competent jurisdiction* for otherwise there cannot be a *legal* variation, or reversal.²

Again, the Section will apply only where a *decree* is varied or reversed. It will not apply where an *order* (which is not a decree) is varied or reversed³ though in such cases, the Court can order restitution under its inherent powers, on the analogy of Section 144.⁴ The Nagpur Judicial Commissioner's Court has however held that the word "decree" in Section 144 covers an "order".⁵ The decision is clearly against the definition of the word "decree" in Section 2 (2) of the Code and further, the decisions cited by that Court in support of its view do not bear it out. The decision cannot therefore be accepted as sound.

4. Modes of variation and reversal. — Section 583 of the old Code allowed restitution only in cases where the decree was reversed in *appeal* preferred under Chapters 41 and 42 of that Code, corresponding to Orders 41 and 42 of the present Code. It did not, therefore apply to variations and reversal *otherwise* than in appeal¹ nor to a variation or reversal in appeal to the Privy Council.²

This Section contains no such restriction as to the manner in which a decree should be varied or reversed and none can be legitimately read into it, except, of course, that it should be in "accordance with law."³ The Section has also been transferred to the Chapter headed "Miscellaneous" from its position in the Chapter headed "Appeals from Original Decrees" under the old Code. The effect of it is to extend its operation to all cases of reversals, *howsoever* the variation has been effected.⁴

2. ('98) 20 All 237 (239, 240).

('37) AIR 1937 All 232 (234).

3. ('22) AIR 1922 Mad 99 (99). (Order for rateable distribution.)

('18) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206. (Order setting aside execution sale.)

('19) AIR 1919 Mad 581 (581) : 41 Mad 467. (Do.)

('17) AIR 1917 Pat 495 (496) : 2 Pat L Jour 361. (Do.)

('14) AIR 1914 Cal 692 (692). (Do.)

('24) AIR 1924 Rang 181 (181) : 1 Rang 770. (Order removing receiver.)

('35) AIR 1935 Mad 783 (783). (Variation of order in appeal under S. 75, Provincial Insolvency Act.)

('35) AIR 1935 All 126 (127).

4. ('17) AIR 1917 Pat 495 (496) : 2 Pat L Jour 361. (Section does not apply when an order setting aside sale is reversed.)

('33) AIR 1933 Mad 888 (888). (Decree against a dead man a nullity — Money recovered — There being no decree Court has inherent power to order restitution.)

('23) AIR 1923 All 394 (396) : 45 All 369.

('96) 1896 Pun Re No. 49. (Order as to costs reversed in appeal — Restitution on general principles.)

('18) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

('14) AIR 1914 Cal 692 (692). (Setting aside of auction sale.)

('19) AIR 1919 Mad 581 (581) : 41 Mad 467. (Order refusing to set aside sale — Reversal of — No restitution under S. 144.)

('35) AIR 1935 Mad 783 (783).

('38) AIR 1938 Lah 833 (834).

[See also ('32) AIR 1932 Bom 96 (98). (Section construed liberally.)]

See also Note 34.

5. ('24) AIR 1924 Nag 258 (261) : 20 Nag L R 93. [See also ('06) 9 Oudh Cas 101 (103).

('38) AIR 1938 Lah 456 (456). (Order passed on appeal setting aside the sale of a judgment-debtor's property — Application for restitution on such order being passed falls under S. 144.)]

Note 4

1. ('09) 1 Ind Cas 744 (744) : 31 All 364.

('98) 20 All 139 (142).

('89) 1889 All W N 163 (164).

('06) 28 All 665 (667). (Case of review.)

[See ('05) 27 All 485 (487). (Application for restitution on amendment of decree treated as application under S. 244 (S. 47 of 1908 Code).

('02) 1902 Pun Re, No. 76. (In this case order for restitution made on the supersession of the decree by decree in another suit was treated as falling under S. 244 (S. 47 of the Code of 1908).]

2. ('98) 20 All 139 (142).

3. ('19) AIR 1919 Sind 79 (79) : 13 Sind L R 153.

('22) AIR 1922 Mad 70 (71).

4. ('22) AIR 1922 Mad 70 (71).

('33) 1933 Mad W N 641 (642). (Section is not confined to cases where restitution is claimed on the reversal of the decree in first or second appeal.)

('17) AIR 1917 Mad 293 (293) : 40 Mad 299.

('19) AIR 1919 Bom 1 (10) : 43 Bom 433 (FB).

(Reversal in second appeal.)

('26) AIR 1926 Lah 488 (488) : 7 Lah 232. (Reversal by Privy Council.)

('19) AIR 1919 Bom 175 (176) : 43 Bom 235. (Ex parte decree set aside.)

merits.² As to the effect of the subsequent passing of the same decree, where the sale has not been set aside before the passing of such decree, see Note 20, *infra*.

6. Effect of reversal of main decree on dependent decrees. — It is a general rule of law that upon a reversal of a judgment, order or decree, all connected or dependent judgments or orders fall with it.¹

Illustrations

1. *A* obtains a *preliminary* decree for partition against *B*. Pending appeal by *B* therefrom, *A* obtains a *final* decree, executes it and recovers money from *B*. The preliminary decree is then set aside by the Appellate Court. *B* is entitled to claim restitution from *A* of the amount recovered from him. The reason is that no effect remains in the final decree after the reversal of the preliminary decree.²

2. *A* obtains a decree for enhanced rent against *B*. Pending appeal by *B* therefrom, *A* files another suit against *B* for enhanced rent for another period and obtains a decree *conditional on the first decree being confirmed in appeal*, and recovers money from *B* in execution of that decree. The first decree is subsequently reversed on appeal. *Held*, that *B* is entitled to claim restitution from *A* of the money recovered from him under the second decree, as it was made conditional on the confirmation of the first decree and became infructuous on its being reversed in appeal.³

7. Who may apply for restitution. — In order to entitle a person to apply under this Section two conditions must be satisfied —

- (1) He must be a *party to the decree varied or reversed*,¹ and
- (2) He must have become "*entitled to any benefit* by way of restitution or otherwise" under the reversing decree.² But it is not necessary that the decree by which the original decree is reversed or varied should declare the party's right to restitution. Where the effect of the decree of the Appellate Court is to reverse that of the lower Court, the party against whom the lower Court's erroneous decree has been enforced and who has lost possession of the property is entitled to apply for restitution under this Section irrespective of the question whether or not the appellate decree declares the party's right to the property.³

2. ('09) 3 Ind Cas 30 (31) (Cal).

Note 6

1. ('17) AIR 1917 Cal 188 (191). (Specially judgments subsequently entered and dependent thereupon.)

('38) AIR 1938 Pat 209 (209). (Application for execution of transferred decree—Execution dismissed and certificate of non-satisfaction sent to transferor Court—Execution allowed to proceed on appeal — On reversal the certificate of non-satisfaction also falls to the ground.)

('13) 21 Ind Cas 510 (512) (Cal).

('18) 19 Ind Cas 630 (632) (Cal).

2. ('18) AIR 1918 Cal 457 (457). (Following 21 Ind Cas 510 (Cal).)

('31) AIR 1931 All 655 (656). (Decree varied by the Appellate Court.)

[See also ('38) AIR 1938 All 364 (366) : I L R (1938) All 494. (*A* obtained a preliminary decree for foreclosure against *B*. Subsequently *A* applied for amendment of the preliminary decree and the application was allowed and the decree amended. *B* thereupon applied in revision to High Court and the amendment was set aside in revision. In the meanwhile *A* obtained a final decree for foreclosure on the basis of the amended decree and obtained possession of the properties in execution. *Held* that *B* was en-

titled to restitution of the property taken in excess of the original preliminary decree as the final decree would automatically conform with the preliminary decree as amended in revision.)].

3. ('80) 5 Cal 589 (592).

Note 7

1. ('93) 3 Mad L Jour 258 (259).

('19) AIR 1919 Cal 503 (504).

('29) AIR 1929 Lah 657 (658). (An objector under O. 21 R. 58 deemed a party to suit.)

('37) AIR 1937 Bom 101 (103) : I L R (1937) Bom. 150.

2. ('02) 25 Mad 426 (428). (Decree of reversal in appeal, limited to the interests of the appealing defendant alone—Non-appealing defendant cannot claim restitution.)

('94) 17 Mad 82 (84, 85). (Appeal not in favour of party—No restitution can be had.)

('30) AIR 1930 Lah 352 (353).

('25) AIR 1925 Rang 215 (216) : 3 Rang 251.

('86) 8 All 545 (548).

('37) AIR 1937 Bom 101 (103) : I L R (1937) Bom 150.

3. ('35) AIR 1935 Mad 476 (477). (Reversal of decree in appeal—Party losing possession by first decision can apply for restitution.)

('37) AIR 1937 Bom 101 (103) : I L R (1937) Bom. 150.

In either case the auction-purchaser is entitled to a return of the purchase price less the mesne profits he has enjoyed. In fact where an auction sale is set aside it is incumbent upon the Court to order that the recovery of possession by the judgment-debtor is made conditional on his paying up to the purchaser the purchase-money.²

Where, however, no such conditional order is passed, can the auction-purchaser apply under *this Section* for the return of the purchase-money? It has been held that he cannot. The reason is that he is neither a *party to the decree varied or reversed* nor is he a person *entitled to any benefit* under the reversing decree.³

He may, of course, *sue* the judgment-debtor for a refund of his purchase-money.⁴

11. Against whom restitution can be granted. — Under Section 583 of the Code of 1882 an appellate decree reversing a decree of the lower Court had to contain, or was deemed to contain, a *direction* for restitution in favour of the successful appellant, who had, in order to claim restitution, to *execute the appellate decree*. This, of course, could not be done against a person who was not a *party to the appellate decree*.

It was therefore held that the transferee of a decree reversed in appeal, or other person who was not a party to the appeal, could not be proceeded against under the Section.¹

There is no such restriction under the present Section. A right to claim restitution may now be enforced against a party or his *representative* or assignee even if he is not a party to the appeal.² *A mortgages to C certain property and then sues B,*

2. ('14) AIR 1914 Cal 718 (719). (Order is made under the inherent powers of the Court.)
 - ('24) AIR 1924 All 273 (273, 274).
 - ('22) AIR 1922 PC 269 (271) : 49 Ind App 351 : 2 Pat 10 (PC).
 - ('17) AIR 1917 Pat 55 (57).
 - [See ('88) AIR 1938 Pat 447 (449). (Decree in favour of third party that the property sold in auction really belonged to him and not to the judgment-debtor—Auction-purchaser's remedy to get back his purchase-money is only by getting the sale set aside under O. 21 R. 91 and applying under O. 21 R. 93; without getting sale set aside there is no independent right to obtain refund under inherent powers of Court.)
 3. ('22) AIR 1922 Mad 228 (229, 230). (Nor can he invoke the aid of S. 151, C. P. C.)
 - ('25) AIR 1925 Rang 215 (216) : 3 Rang 251.
 4. ('13) 18 Ind Cas 381 (382). (Bom.).
- Note 11**
1. ('01) 5 Cal WN 426 (428). (Assignee of decree.)
 - ('98) 20 All 139 (143). (Do.)
 - ('97) 19 All 136 (139). (Do.)
 - ('02) 24 All 288 (291). (Do.)
 - ('17) AIR 1917 Mad 293 (293) : 33 Ind Cas 739 (740) : 40 Mad 299. (Where he is a party to the reversing decree, he will of course be bound to make restitution.)
 - ('85) 7 All 681 (687).
 - ('05) 8 Oudh Cas 115 (115).
 2. ('16) AIR 1916 Mad 745 (746) : 17 Ind Cas 420 (422) : 38 Mad 36.
 - ('32) AIR 1932 Lah 527 (528, 529). (The representative can therefore also move the Court to ascertain the amount of restitution payable by him.)
 - ('30) AIR 1930 Mad 787 (788) : 53 Mad 796. (A decree-holder attaching another decree is representative of the decree-holder under attached decree.)
 - ('24) AIR 1924 Sind 101 (102) : 17 Sind L R 73. (Restitution granted against auction-purchaser whose sale was not bona fide.)
 - ('18) AIR 1918 Mad 673 (674).
 - ('20) AIR 1920 Cal 550 (551, 552).
 - ('17) AIR 1917 Mad 293 (294) : 40 Mad 299.
 - ('38) AIR 1938 Oudh 169 (170) : 14 Luck 106. ('Parties' in S. 144 must be taken to include their representatives and further representative does not mean only a party's legal representative but means his representative-in-interest judgment creditor of party attaching and with drawing latter's money lying in Court is his representative and can be ordered to refund.)
 - ('35) AIR 1935 All 65 (66). (Restitution can be claimed against tenant deriving title from opposite party.)
 - ('37) AIR 1937 Mad 95 (96). (A suing B for possession—Receiver appointed—Profits pending suit deposited in Court—A claiming those profits—Trial Court refusing A's claim—A appealing—C obtaining decree during pendency of A's appeal attaching profits lying in Court in B's name — A's title established on appeal — A's claim for restitution against C is valid.)

who is in possession thereof, in ejectment, and obtains a decree and gets delivery of possession in execution. Pending appeal by B, C sues on his mortgage, obtains a decree and purchases the property in execution of his decree and obtains possession. A's decree is reversed in appeal. Held, B can claim restitution from C of the property taken from him. The reason is that C is a *representative* of A and cannot be in a better position than A.³

Where the liability to make restitution is a joint one, a claim against *some only* of the persons liable in the absence of the others is not sustainable.⁴

Restitution can be ordered under this Section only against a party who has benefited under the *reversed* decree.⁵ Thus, suppose that in a suit for possession A obtains a decree against B and his usufructuary mortgages. The decree being reversed on appeal B is given possession instead of the mortgages. Here the mortgagees cannot claim the mortgaged property from B by way of restitution. The reason is that B was given possession of the property not under the reversed decree of the lower Court but under the reversing decree of the Appellate Court.⁶

12. Transferee of a decree. — See Note 11 above.

13. Auction-purchaser. — The question whether restitution can be claimed against an auction-purchaser on the reversal of the decree in execution of which the sale took place, depends upon the question whether he is a *bona fide* purchaser. By the phrase "*bona fide* purchaser" the Courts imply the test of knowledge of the pending proceedings to set aside the decree, and opportunity to defend his own interests in those proceedings.¹

In the case of *bona fide* purchasers the rule is that the sale will be upheld notwithstanding the reversal of the decree,² because otherwise there will be less inducement to intending purchasers to buy at an execution sale, and consequently less chance of property fetching proper value at such sales.³ Another reason is that a purchaser cannot be expected to go behind the judgment to inquire into the irregularities in the suit.⁴

- [But see (32) AIR 1932 Rang 148 (150) : 10
Rang 180.
(30) AIR 1930 All 415 (416). (Vendee from party—*Held* not to fall under the Section.]]
(23) AIR 1923 Pat 371 (373) : 2 Pat 277.
(32) AIR 1932 Lah 527 (528, 529).
(29) AIR 1929 Cal 590 (591). (Analogous case of lease.)
4. Compare (21) AIR 1921 Pat 350 (351).
(17) AIR 1917 All 117 (118). (Co-plaintiff—No decree in his favour — No restitution against him.)
5. (36) AIR 1936 Mad 694 (695).
6. (36) AIR 1936 Mad 684 (685).
Note 13
1. (24) AIR 1924 Sind 101 (103) : 17 Sind LR 75. [But see (17) AIR 1917 Mad 250 (253, 254). (Where the test applied is the knowledge of and participation by the purchaser in the frauds or irregularities committed by the decree-holder.]]
2. (37) AIR 1937 Mad 694 (695). [See (38) AIR 1938 Nag 525 (526).]
3. (13) 21 Ind Cas 570 (572) : 16 Oudh Cas 225. (The Court must have jurisdiction to sell the property.)
4. (1900) 22 All 377 (379).
(15) AIR 1915 Cal 203 (206).
(88) 10 All 166 (172) (P O). [See (23) AIR 1923 Cal 538 (550). (Case of a decree obtained by fraud.)]
(85) 11 Cal 362 (365).
(10) 12 Cal 1 Jour 357 (367).
(16) AIR 1916 All 159 (160) : 38 All 240.
(05) 29 Bom 435 (448) (F B). (Pendency of appeal immaterial to the applicability of this principle.)
(or a party to the suit.)
(Principle should not be extended to defendant or a party to the suit.)
(26) AIR 1926 Mad 78 (80, 81) : 48 Mad 767.
(17) AIR 1917 Mad 250 (253).
(03) 27 Mad 98 (100, 101). (But in the case of decree-holders purchasers the rule is otherwise.)
(25) AIR 1925 Lah 176 (177).
(11) 38 Cal 622 (627).
(under mortgage decree.)
(case of sale under money decree and that of sale under mortgage decree.)
(99) 26 Cal 734 (737). (No distinction between means of decree.)
(26) AIR 1926 All 35 (35, 36) : 48 All 94. (Amend-
(1900) 22 All 168 (176, 179, 181).
All 166 (P O).
(12) 14 Ind Cas 836 (836) (Mad). (Following 10.

This, however, does not mean that an execution sale cannot be set aside on *other* grounds such as want of jurisdiction to sell the property,⁵ fraud,⁶ want of saleable interest in the judgment-debtor⁷ and, the sale being affected by the doctrine of *lis pendens*,⁸ etc. In such cases restitution can be ordered against the auction-purchaser⁹ under the inherent powers of the Court.¹⁰

The reason of the rule upholding an execution sale in favour of a *bona fide* purchaser disappears where the *decree-holder* is himself the purchaser, and has notice of all the proceedings in the suit. The rule itself consequently becomes inapplicable in accordance with the maxim *cessante ratione legis, cessat et ipsa lex*.¹¹ The *decree-holder* purchaser will therefore be bound, on the reversal of the decree, to make restitution to the person entitled thereto.¹² An assignee from such purchaser will be in no better position than his assignor though he is a *bona fide* purchaser from the decree-holder,¹³ unless the reversal of the decree has been obtained fraudulently by the decree-holder himself after the assignment.¹⁴

In the principles enunciated above there is no distinction between the auction-purchaser at a sale in execution of a money decree and that in execution of a mortgage decree.¹⁵

The above discussion relates to cases where the decree of the first Court is *reversed* subsequently. Where the decree is modified the sale need not necessarily be set aside even in cases where the decree-holder is the purchaser. See Note 20 *infra*.

14. Surety — Restitution against. — Section 144 applies only to the parties or the representatives of the original parties, and does not apply to sureties as against whom, therefore, no restitution can be claimed under this Section.¹

15. Third persons — Restitution against. — This Section does not apply to third persons who are neither parties nor their representatives.¹

5. ('13) 41 Cal 590 (599, 600) : 41 Ind App 98 (P C). (Sale can be set aside where it is of property not attached.)

[But see ('97) 21 Bom 463 (464). (Sale in execution of satisfied decree — Not void on that ground — 13 Ind App 106 (PC), Followed.) ('88) 15 Cal 557 (563). (13 Ind App 106 (PC), Foll.)

6. ('10) 5 Ind Cas 390 (395) (Cal).

7. ('24) AIR 1924 All 273 (274).

8. ('01) 23 All 60 (65, 66). (But see the obiter dictum in 21 Ind Cas 570 (Oudh).)

('08) 27 Bom 266 (270).

('06) 28 All 337 (339). (The decision however does not refer to the doctrine of *lis pendens*.)

('18) AIR 1918 Cal 229 (230).

('31) AIR 1931 All 655 (656). (Remedy under Section 144 is independent of remedy under O. 21, R. 90.)

9. ('37) AIR 1937 Mad 694 (695). (Property sold on a wrong date.)

10. ('37) AIR 1937 Mad 694 (695).

11. "When the reason for any law ceases so does the law itself "

12. ('04) 31 Cal 499 (501, 502).

('97) 1897 All W N 28 (29).

('82) 5 Mad 106 (106, 107).

('73) 10 Bom H C R 297 (298).

('16) AIR 1916 Mad 706 (707).

(1900) 27 Cal 810 (814).

('88) 10 All 166 (172) : 15 Ind App 12 (P C).

('16) AIR 1916 Pat 299 (300) : 1 Pat L Jour 43.

[See also ('10) 14 Cal W N 182 (182, 183). (Decree set aside under S. 108 C. P. C. (old Code)

—It cannot be taken to be revived by any subsequent proceedings and the proceedings under it are consequently invalid.)

('07) 6 Cal L Jour 102 (104).]

13. ('20) AIR 1920 Cal 550 (551, 552). (Decree-holder settling property with a tenant—Tenant held liable for restitution.)

('16) AIR 1916 Cal 710 (711) : 22 Cal L Jour 412 (414).

[See also ('15) AIR 1915 Cal 363 (364).]

[See however ('03) 13 Mad L Jour 231 (236).

('90) 30 Mad 295 (297).]

14. ('25) AIR 1925 Cal 1074 (1076). (Decree-holder entering into compromise with the judgment-debtor behind the back of the assignee.)

[See also ('24) AIR 1924 Sind 101 (103, 104) : 17 Sind L R 73.]

15. ('99) 26 Cal 734 (737).

Note 14

1. ('19) AIR 1919 P C 55 (58) : 42 All 158 : 46 Ind App 228 (P C).

('98) 1898 Bom P J 830.

('38) AIR 1938 Nag 101 (102) : ILR (1938) Nag 354.

Note 15

1. ('19) AIR 1919 P C 55 (58) : 42 All 158 : 46 Ind App 228 (PC). (Such as sureties.)

('32) AIR 1932 Cal 29 (34) : 58 Cal 1070.

('13) 21 Ind Cas 570 (572) : 16 Oudh Cas 225.

16. Trustee. — Where a trustee of a temple obtains a decree and in execution thereof recovers money and hands it over to the temple and then the decree is reversed in appeal, restitution can be had only against the temple and not against the trustee personally.¹

17. What Court can grant restitution. — Section 583 of the old Code required that the person entitled to restitution "shall apply to the Court which passed the decree against which the appeal was preferred." Thus, where a first Appellate Court reverses a decree of the original Court, which reversal is again set aside by the second Appellate Court, it was held that the application should be made to the first Appellate Court against whose decree the second appeal was preferred and not to the original Court.¹

Under the present Section, the application should be made in all cases to "the Court of first instance." It is only the Court which executes the decree that has jurisdiction to order restitution to the parties.²

Where the Court of first instance loses its territorial jurisdiction or ceases to exist, the Court which gets such jurisdiction will be "the Court of first instance."³

Where a decree is transferred for execution to another Court, the latter Court can exercise the same powers as the Court of first instance.⁴

The jurisdiction of the Court of first instance is not ousted by the fact that the value of the subject-matter of the restitution exceeds the limits of its pecuniary jurisdiction,⁵ nor by the fact that after its decree has been set aside, the case has been transferred for re-hearing to another Court.⁶

18. Extent of power to grant restitution. — Before the passing of the Code of 1908, there was no *legislative expression* as to the *extent* of the power of the Court to make restitution. This Section now specifies that the power extends to "cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such a decree as has been varied or reversed." The

(38) AIR 1938 Cal 554 (556). (Decree passed by Court A—Purchase of judgment-debtor's property by decree-holder in execution at A—Sale set aside—Decree transferred to Court B—Appeal against order setting aside sale allowed—Meanwhile decree executed in Court B—Application by judgment-debtor for restitution in Court B—Court B cannot grant restitution as it is not Court of first instance.) (37) AIR 1937 All 515 (523, 524) : 1 L R (1937) All 670. (Application for restitution by person who is successful in appeal to Privy Council—Applicant should only approach Court of first instance and need not apply to High Court under O. 45 R. 15.)

[See (21) AIR 1921 All 241 (241).]

(26) AIR 1926 Mad 813 (814). ("Court of first instance" must be interpreted on principles laid down in S. 37 (b), C. P. C.)

(21) AIR 1921 Mad 103 (104). (Ceases to exist.) (37) AIR 1937 All 515 (520) : 1 L R (1937) All 670. (13) 20 Ind Cas 540 (541) : 7 Sind L R 19. (The transferee Court has under S. 42 the same powers as the transferor Court.)

(89) 13 Bom 485 (488). (8 Bom 31, Followed.) [Compare (702) 1902 Pun Re No. 29, page 114.]

(20) AIR 1920 Bom 12 (12) : 44 Bom 702.

1. (104) 14 Mad L Jour 377 (378).
Note 16

1. (101) 5 Cal W N 287 (289).
Note 17

2. (27) AIR 1927 Mad 898 (899).

(22) AIR 1922 All 71 (72) : 44 All 283. (Subject-matter of Revenue Court reversed by District Judge and confirmed by High Court. Revenue Court is the "Court of first instance.")

(31) AIR 1931 Rang 21 (23). ("Court of first instance" means Court which did the act which turned out to be wrong.)

(28) AIR 1928 Pat 502 (504).

Courts ought not to adopt a narrow construction so as to restrict the application of this salutary provision of law which has been enacted with a view to shorten litigation, and afford speedy relief.¹ In *L. Guran Ditta v. T. R. Ditta*,² their Lordships of the Privy Council observed as follows :

"The duty of the Court when awarding restitution under Section 144 of the Code is imperative. It shall place the applicant in the position in which he would have been if the order had not been made : and for this purpose the Court is armed with powers (the 'may' is empowering, not discretionary) as to mesne profits, interest and so forth."

19. "Shall cause restitution to be made." — The Section is mandatory.¹ The Court has *no discretion* to grant restitution or not, in matters falling within the terms of the Section.² It is the legal effect of a decree of reversal that a party against whom the decree reversed was given is to have restitution of all that he had been deprived of under it.³ It is not necessary that the reversing decree should contain any direction or provision for restitution.⁴

But in cases not falling within the terms of the Section restitution is not a matter of *right* but depends upon the *discretion* of the Court and will be ordered only when the justice of the case demands it.⁵

20. "Place the parties in the position which they would have occupied but for such decree as has been varied or reversed." — The object of restitution is to restore the *status quo ante* between the parties.¹ Under the old Code the power of

Note 18

1. ('12) 17 Ind Cas 121 (122) (Cal).
2. ('35) AIR 1935 P C 12 (13) (PC).

Note 19

1. ('26) AIR 1926 Lah 685 (687).
(18) AIR 1918 Mad 673 (674). (Section gives no discretion to Court.)
(17) AIR 1917 Mad 250 (254).
(22) AIR 1922 P C 269 (271) : 2 Pat 10 : 49 Ind App 351 (PC).
(74) 22 Suth W R 434 (486).
(35) AIR 1935 P C 12 (13) (PC).
(35) AIR 1935 All 65 (66).
[See also ('28) AIR 1928 Oudh 208 (208).]
2. ('20) AIR 1920 All 127 (128).
(78) 3 Cal 720 (723, 724).
(28) AIR 1928 Rang 293 (294).
3. ('68) 10 Suth W R 131 (132). (Reversal of a decree for possession only gives right to mesne profits.)
(32) AIR 1932 Cal 313 (315). (Joint and several decree against *A* and *B*—Amount deposited by *A* on his own behalf and also for *B*—Decree reversed as against *A* only—*A* is entitled to restitution of full amount and not of an amount proportionate to his share.)
(09) 4 Ind Cas 376 (378) : 32 All 79.
(21) AIR 1921 All 241 (241). (Refund of Costs—Interest allowed.)
(73) 20 Suth W R 49 (49). (Do.)
(86) 8 All 262 (264). (Do.)
(20) AIR 1920 All 127 (128). (Refund of costs.)
(06) 3 Cal L Jour 181 (182).
(25) AIR 1925 Lah 177 (178). (Refund of purchase price deposited under pre-emption decree, Appellate Court awarded a higher amount and

on the same not being paid, the suit was dismissed.)

- (26) AIR 1926 Rang 126 (126). (Decree modified in small part—Judgment-debtor is not entitled to have execution sale set aside but is entitled to the balance of the sale proceeds.)
(68) 9 Suth W R 402 (407, 408) (FB). (Per Peacock, C. J.)
(75) 23 Suth W R 441 (442). (Reversal of decree for possession gives right to mesne profits.)
(97) 21 Bom 55 (57).
(17) AIR 1917 Cal 188 (192).
(94) 21 Cal 340 (343). (Partition decree set aside—Party successful is entitled to be placed in joint possession.)
(15) AIR 1915 Cal 502 (503). (Decree absolute erroneous—Mortgaged property has to be restored.)
(37) AIR 1937 Mad 229 (230). (Decree against *A* and *B* jointly and severally—Amount deposited by *B* on behalf of himself and *A*—Decree reversed as against *B* only—*B* entitled to restitution of whole amount.)
[See also ('04) 27 Mad 504 (508).]
4. ('94) 21 Cal 989 (996, 997).
(93) 21 Cal 340 (343).
(89) 13 Bom 485 (488).
(15) AIR 1915 P C 92 (93) : 38 All 163 : 43 Ind App 43 (PC). (Affirming the reasons given in 32 All 79 (84, 85).)
(70) 14 Suth W R 465 (465).
(16) AIR 1916 Mad 1204 (1205).
5. ('17) AIR 1917 Cal 188 (192). (But the test of what is just must be determined with reference to the imperative requirements of the law applicable to the subject-matter.)

Note 20

1. ('17) AIR 1917 Mad 185 (185) : 40 Mad 780.

The restoration is to be as nearly as possible to their positions *at the time* the erroneous order was passed and not to later positions taken up by them of their own accord as resulting from that order.⁹ Such restoration may be ordered after taking evidence in the matter, if necessary.¹⁰

Where a party has obtained possession or recovered money under an erroneous decree, it will not be a restoration of the *status quo ante* merely to restore the possession or to return the money recovered. The party deprived of it would have lost the *profit* of the property or the *interest* on the money, of which he had been deprived. The Court has therefore been empowered to pass "any orders including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits" consequential on the variation or reversal of the decree.¹¹

But the restitution claimed must have been *properly consequential* on the reversal or variation.¹² Thus, where a judgment-debtor, pending appeal by him against the decree sells his property and deposits the decree amount in Court fearing that he may not succeed in the appeal, but the appeal is subsequently allowed, he cannot claim damages caused by the private sale, in restitution, he being under no obligation to pay the amount and the damages claimed also not being consequential on the reversal of the decree.¹³

It has been held that where a judgment-debtor against whom an *ex parte* decree was passed, chooses to set aside the sale held in execution of the decree by making the necessary deposit under O. 21 R. 89 and afterwards the *ex parte* decree also is set aside, the judgment-debtor would not be entitled to claim a refund of the amount which he had deposited as the auction-purchaser's compensation. The reason given is that such a deposit is not made by the judgment-debtor directly in connexion with the decree which has been passed against him but is made in order that he may obtain a special privilege which the law provides.¹⁴

9. ('17) AIR 1917 Pat 55 (58) : 37 Ind Cas 863 (865, 866, 869).

('17) AIR 1917 Mad 314 (315).

('06) 29 All 143 (144).

('97) 21 Bom 55 (57). (Uncertified payment.)

('94) 21 Cal 340 (343). (Partition decree reversed — Defendant will be restored to joint possession.)

('08) 12 Cal W N 642 (644).

('20) AIR 1920 Lah 499 (499).

('73) 20 Suth W R 238 (239, 240).

('29) AIR 1929 All 527 (528). (In ordering restitution, the Court cannot ignore other proceedings whereby the parties' rights are affected.)

('29) AIR 1929 Oudh 426 (426) : 5 Luck 302 (F B). (Money recovered under illegal arrest in execution of a decree.)

10. ('20) AIR 1920 Cal 919 (919, 920). (Question of prior possession as between parties to proceeding under this Section.)

('98) 8 Mad L Jour 276 (278).

11. ('12) 14 Ind Cas 456 (457) (Cal). (Refund of profits got by party in possession under erroneous decree.)

('34) AIR 1934 All 626 (631) (F B).

('87) 11 Bom 724 (726). (Money recovered.)

(1865) 2 Suth W R 275 (275). (Do.)

('35) AIR 1935 P C 12 (13) (P C). (The word 'may' is empowering and not discretionary.)

[See ('35) AIR 1935 Cal 206 (208) : 62 Cal 217.

(But in assessing what a party may have lost

or of what he may have been deprived during his dispossession, the law takes into account not what he could have made, but what his opponent did in fact make or could with reasonable diligence have made. There may be cases in which in addition to mesne profits claimed on the ground of the wrong-doer remaining in possession, damages or compensation may be claimed on other grounds.)]

[See also ('18) AIR 1918 Lah 313 (313). (Refund of costs.)]

12. ('39) AIR 1939 All 66 (69) : I L R (1939) All 103. (Suit for specific performance of contract of sale decreed — Execution delayed for four years owing to objections of other party which were ultimately disallowed by the High Court—Application under S. 144 claiming compensation for loss of profits of property for four years — Held claim was not properly consequential and not maintainable by application under S. 144, and the decree for specific performance entitled the plaintiff only to the execution of the sale-deed and did not award him possession, and the loss of profits of four years which had resulted to the plaintiff owing to the delay in execution of his sale-deed could not be said to be properly consequential as it was remote and indirect.)

13. ('27) AIR 1927 Mad 353 (354).

[See ('32) AIR 1932 Cal 303 (307) : 59 Cal 647.]

14. ('39) 43 Cal W N 104 (106).

21. "So far as may be." — It will not be possible in many cases to restore the *exact status quo ante* between the parties. Crops, for instance, which have been removed by the respondent pending appeal cannot be restored. In such cases the Court can grant damages representing the *value* (but only the net value) of the moveable property of which the restitution is claimed.¹

The Court is, in fact, bound to do everything and make every order fairly and properly consequential on the reversal of the original judgment so as to restore the parties to the same position as they were in at the time of the erroneous order.² Where each party is found entitled to restitution from the other, the restitution should, as near as possible, be *simultaneous*. Thus, where an auction sale is set aside, the judgment-debtor can claim restitution only on payment to the purchaser of the purchase money. In such a case the restoration of the property must be made *conditional* on the payment back of the purchase money so that the mutual restoration is, as far as possible, *simultaneous*.³

Where a decree for pre-emption obtained by a plaintiff is reversed in appeal, the plaintiff is entitled to restitution of the money deposited by him and which had been taken by the defendant vendee.⁴ In such a case it cannot be said that because the plaintiff is unsuccessful in the appeal, there could be no question of restitution to him. As the Section only permits restitution "so far as may be," such restitution cannot be ordered so as to prejudice the rights of third parties.⁵

22. *Mesne profits*.—The use of the words 'damages,' 'compensation' and 'mesne profits' indicate that the possession obtained under an erroneous decree subsequently reversed is *wrongful* possession.⁶ On the reversal of the decree, the judgment-debtor will be not only entitled to the possession of the property taken from him but also to *mesne profits* during the period he was kept out of possession.⁷ Where, however, the Appellate Court sets aside the decree and *remands* the case for fresh or further enquiry and the question of nature of the possession of the party who has been in possession

Note 21

1. (11) 12 Ind Cas 105 (Mad).

(89) 18 Bom 485 (488).

2. (98) 1898 Bom P J 335. (Such as giving costs and interest on refund.)

(29) AIR 1929 Lah 657 (658).

(31) AIR 1931 Oudh 12 (12). (Restitution should clear the account between parties.)

[See (34) AIR 1934 Lah 45 (46).]

3. (17) AIR 1917 Pat 55 (57).

(29) AIR 1929 Rang 157 (158) : 7 Rang 107.

4. (34) AIR 1934 All 13 (14). (Pre-emption decree aside in appeal—Right of plaintiff to get his money back is covered by S. 144.)

5. (37) AIR 1937 Lah 169 (170).

Note 22

1. (15) AIR 1915 Mad 1133 (1134).

(30) AIR 1930 Cal 89 (91, 92) : 56 Cal 550. (Case of a compromise appellate decree and so of no wrongful possession.)

(39) AIR 1939 All 66 (69) : ILR (1939) All 103.

2. (75) 23 Subh W R 441 (442).

(68) 10 Subh W R 131 (132).

(73) 20 Subh W R 238 (249).

(74) 21 Subh W R 195 (195).

(99) 21 All 1 (3).

(78) 3 Cal 720 (724).

(87) 14 Cal 484 (486).

(94) 21 Cal 989 (997).

(95) 22 Cal 501 (503, 504).

(24) AIR 1924 Lah 166 (167).

(88) 11 Mad 261 (262).

(91) 15 Mad 203 (209).

(09) 4 Ind Cas 376 (378) : 32 All 79.

(18) 19 Ind Cas 1 (2) (All).

(14) AIR 1914 Cal 692 (692). (Sale in execution set aside on account of fraud of decree-holder—Judgment-debtor is entitled to compensation though not to mesne profits strictly so called.)

(17) AIR 1917 Lah 426 (428) : 1917 Fnn Re No. 61.

(18) AIR 1918 Pat 396 (398) : 3 Pat L Jour 367.

(20) AIR 1920 Cal 550 (552).

(19) AIR 1919 Lah 218 (220).

(05) 8 Oudh Cas 254 (256).

(06) 9 Oudh Cas 254 (258).

(08) 11 Oudh Cas 236 (236, 237).

(29) AIR 1929 Cal 590 (591). (Dispossession in execution of decree—Appeal against decree—Pending appeal, respondent leased the lands—Reversal on appeal—In restitution, held lessee

which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them with interest during the time that the money has been withheld".²

The rule of interest allowable is however in the judicial discretion of the Court which will not be interfered with in appeal.³

Where no interest is *claimed* in an application for restitution it will not be allowed.⁴

In granting restitution it is the injury which has been caused to the party who is ultimately successful, that the Court seeks to remedy. The Court is not concerned with the actual benefit which may or may not have been gained by the other party.⁵ Thus, where a defendant against whom a decree was passed deposited into Court certain amount which the decree-holder did not draw out as he was unable to furnish security as ordered by the Court, it was held that the defendant was entitled, on the reversal of the decree, to get back the amount with interest thereon, though the other party did not get any benefit from the money deposited.⁶

24. Refund of compensation money in land acquisition cases.—Where Government deposits money in a land acquisition case and that is taken by a party and on appeal to the High Court the amount payable is reduced, the party must refund the excess amount to the Government with interest in accordance with the principle of restitution.¹

25. Possession of property or money obtained otherwise than in execution.—It is not necessary for the application of the Section that the possession of the

(192) AIR 1982 Cal 818 (816). (Costs deposited in Court.—Interest runs only from date of withdrawal of amount.)
(17) AIR 1917 Pat 696 (696). (Liability to pay interest not affected by execution of security bond by which principal alone was secured.)
(18) AIR 1918 Oudh 119 (120): 20 Oudh Cas 327. (Costs recovered.—Interest should be allowed on it.)
(25) AIR 1925 Bom 318 (314).
(26) AIR 1926 Lah 488 (488): 7 Lah 292. (Reversal of decree in Privy Council.—Interest allowed.)
(24) AIR 1924 Mad 87 (87). (Interest was substituted as compensation.)
(71) 15 Suth W R 74 (76).
(78) 20 Suth W R 49 (49). (Costs wrongfully recovered.)
(81) AIR 1981 Mad 661 (661): 54 Mad 887. (Do.)
(96) 1896 Pun Re No. 82, p. 229.
(98) 1898 Bom P J 385.
(96) AIR 1986 P O 12 (13) (P O).
(84) AIR 1984 All 13 (14). (Pre-emption decree set aside in appeal.—Plaintiff is entitled to restoration of money deposited into Court and withdrawn by defendant together with interest thereon.)
(84) AIR 1984 Lah 604 (604). (Executing Court has discretion to allow interest even if refund is occasioned by compromise which does not mention interest.)
(See also) (96) 28 Mad 355 (356, 357).
(97) A I R 1987 Mad 178 (179). (An application by the petitioner claiming interest on the

refund of the court-fee paid by him in the trial Court falls under S. 151 but it is discretionary to the Court to award it.)
(1871) 24 Law Tim 111, Rodger v. Comptoir D'Escompte de Paris.
3. (122) AIR 1992 P O 233 (234): 44 Mad 570: 48 Ind App 160 (PC).
4. (89) 13 Bom 485 (489).
5. (93) AIR 1933 Mad 33 (35, 37): 55 Mad 1025. (25) AIR 1925 Bom 313 (314). (Money paid under decree by one defendant.—Plaintiff pursuing his appeal against another defendant and succeeding—First defendant while withdrawing money is entitled to interest thereon.)
(29) AIR 1929 Pat 593 (594). (Following AIR 1925 Bom 313.)
[But see (25) AIR 1925 Rang 215 (217): 3 Rang 251. (Money lying in Court and none deriving benefit from it.—No interest is payable.)
(13) 19 Ind Cas 1 (1) (All). (Money deposited in Court by pre-emptor after first Court's decree—Decree set aside by Appellate Court.—Plaintiff not entitled to interest on deposit money as it was held that the suit ought not to have been brought.)
(66) 6 Suth W R 285 (285). (Defendant depositing decretal amount in Court—Decree reversed in appeal.—Plaintiff not withdrawing money—Interest not allowed.)

Note 24

1. (11) 10 Ind Cas 818 (818): 35 Bom 255. (30) AIR 1930 Mad 577 (578): 53 Mad 708.

property or money should have been obtained *in execution* of the decree which was subsequently reversed.¹ The Section would apply even if the possession of the property or money was taken *otherwise* than in execution provided it was obtained *under colour of, or in consequence of, the decree*.²

Where possession is obtained by the decree-holder independent of, and in *opposition*, to the decree, this Section does not apply. Thus, where *A* gets only a decree for *injunction* against *B* and then enters into *possession* with the aid of the police and the decree is subsequently reversed in appeal, *B* cannot be given restitution by removal of the superstructure erected on the property.³

26. Splitting up claim of restitution. — The principle of constructive *res judicata*, whether Section 11 Explanation IV or O. 2 R. 2 of the Code is invoked in its aid, cannot be applied to proceedings under this Section.¹ Where therefore a party is entitled by way of restitution to *two* reliefs, the claiming of *one* only of such reliefs in an application does not bar a subsequent application for the *other* relief. Thus, where *A* is entitled to the restoration of a *property* and *mesne profits*, a first application for the restitution of the *property* does not bar a subsequent application for the *mesne profits*.² The same principle will apply where a party is entitled to restitution of a sum of money and the interest thereon.³

A second application for the *same relief* as was previously granted is however clearly barred on the principles of *res judicata*.⁴

See also the undermentioned case.⁵

27. Pecuniary jurisdiction of Court in awarding restitution. — See Note 17, *ante*.

28. Security for restitution. — The Appellate Court has an inherent power to call upon the respondent to furnish security (notwithstanding the decree has been executed) for the due performance of any decree that might be made in appeal.¹

Where a decree-holder, at the time of the withdrawal of money, executes a security bond by which the *principal* alone is secured, the Court is not deprived

Note 25

1. ('13) 21 Ind Cas 84 (85) (Cal).
(('87) 1887 Bom P J 75.
[See also ('07) 29 All 348 (350).]
2. ('20) AIR 1920 All 190 (191) : 42 All 568.
(('27) AIR 1927 Lah 37 (38) : 8 Lah 41. (AIR 1920 All 190, Followed.)
(('27) AIR 1927 Lah 625 (626) : 8 Lah 356. (Payment made not in consequence of any decree not recoverable.)
(('10) 5 Ind Cas 776 (776) (Mad).
(('37) AIR 1937 All 728 (730). (Decree-holder obtaining decree for holding charge of institution — Decree-holder obtaining possession of buildings under colour of decree — Decree set aside on appeal — Decree-holder must restore possession under S. 144.)
[See also ('05) 2 Cal L Jour 537 (539, 540). (Decree for confirmation of possession only — However decree-holder obtaining possession in execution.)]
3. ('18) AIR 1918 Mad 1293 (1294).
(('37) AIR Mad 315 (316).

Note 26

1. ('17) AIR 1917 Mad 185 (185) : 38 Ind Cas

806 (806, 808) : 40 Mad 780.

- (('19) AIR 1919 Sind 79 (79) : 13 Sind L R 153. (Suit for declaration that decree is null and void — Omission to ask for restitution — Right is not relinquished — Subsequent application is maintainable.)
- (('35) AIR 1935 All 195 (197). (S. 141 does not require that O. 2 R. 2 or S. 11 Expl. 4 should be applied to such proceedings.)
2. ('18) AIR 1918 Pat 396 (397) : 3 Pat L Jour 367.
(('21) AIR 1921 Nag 112 (113) : 17 Nag L R 62.
(('35) AIR 1935 Cal 206 (208) : 62 Cal 217
3. ('17) AIR 1917 Mad 185 (185) : 38 Ind Cas 806 (806) : 40 Mad 780.
(('35) AIR 1935 All 195 (197).
4. ('17) AIR 1917 Mad 202 (203).
5. ('37) AIR 1937 Mad 173 (174, 175). (Application after reversal of decree on appeal — Grant of — Subsequent reversal of appellate decision — Appellate decision restored on Letters Patent Appeal — Fresh application for restitution lies.)

Note 28

1. ('05) 33 Cal 927 (934, 942).

If the application is one in execution, then Section 141 would not apply thereto. Otherwise it would apply and an application under Section 144 dismissed for default may be restored by applying O. 9 R. 9 thereto.⁵

The nature of proceedings becomes important also where the question is whether Article 151 or Article 152 of the Limitation Act applies to such proceedings (see Note 33), and whether the court-fee payable on the memorandum of appeal from an order under this Section is to be *ad valorem* under Schedule I, Article 1 of the Court-fees Act, or under Schedule II, Article 11 thereof. (See Note 32.)

The adjustment of a claim for restitution before it has been ordered by the Court is not the adjustment of a decree.⁷

See also Notes 31, 32 and 33, below.

31. Appeal — Tenability of. — The determination of a question under this Section has been *expressly* declared to be a decree under Section 2 (2) and is appealable as such under Section 96.¹ But does an adjudication in an application for restitution *not falling* within Section 144 amount to a decree? There is a difference of opinion on this point. The Calcutta High Court holds that it is a decree under Section 2 (2).² The Patna High Court holds that it is not;³ while Mr. Justice Chapman of the same Court has expressed an *obiter dictum* in the undermentioned case⁴ that it will amount to a decree. The Nagpur High Court has held that an order for restitution under Section 151 is appealable on the analogy of an order under this Section.⁵ The Madras High Court has held that an order for restitution made as between the parties to the

(133) AIR 1934 Pat 246 (245, 251, 253) : 13 Pat

411 (F.R.). (Overruling AIR 1925 Pat 1 and AIR

1925 Pat 593)

[See (37) AIR 1937 Mad 173 (175, 176). (Appli-

cation for restitution may be made in such

manner as the nature of each case might

require and need not follow in every case the

procedure in O. 21 R. 11, C. P. C.)]

6. (22) AIR 1922 All 223 (226) : 44 All 407. (This

case however did not consider the question whe-

ther a proceeding under this Section is in the

nature of an original proceeding to which alone

S. 141 has been held to be applicable by the Privy

Council in 17 All 106 (P.C.). See notes to S. 141.)

7. (36) AIR 1936 Mad 840 (841).

Note 31

1. (21) AIR 1934 All 64 (65). (Decision wrong

as being under S. 144—Appeal lies.)

(32) AIR 1932 Pat 317 (319) : 11 Pat 553. (Deci-

sion on the footing that S. 144 was applicable—

Appellate Court finding that matter is not gov-

erned by S. 144—Appeal lies.)

(34) AIR 1934 Pat 109 (109) : 13 Pat 108. (Order

for restitution by delivery of possession—Obstruc-

tion by stranger—Application under O. 21 R. 97

to remove obstruction dismissed—The order is

still one under this Section and an appeal lies.)

(24) AIR 1924 Nag 328 (330) : 20 Nag L R 170.

(15) AIR 1915 Cal 530 (531).

(12) 14 Ind Cas 836 (836) (Mad).

(25) AIR 1925 Cal 102 (103). (No distinction bet-

ween a decree in suit and a decree in a proceed-

ing under this Section.)

(14) AIR 1914 Mad 328 (329) : 38 Mad 1120. (Order

for restitution is tantamount to a decree.)

5. (35) AIR 1935 Nag 326 (328) : 11 L R 1939

Nag 350. (If the inherent powers are used to

expand a remedy in order to do justice to cover

a case not within the exact words of but within

the purpose of a procedural Section, the Court

is in effect using its inherent powers to act as if

the orders were made under the Section in ques-

tion. In such a case, even justice demands that

one side should be given a remedy and otherwise

should, as a matter of justice, be allowed the

right to appeal that would have existed had a

particular Section really applied instead of its

being applied by means of a fiction.)

4. (15) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

[See also (38) 1938 Pat W N 310 (311). (Held,

that the Court having decided the rights of the

parties and in effect given a decree which was

capable of execution, the order was appealable,

though it was styled as falling under S. 144 or

S. 151 or under both Sections 144 and 151.)]

4. (15) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

[See also (38) 1938 Pat W N 310 (311). (Held,

that the Court having decided the rights of the

parties and in effect given a decree which was

capable of execution, the order was appealable,

though it was styled as falling under S. 144 or

S. 151 or under both Sections 144 and 151.)]

4. (15) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

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4. (15) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

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that the Court having decided the rights of the

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capable of execution, the order was appealable,

though it was styled as falling under S. 144 or

4. (15) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

[See also (38) 1938 Pat W N 310 (311). (Held,

that the Court having decided the rights of the

parties and in effect given a decree which was

capable of execution, the order was appealable,

though it was styled as falling under S. 144 or

S. 151 or under both Sections 144 and 151.)]

4. (15) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

[See also (38) 1938 Pat W N 310 (311). (Held,

that the Court having decided the rights of the

parties and in effect given a decree which was

capable of execution, the order was appealable,

though it was styled as falling under S. 144 or

S. 151 or under both Sections 144 and 151.)]

4. (15) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

[See also (38) 1938 Pat W N 310 (311). (Held,

that the Court having decided the rights of the

parties and in effect given a decree which was

capable of execution, the order was appealable,

though it was styled as falling under S. 144 or

suit would be appealable as falling under Section 47 though it is not covered by this. Se
No
Section.⁶

The decision in order to constitute a determination of a question under this Section and therefore a decree, must have been one *on the merits* of the application and must not relate to matters *incidentally* connected with or *collateral* to the decision of any such question.⁷

An order dismissing an application for restitution on the ground that the applicant had already obtained restitution⁸ or an order holding that the application is not time-barred⁹ are not decisions on the merits and therefore are not decrees which are appealable. But it has been held that the *rejection* of a prayer for restitution under this Section amounts to a determination of a question under this Section.¹⁰ It has been held by the Rangoon High Court that an order on an application on the original side of the High Court under this Section is not a "judgment" within the meaning of Clause 13 of the Letters Patent of the Rangoon High Court and hence is not appealable.¹¹

32. Court-fee. — The court-fee payable on a memorandum of appeal against an order under Section 144 depends upon the question whether such an application is one for execution, discharge or satisfaction of the decree within the meaning of Section 47 of the Code.

Under the Court-fees Act, 1870, the court-fee payable on memorandum of appeal against *decrees* is *ad valorem* under Schedule I Article 1 thereof. But under Section 35 of the Act, the Government of India and the Local Governments have directed that the fee payable on appeals from orders under Section 47 of the Code [which are "decrees" under Section 2 (2) of the Code] shall be limited to the amounts chargeable with a *fixed* fee under Article 11 Schedule II of that Act.¹

If an order under Section 144 is therefore considered to be one under Section 47, then the fee chargeable is that under Article 11 Schedule II of the Court-fees Act. If not, it will be payable as on an appeal from a decree *ad valorem* under Article 1 of Schedule I of the Act, on the amount dealt with by the order.

There is a conflict of decisions as to whether an order under this Section is to be considered as one under Section 47 for purposes of court-fees. According to the High Courts of Madras,² Nagpur,³ Patna⁴ and Lahore,⁵ such an order is to be treated as falling under Section 47 for purposes of court-fees. But the contrary view has been

6. ('86) AIR 1936 Mad 636 (638).

7. ('14) AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110. (The question of limitation is collateral to the merits of the application.)

('33) AIR 1933 Pat 498 (499). (Preliminary objection to application that it is barred by limitation—Court holding that it is not barred — No appeal lies against the order.)

8. ('14) AIR 1914 Lah 9 (11) : 20 Ind Cas 203 (205); 1914 Pun Re No. 10.

9. ('14) AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110.

10. ('36) AIR 1936 Cal 812 (812).

11. ('38) AIR 1938 Rang 446 (446).

Note 32

1. [See (1) Government of India Notification

No. 4650, dated 10th September 1889, (Gazette of India 1889, Part I, p. 506); (2) Madras Government Notification No. 358, dated 11th October 1921 (Fort St. George, pp. 1008-1011); (3) Bombay Government Notification No. 590, dated 22nd September 1921 (Bombay Government Gazette, pp. 2271 to 2274); (4) U. P. Government Notification No. 560/VII — 419, dated 3rd May 1921.]

2. ('23) AIR 1923 Mad 270 (271).

3. ('22) AIR 1922 Nag 62 (64) : 18 Nag L R 15.

4. ('17) 1 Pat L W 150n.

('25) AIR 1925 Pat 577 (580) : 4 Pat 249.

5. ('27) AIR 1927 Lah 635 (636).

('28) AIR 1928 Lah 143 (143, 144).

[But see ('30) AIR 1930 Lah 24 (25).]

held by the High Courts of Allahabad,⁶ Calcutta⁷ and Rangoon⁸ according to which an appeal from such an order must be stamped with *ad valorem* court-fee.

33. Limitation.—There is a great divergence of judicial opinion as to whether Article 181 or Article 182 of the Limitation Act applies to an application for restitution under this Section.

Article 182 applies to an application for the *execution of a decree or order of a Civil Court*, and Article 181 applies where no limitation is provided elsewhere for such applications.

Under Section 583 of the old Code, an application for restitution under that Section was one in *execution of the appellate decree* and Article 179 (now Article 182) of the Limitation Act of 1877 was applied.¹ In cases not falling within that Section, the application was not treated as one in execution of any decree and the Article applied was 178 (now 181) of the Limitation Act, 1877.²

Under the present Code, the Madras, Bombay, Patna, Rangoon and Oudh Courts hold that an application for restitution is one in "execution of a decree" within Article 182 of the Limitation Act, 1908.³ Further, Section 6 of that Act would also apply to such cases, and in cases of disability of the applicant, the time would be extended by virtue thereof.⁴

The other High Courts hold that an application for restitution is not a proceeding in "execution of a decree" and that therefore the Article applicable is 181.⁵ The High Courts of Allahabad, Calcutta and Lahore have held that where a decree reversing that

6. ('01) 1901 All W N 180 (182).
- (25) AIR 1925 All 137 (138) : 47 All 98.
7. ('37) AIR 1937 Cal 152 (155) : 1 L R (1937) 1 Cal 637. (Even application for restitution under S. 151 requires *ad valorem* court-fee.)
- (38) 42 Cal W N 152.
- [But see ('18) AIR 1918 Cal 335 (335).
- (10) 6 Ind Cas 125 (125) (Cal).]
8. ('80) AIR 1930 Rang 241 (243) : 3 Rang 271.
- (39) AIR 1939 Rang 32 (33, 34) : 1939 Rang L R 635.
- [But see ('33) AIR 1933 Rang 180 (183) : 11 Rang 275.]

Note 33

1. ('97) 20 Mad 448 (449). (Not following the obiter dictum in 10 Mad 66.)
- (98) 22 Bom 998 (1001).
- (76) 1 Bom 19 (22).
- (86) 8 All 545 (548).
2. ('05) 27 All 485 (487). (Restitution due to amendment of decree.)
- (08) 30 All 476 (479). (Ex parte decree set aside.)
- (01) 28 Cal 113 (115). (Do.)
3. ('17) AIR 1917 Mad 194 (195).
- (84) AIR 1934 Pat 246 (247, 251, 253) : 13 Pat 411 (FB). (Overruling AIR 1925 Pat 1 and AIR 1928 Pat 598.)
- (33) AIR 1933 Rang 180 (183, 184) : 11 Rang 275.
- (31) 1931 Mad W N 1006 (1007).
- (21) AIR 1921 Bom 67 (67) : 45 Bom 1137.
- (26) AIR 1926 Oudh 199 (199, 200) : 1 Luck 40.
- (31) AIR 1931 Oudh 51 (52) : 6 Luck 448.
- (36) AIR 1936 Oudh 185 (188) : 12 Luck 52.
- (37) AIR 1937 Mad 150 (150).
- [But see ('19) AIR 1919 Bom 175 (176) : 43 Bom 235. (Where Art. 181 was applied.)

- (15) AIR 1915 Low Bur 141 (142) : 8 Low Bur Rui 262.]
4. ('17) AIR 1917 Bom 210 (211) : 41 Bom 625.
- (26) AIR 1926 Oudh 199 (200) : 1 Luck 40.
5. ('21) AIR 1921 All 321 (321).
- (34) AIR 1934 All 626 (634, 645) (FB). (Difference between execution application for restitution explained in detail—Case law discussed.)
- (82) AIR 1932 Cal 308 (309, 310) : 59 Cal 337.
- (28) AIR 1928 Cal 646 (650, 651) : 56 Cal 61 (SB).
- (26) AIR 1926 Cal 981 (981).
- (17) AIR 1917 Cal 188 (192, 193).
- (26) AIR 1926 Lah 685 (686).
- (81) AIR 1931 Lah 504 (504).
- (24) AIR 1924 Lah 166 (166).
- (39) AIR 1939 All 66 (69) : 1 L R (1939) All 103.
- (38) AIR 1938 All 552 (554).
- (39) AIR 1939 Cal 349 (350) : 69 Cal L Jour 293 (296).
- (38) AIR 1938 Lah 456 (457).
- (39) AIR 1939 Lah 73 (76) : 1 L R (1938) Lah 571.
- (35) AIR 1935 Nag 76 (77).
- (21) AIR 1921 Nag 112 (113) : 17 Nag L R 62.
- [See also ('18) AIR 1918 Cal 457 (457). (Question raised but not decided.)
- (18) AIR 1918 Lah 378 (379, 380) : 1918 Pun Re No. 67. (Decree passed under the old Code of 1882—Hence application for restitution is an application for execution and Art. 182 applies—Under the present Code such an application will be governed by Art. 181.)
- (37) AIR 1937 Cal 152 (154, 155) : 1 L R (1937) 1 Cal 637.]
- [But see ('23) AIR 1923 Nag 101 (101) : 18 Nag L R 200.]

of a trial Court is confirmed in second appeal, the period of limitation for an application for restitution begins to run from the date of the lower Appellate Court's decree and not from the date of the decree in second appeal confirming the reversing decree.⁶ The High Court of Allahabad⁷ has, however, held that, where the application for restitution is for recovery of mesne profits, time does not begin to run until possession of the property has been restored to the successful applicant.

An application for restitution on the reversal of the decree of the High Court by the Privy Council is one to "enforce" the decree of the Privy Council and is therefore governed by Article 183 of the Limitation Act.⁸

For fuller discussion, see the Author's Commentaries on the Limitation Act, Article 181 Note 7 and Article 183 Note 4.

34. Inherent power of Court to grant restitution.—It has already been seen in Note 2 that this Section does not confer any *new* rights which a successful party did not possess otherwise under the general law.¹ The jurisdiction to make restitution is *inherent* in every Court and will be exercised whenever the justice of the case demands it.² Such powers will be exercised, where an

- 6. ('84) AIR 1934 All 626 (643, 645) (FB).
- ('32) AIR 1932 All 609(610):54 All 770. (Limitation is not suspended by the filing of second appeal.)
- ('32) AIR 1932 Cal 308 (310) : 59 Cal 337.
- ('28) AIR 1928 Cal 646 (650, 651): 56 Cal 61 (SB).
- ('39) AIR 1939 Lah 73 (76): I L R (1938) Lah 571. [See also ('33) AIR 1933 Cal 422 (423).
- ('39) AIR 1939 Cal 349 (351): 69 Cal L Jour 293 (296). (Ex parte decree set aside in suit—Order confirmed in appeal—Time for application for restitution runs from order of trial Court and not of Appellate Court.)]
- [See however ('33) AIR 1933 Rang 180 (182) : 11 Rang 275. (Assuming that Art. 181 is applicable time begins to run from date of final decree.)]
- [But see ('26) AIR 1926 Cal 981 (982). (Not followed in AIR 1928 Cal 646 which is a decision of three Judges.)]
- 7. ('34) AIR 1934 All 626 (637, 643, 645) (FB).
- 8. ('22) AIR 1922 All 238 (239) : 44 All 555.
- ('28) AIR 1928 All 293 (294) : 50 All 767.

Note 34

- 1. ('12) 16 Ind Cas 966 (966) (Cal).
- 2. ('24) AIR 1924 All 718 (718, 719): 46 All 767. (Costs disallowed as being not necessary for the ends of justice.)
- ('32) AIR 1932 Cal 29 (31): 58 Cal 1070. (Ex parte decree set aside—Restitution under inherent powers of Court.)
- ('33) AIR 1933 All 117 (118). (Provincial Insolvency Act 1920, S. 5—Adjudication annulled yet distribution ordered—Order set aside—Payments under distribution order can be ordered to be refunded.)
- ('33) AIR 1933 All 218 (221) : 55 All 221. (Decree rendered inoperative in a separate suit—Restitution may be granted under inherent powers though the terms of this Section do not apply.)
- ('34) AIR 1934 Mad 320 (322) : 57 Mad 849. (Money improperly drawn out under decree—Permission to draw subject to execution of bond undertaking to repay—Court has inherent power to accord restitution.)

- ('34) AIR 1934 Lah 322 (323). (Mesne profits not granted as possession was not wrongful.)
- ('34) AIR 1934 Pat 150 (151).
- ('71) 7 Moo P C (N S) 314 (PC).
- ('30) AIR 1930 Mad 988 (990, 991). (Section 144 can be applied to interim orders pending final disposal of partition suit.)
- ('26) AIR 1926 All 274 (276). (Sale under prior mortgage decree—Subsequent sale under decree on subsequent mortgage to which the prior decree-holder and purchaser were parties—Court can order refund of the money received from the latter by the former.)
- ('11) 10 Ind Cas 818 (819) : 35 Bom 255. (Refund of money wrongly taken from Court.)
- ('13) 18 Ind Cas 144 (144) (Low Bur). (Property sold in execution *held* not liable for attachment in claim suit—Court can order restitution to successful claimant.)
- ('87) 14 Cal 484 (486).
- ('14) AIR 1914 Cal 692 (692). (Sale set aside on ground of fraud—Court has inherent power to grant mesne profits from auction-purchaser.)
- ('05) 2 Cal L Jour 537 (539, 540). (Decree for confirmation of possession only—Decree-holder obtaining possession in execution—Court can grant restitution under its inherent powers.)
- ('05) 2 Cal W N 381 (382).
- ('06) 33 Cal 927 (932, 934). (Respondent may be ordered to furnish security pending appeal.)
- ('06) 3 Cal L Jour 181 (182). (Ex parte decree set aside—Court has inherent power to order restitution.)
- ('07) 6 Cal L Jour 662 (666).
- ('16) AIR 1916 Cal 241 (244): 43 Cal 269. (Money deposited in Court wrongly withdrawn—Court has inherent power to order restitution.)
- ('26) AIR 1926 Lah 685 (687).
- ('22) AIR 1922 P C 269 (271) : 49 Ind App 351 : 2 Pat 10 (PC). (Auction sale—Deposit of price by purchaser and subsequent discharge of incumbrance—Sale set aside—Judgment-debtor must refund deposit before claiming restoration of possession.)

of the Code.⁴

Illustrations

1. *A* purchases a property in a sale held in execution of a decree and obtains possession thereof. On the application of *B*, the judgment-debtor, the sale is set aside. *B* applies for restitution of possession and mesne profits from *A*. Does the application lie under Section 144? No: for, no decree has been varied or reversed. But the restitution can be granted under Section 151,⁵ on the principle that an erroneous act of the Court should not be allowed to do injury to the suitors.⁶

2. *A* obtains a decree against *B* and recovers the money due under the decree by execution. Subsequently it appears to the Court that *B* was dead at the time of the institution of the suit. The decree is a nullity and the Court, having levied execution while there was legally no decree, has inherent power to rectify the mistake and order restitution.⁷

There is one distinction between the exercise of the powers under S. 144 and the exercise of the Court's inherent jurisdiction. While the Section is mandatory the exercise of the power under Section 151 depends upon the *discretion* of the Court which will be used only in the interests of justice.⁸

The inherent powers of a Court do not extend to convert an application which has nothing to do with restitution into one for restitution.⁹ Nor does it extend to ordering restitution against a person who is neither a party to nor bound by any order of the appellate or reversing Court.¹⁰

35. Revenue Court. — The jurisdiction to make restitution being inherent in all Courts, the principles of Section 144 will apply to Revenue Courts also.¹

decree does not amount to reversal or variation nor does the new decree passed after retrial amount to reversal or variation of the original decree as that decree has been already set aside.) [See ('14) AIR 1914 Lah 9 (11) : 20 Ind Cas 203 (205) : 1914 Pun Re No. 10.

('10) 6 Ind Cas 508 (511, 512) (Cal).]

4. ('20) AIR 1920 Bom 12 (12) : 44 Bom 702. (Ex parte decree set aside — Property must be restored whether under Sec. 47 or this Section.)

('33) AIR 1933 All 218 (221) : 55 All 221. (Power under S. 151 will be exercised where it is necessary for preventing injustice and where it does not contravene any statutory provision.)

('19) AIR 1919 Bom 175 (176) : 43 Bom 235.

5. ('14) AIR 1914 Cal 692 (692, 693).

('18) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

('94) 21 Cal 989 (997). (Mesne profits.)

('12) 14 Ind Cas 456 (457) (Cal).

('37) AIR 1937 Mad 694 (695). (Mesne profits also can be awarded.)

[See also ('19) AIR 1919 Bom 175 (176) : 43 Bom 235.

('36) AIR 1936 Lah 497 (498, 499). (Execution sale set aside—Court can order decree-holder to refund purchase-money to auction-purchaser.)]

6. ('22) AIR 1922 PC 269 (271) : 49 Ind App 351 : 2 Pat 210 (P C).

('02) 6 Cal W N 710 (712).

('22) AIR 1922 Nag 82 (84) : 18 Nag L R 24.

7. ('33) AIR 1933 Mad 888 (888). (Under Section 151, C. P. C.)

8. ('17) AIR 1917 Cal 188 (192). (But the test of what is just must be determined with reference

to the imperative requirements of the law applicable to the subject-matter.)

('37) AIR 1937 Mad 178 (179). (Interest refused in view of peculiar circumstances of the case.)

9. ('17) AIR 1917 Mad 453 (453) : 34 Ind Cas 774 (775).

[See also ('39) AIR 1939 All 66 (69) : I L R (1939) All 103. (Where the relief claimed is not really restitution and can appropriately be claimed in a suit, recourse cannot be had to the inherent powers of the Court under S. 151.)

('37) AIR 1937 Pat 647 (650) : 16 Pat 729. (Decree against Hindu father and sons based on compromise—Sale of family property in execution—Purchase by decree-holder—Full satisfaction of decree entered—Subsequent suit by sons to declare compromise decree not binding on them — Decree releasing half share in property—Decree and sale remaining as a whole—Application by decree-holder for compensation not maintainable—Doctrine of *caveat emptor* applied.)]

10. ('19) AIR 1919 Mad 581 (581) : 41 Mad 467. (Order refusing to set aside execution sale reversed in appeal — Auction-purchaser not party to proceedings — Claim to restitution not maintainable.)

Note 35

1. ('04) 26 All 149 (151, 152). (Restitution due in virtue of the modification in appeal of the decree of a Rent Court.)

('22) AIR 1922 All 71 (72) : 44 All 283.

('67) 7 Suth W R 520 (521) (F B).

('90) 1890 Rent Act Rul No. 56. (1900 Jacob Reprint, page 84.)

('18) 46 Ind Cas 475 (476) (Bur.)

36. Revision. — No revision lies from an order on an application falling under Section 144, for such an order is *appealable* as a decree under Section 2 (2).¹ Where the Court refuses to order restitution in the exercise of its discretion in a case not falling within Section 144, the order is not open to revision.²

It has been seen in Note 31 that in cases of restitution not falling within Section 144 there is a difference of opinion as to whether the order made amounts to a "decree." Where the order is held not to amount to a decree and no other remedy is open, a revision will lie.³

falling within Section 144, the order is not open to revision.³ It has been seen in Note 31 that in cases of restitution not falling within Section 144 there is a difference of opinion as to whether the order made amounts to a "decree." Where the order is held not to amount to a decree and no other remedy is open, a revision will lie.³

Enforcement of liability of surety.

145. [S. 253.] Where any person has become liable as surety —

(a) For the performance of any decree³ or any part thereof, or

(b) For the restitution of any property taken in execution of a decree,⁴ or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceedings consequent thereon,

the decree or order may be executed against him,' to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal,¹² be deemed a party within the meaning of section 47 :

Provided that such notice" as the Court in each case thinks sufficient has been given to the surety.

[1877, S. 253; 1859, S. 204; See S. 55 (?), O. 25 R. 1; O. 38, Rr. 2 and 5; O. 41 R. 10; O. 45 R. 7.]

Symonds

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| 1. Legislative changes. | 4. Security for restitution of property taken in execution of a decree — Clause (b). |
| 2. Scope, applicability and object of the Section. | 5. Security for payment of money. |
| 2a. Security by person primarily responsible — Applicability of Section. | 6. Security for fulfilment of any condition imposed on any person — Clause (c). |
| 2b. Security in favour of the Court—Applicability of the Section. | 6a. Under an order of the Court — Clause (c). |
| 2c. "Has become liable as surety." | 6b. "In any suit or in any proceedings consequent thereon." |
| 3. Security for the performance of any decree. | 7. "The decree or order may be executed against him." |

1. See S. 119 of the Code and the Notes thereto.
(193) AIR 1935 All 578 (575).
2. (11) AIR 1911 Lah 9 (11) : 20 Ind Cas 203
(1905) : 1911 Pun Re 201 (10).

3. (007) 1962 Pan Am B-26 to Puerto Rico
from New Orleans
(007) AIR 1961 Jan 108 (100)
(007) T Smith W H 570 (101)
(007) S Mink 191 (100), (007) Mink 191 (100)

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| <p>8. "To the extent to which he has rendered himself personally liable."</p> <p>9. Discharge of surety.</p> <p>9a. Surety if can recover sum forfeited.</p> <p>10. Form of surety bond.</p> <p>10a. Enforceability of surety bond in execution apart from the Section.</p> | <p>11. Maintainability of separate suit by or against the surety.</p> <p>12. Appeal.</p> <p>13. Limitation.</p> <p>14. Notice to surety.</p> |
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Other Topics (miscellaneous)

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| <p>Appellate decree. See Note 3.</p> <p>Duration and extent of liability. See Note 8.</p> <p>Enforcement of surety bond. See Notes 8 and 11.</p> <p>Ex parte decree. See Note 3.</p> <p>Liability of legal representative of surety. See Note 9.</p> <p>Oral contract of suretyship. See Note 10.</p> <p>Proceedings. See Note 9.</p> | <p>Refund of security money. See Notes 7 and 12.</p> <p>Registration. See Note 10.</p> <p>Revision. See Note 12.</p> <p>Such person shall be deemed a party. See Note 12.</p> <p>Surety bond—Whether to be in favour of Court. See Note 10.</p> <p>Surety under adjustment. See Note 6.</p> |
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1. Legislative changes. — The present Section has altered the law in the following respects:—

1. The old Section applied only to sureties for the performance of *decrees*. It did not apply to securities for the fulfilment of a condition imposed by an order of Court. It was also doubtful whether it applied to securities for the performance of appellate decrees and to securities for restitution of property taken in execution of a decree. It did not also apply to securities for payment of money which were not securities for the performance of decrees. The present Section applies to all these kinds of securities.

2. The word "personally" has been newly added in the present Section before the word "liable."

3. The competency of an appeal from an order under this Section is made clearer by the provision as to the surety being deemed a "party" for purposes of appeal.

4. Notice under the present Section need not be in writing.

2. Scope, applicability and object of the Section. — The object of this Section is to provide a *summary remedy* for the enforcement of the liability of a surety who has given security for any of the purposes enumerated in the Section. But for this Section, the party for whose benefit the security has been given would have to file a separate *suit* to enforce the security. This Section dispenses with the necessity of a suit and enables him to enforce the security by *execution proceedings* in the same manner as if the surety was a party to the decree or order in respect of which security has been given.¹ But the procedure provided by the Section applies only to the extent to which the surety has rendered himself *personally* liable.

2a. Security by person primarily responsible — Applicability of Section. — A surety is one who takes upon himself, and guarantees the performance of, an obligation which rests primarily upon another. The surety's liability is an accessory one. Hence the Section has no application unless the person sought to be proceeded against has taken upon himself the liability of *another*.¹ The liability need not be that of either the judgment-debtor or the decree-holder but it may be the liability of an officer of the Court.² Thus, this Section applies to the enforcement of the liability of a

Section 145 — Note 2

1. ('36) AIR 1936 Lah 463 (464). (It does not matter that the name of the surety is not mentioned in the decree.)

Note 2a

1. ('39) AIR 1939 Cal 316 (319).

(16) AIR 1916 Mad 521 (522) : 39 Mad 584.

(33) AIR 1933 Mad 691 (693) : 56 Mad 989.

2. ('39) AIR 1939 Cal 316 (319).

[See ('28) AIR 1928 Nag 294 (294). (In this case it was only decided that in the particular circumstances of the case the surety was a surety

person who has stood surety for a receiver.³ See also Note 4 below.

2b. Security in favour of the Court — Applicability of the Section. —

The security under this Section is intended to be given to some named officer or other individual and not to be a mere undertaking to the Court. The Court is not a juridical person. It cannot be sued. It cannot take property and as it cannot take property it cannot assign it. Where therefore a security bond is executed in favour of the Court, this Section has no application. But independently of this Section it can be enforced by an order on an application to which the sureties are parties that the properties be sold unless, before a day named, the sureties find the money.⁴

In the undermentioned case⁵ a security bond was executed in favour of a certificate officer under the Bengal Public Demands Recovery Act in respect of a debt due by a certificate debtor to a certificate holder. It was held that the certificate officer who was deemed to be a Court under Section 57 of the Act, could not maintain a suit on the surety bond, and that the certificate holder as the beneficiary under the bond could sue on it.

See also Note 11 *infra*.

2c. "Has become liable as surety." — Where A was appointed commissioner to attach certain moveable property and keep it in custody and he after attaching such property locked the goods in a shop and appointed two watchmen to look after the shop and locks, it was held that the watchmen could not be said to have become liable as sureties and that this Section did not apply.⁶

3. Security for the performance of any decree. — Old Section 253 used the words "wherever a person has before the passing of a decree in an original suit become liable as a surety," etc. Hence it did not apply to securities given subsequent to the passing of a decree except when the bond expressly stipulated for its enforcement

for a party to the suit and so the objection that the surety was not a surety for a party was groundless. But the case does not decide the question whether this Section will not apply unless the surety is a surety for a party to the suit.)

(16) AIR 1916 Mad 521 (522): 39 Mad 584. (The remark in this decision that the Section contemplates proceedings against a third party who has given an undertaking for the due discharge of the obligations resting upon a party to the suit only means that the Section does not apply to the enforcement of the liability of the person on whom the primary responsibility lies.)

3. (15) AIR 1915 Cal 331 (334).
(27) AIR 1927 Rang 334 (334).
(20) AIR 1920 Low Bur 58 (59): 10 Low Bur Rul 236.

Note 2b

1. (19) AIR 1919 P C 55 (59): 42 All 158: 46 Ind App 228 (P C).

(33) AIR 1933 Mad 691 (693): 56 Mad 989.

(33) AIR 1933 Mad 342 (342).

(34) AIR 1934 Cal 64 (67): 60 Cal 1298.

(34) AIR 1934 Mad 186 (188, 189): 57 Mad 688.

(Assumed case.)

(34) AIR 1934 Mad 262 (264): 57 Mad 803.

1. (33) AIR 1933 All 385 (386).

Note 3

1. (86) 8 All 639 (641).

(81) 3 All 809 (811).

(84) 7 Mad 284 (287).

Note 2c

the principle in (1861) 30 L J Q B 265.)

2. (37) AIR 1937 Cal 625 (630): 1 L R (1937) 2 Cal 698. (Certificate-holder's suit not barred by

affected by the principle of *lis pendens*.)

subsequent to the property being given as security, the property is alienated to a third party inasmuch as such alienation will be

same procedure can be followed even where

[See also (36) AIR 1936 Mad 589 (591). (The

743 is not good law.)

(The decision to the contrary in AIR 1919 Cal

(24) AIR 1924 Cal 485 (486, 487): 51 Cal 150.

(16) AIR 1916 All 57 (59, 60): 38 All 327.

(95) 17 All 99 (102).

(27) AIR 1927 Mad 416 (420).

(29) AIR 1929 Lah 393 (394).

(29) AIR 1929 Rang 126 (127): 7 Rang 352.

(26) AIR 1928 All 527 (529): 51 All 346.

(26) AIR 1926 All 657 (658).

(24) AIR 1924 All 105 (107): 45 All 649.

(28) AIR 1928 Bom 42 (47, 48): 52 Bom 116.

person who has stood surety for a receiver. See also Note 4 below.

2b. Security in favour of the Court — Applicability of the Section. — The security under this Section is intended to be given to some named officer or other individual and not to be a mere undertaking to the Court. The Court is not a judicial person. It cannot be sued. It cannot take property and as it cannot take property it cannot assign it. Where therefore a security bond is executed in favour of the Court, this Section has no application. But independently of this Section it can be enforced by an order on an application to which the sureties are parties that the properties be sold unless, before a day named, the sureties find the money.¹

In the undermentioned case² a security bond was executed in favour of a certificate officer under the Bengal Public Demands Recovery Act in respect of a debtor by a certificate debtor to a certificate holder. It was held that the certificate officer who was deemed to be a Court under Section 57 of the Act, could not maintain a suit on the surety bond, and that the certificate holder as the beneficiary under the bond could sue on it.

See also Note 11 *infra*.

2c. "Has become liable as surety." — Where I was appointed commissioner to attach certain moveable property and keep it in custody and he after attaching such property locked the goods in a shop and appointed two watchmen to look after the shop and locks, it was held that the watchmen could not be said to have become liable as sureties and that this Section did not apply.¹

3. Security for the performance of any decree. — Old Section 253 used the words "whenever a person has before the passing of a decree in an original suit become liable as a surety," etc. Hence it did not apply to securities given subsequent to the passing of a decree except when the bond expressly stipulated for its enforcement.

for a party to the suit and so the objection that the surety was not a surety for a party was groundless. But the case does not decide the question whether this Section will not apply unless the surety is a surety for a party to the suit.¹

(16) AIR 1916 Mad 521 (522): 39 Mad 534. (The remark in this decision that the Section contemplates proceedings against a third party who has given an undertaking for the due discharge of the obligations resting upon a party to the suit only means that the Section does not apply to the enforcement of the liability of the person on whom the primary responsibility lies.)

(15) AIR 1915 Cal 331 (334).
(17) AIR 1927 Rang 334 (334).
(20) AIR 1920 Low Bur 58 (59): 10 Low Bur Rpt 236.

Note 25

1. (19) AIR 1919 P C 55 (59): 42 All 155: 46 Ind App 228 (P C).

(33) AIR 1933 Mad 691 (693): 56 Mad 989.

(33) AIR 1933 Mad 349 (349).

(34) AIR 1934 Cal 65 (67): 60 Cal 1298.

(34) AIR 1934 Mad 186 (188, 189): 51 Mad 688.

(34) AIR 1934 Mad 186 (188, 189): 51 Mad 688. (Assumed case.)

1. (33) AIR 1933 All 335 (336).
Note 3

Note 26

2. (37) AIR 1937 Cal 623 (630): 111 B (1937) 3 Cal 698. (Certificate-holder's suit not barred by the principle in (1931) 30 L J Q B 233.)

[See also (36) AIR 1936 Mad 533 (534). (The same procedure can be followed even where security, the property is alienated to a third party inasmuch as such alienation will be affected by the principle of the payment.)]

(74) AIR 1924 Cal 453 (456, 457): 51 Cal 150. (The decision to the contrary in AIR 1919 Cal 173 is not good law.)

(16) AIR 1916 All 51 (59, 60): 33 All 327.

(95) 17 All 99 (109).

(97) AIR 1927 Mad 416 (420).

(99) AIR 1929 Lah 333 (334).

(99) AIR 1929 Rang 196 (197): 1 Rang 532.

(98) AIR 1928 All 327 (329): 51 All 342.

(96) AIR 1926 All 631 (633).

(94) AIR 1924 All 105 (107): 45 All 649.

(95) AIR 1928 Bom 42 (47, 48): 52 Bom 116.

right of making a person, not a party to a pending suit, amenable to the jurisdiction of the Court in execution proceedings and that it therefore could not be applied to proceedings other than suits. See Section 141 Note 7, *ante*.

Where the judgment-debtor deposited the decree amount into Court and the next friend of the minor decree-holder applied for withdrawing the money and for re-depositing it in the form of Government Promissory Notes, it was held that such an application was a "proceeding consequent on the suit" and that a surety for such re-deposit can be proceeded against under this Section.⁴

7. "The decree or order may be executed against him." — This Section provides for the enforcement of the surety's liability by *execution* against the surety of the decree or order in connexion with which the security was given. But the Court is not *bound* to issue execution against the surety. It has a discretion to refuse such execution.¹ If execution is issued the Court cannot declare a forfeiture in favour of the Government but the security money should be paid to the decree-holder.² The decree-holder must apply it towards the satisfaction of his decree and is not entitled to it over and above the decree amount as a solatium for delay brought about in the execution of his decree.³

The mere fact that the applicant for execution mentions the breach of one condition in the security bond as having given him the right to apply for execution does not disentitle the Court from ordering execution if in the course of the proceedings it finds that some other condition has been broken.⁴

The legality of the order for security cannot be questioned by the surety in the execution proceedings against him under this Section.⁵

The Court has no power under the Section to order the refund of moneys deposited as security. But refund can be ordered under Section 151.⁶

8. "To the extent to which he has rendered himself personally liable." — The word "personally" has been newly added in the present Section. Under the former Section there was a conflict of opinion as to whether the Section applied to cases where the surety had not undertaken a *personal* liability but had merely given a charge on his property.¹ Under the present Section it is clear that it applies only where the surety has rendered himself *personally* liable.² If therefore a security bond were given by the Government on behalf of the Secretary of State for India in Council, Section 145 would not apply to the case, as the Secretary of State would not be personally liable under the bond.³ For the same reason, where a surety bond does not create a personal liability but merely creates a *charge or mortgage* on the surety's property, it cannot be enforced by proceedings under *this Section*.⁴ Where, however, the charge on the surety's property is declared by the *decree* itself, the liability can be enforced by executing the

4. ('33) AIR 1933 Mad 678 (678, 679): 56 Mad 687.

Note 7

1. ('22) AIR 1922 Bom 340 (341): 46 Bom 702.
- ('25) AIR 1925 Rang 135 (137): 2 Rang 567.
2. ('12) 16 Ind Cas 118 (119): 39 Cal 1048.
- ('36) AIR 1936 Sind 244 (246): 30 Sind L R 177.
- [See also ('22) AIR 1922 Bom 340 (340, 341): 46 Bom 702.]
3. ('21) AIR 1921 Cal 559 (560).
4. ('36) AIR 1936 Sind 244 (246): 30 Sind L R 177.
5. ('36) AIR 1936 Cal 143 (145).
6. ('11) 12 Ind Cas 692 (693) (Mad).
- ('26) AIR 1926 Lah 544 (544).

Note 8

1. ('17) AIR 1917 All 104 (106): 39 All 225. (Observation of Banerji, J.)
2. ('16) AIR 1916 Cal 30 (30).
- ('34) AIR 1934 Mad 262 (263): 57 Mad 803.
3. ('11) 9 Ind Cas 862 (872): 38 Cal 754.
4. ('19) AIR 1919 P C 55 (59): 42 All 158: 46 Ind App 228: 22 Oudh Cas 212 (PC).
- ('17) AIR 1917 All 104 (105, 106): 39 All 225.
- ('16) AIR 1916 Cal 30 (31). (Equitable charge on Government Promissory note.)
- ('28) AIR 1928 Bom 42 (48): 52 Bom 72.
- ('34) AIR 1934 Lah 138 (139): 15 Lah 282 (FB).
- (Per Division Bench— Bond creating both per-

decree and no suit on the mortgage is necessary.⁵ The reason is that in such a case the surety is virtually in the position of a judgment-debtor.⁶

Where the surety makes himself personally liable and, in addition, charges his property, it is only the *personal* liability that can be enforced under this Section.⁷ The decree-holder may give up the mortgage and enforce the *personal liability* of the surety by attachment and sale of the property charged.⁸ O. 34 R. 14 does not preclude such a course because there is no *decree* for the payment of money against the surety in such cases as required by that Rule.⁹ But where the surety has transferred his equity of redemption to another person, his *personal liability* cannot be enforced by the sale of the *mortgaged property*, because it no longer belongs to him. In such a case the property can only be brought to sale by a suit on the mortgage.¹⁰

Where a judgment-debtor himself gives his property as security, the property can be sold in execution under Section 47.¹¹

A surety for costs payable by a party to a suit is personally liable for the costs and the mere fact that he deposits a certain amount by way of security does not exclude his personal liability.¹²

The surety's liability is co-extensive with that of the judgment-debtor and he is jointly and severally liable with the judgment-debtor for the decree amount. A decree against the principal can, in fact, be treated as a decree against him.¹³ Hence, the party for whose benefit security has been given is not bound to execute the decree against the judgment-debtor before proceeding against the surety,¹⁴ except where the decree otherwise provides.¹⁵ Within the limits prescribed by the security bond, the

- sonal liability and hypothecating property — Surety can be proceeded against under this Section—AIR 1929 Lah 393, Followed.)
- (‘36) AIR 1936 All 549 (551).
5. (‘26) AIR 1926 Cal 889 (891, 892) : 54 Cal 1.
- (‘28) AIR 1928 Lah 209 (212).
6. (‘28) AIR 1928 Lah 209 (210).
7. (‘34) AIR 1934 Oudh 139 (140).
- (‘35) AIR 1935 Oudh 510 (514, 515) : 11 Luck 449.
- (Surety bond executed by member of joint Hindu family containing personal covenant — Personal liability of member is enforceable after his death against his son.)
8. (‘15) AIR 1915 Cal 533 (534).
- (‘26) AIR 1926 Bom 279 (280) : 50 Bom 339.
- (‘27) AIR 1927 Mad 416 (420).
- (‘17) AIR 1917 Pat 489 (489).
- (‘16) AIR 1916 All 57 (59) : 38 All 327.
- (‘17) AIR 1917 Pat 596 (596) : 2 Pat L Jour 197.
- [See also (‘17) AIR 1917 All 104 (106) : 39 All 225.]
9. (‘17) AIR 1917 Pat 596 (596) : 2 Pat L Jour 197.
- (‘16) AIR 1916 All 57 (59, 60) : 38 All 327.
- (‘17) AIR 1917 Pat 489 (489).
- See the following cases:
- (‘28) AIR 1928 Lah 802 (803, 804). (O. 34 R. 14 not being applicable in the Punjab, it is no bar to the surety's liability being enforced against the mortgaged property.)
- (‘13) 18 Ind Cas 900 (904) (Cal) (FB). (Property already under attachment given as security — O. 34 R. 14 is no bar to sale of property consequent on the attachment.)
- (‘17) AIR 1917 Cal 82 (83, 84). (But where a suit is brought on the security bond and a money decree is obtained therein, the mortgaged pro-

- erty cannot be sold under the decree as O. 34 R. 14 clearly applies.)
10. (‘17) AIR 1917 All 104 (106) : 39 All 225.
11. (‘24) AIR 1924 Cal 485 (487) : 51 Cal 150.
- (‘18) AIR 1918 Mad 442 (442) : 41 Mad 327.
- (‘75) 2 Ind App 219 (233) (PC).
- (‘30) AIR 1930 Pat 108 (109) : 8 Pat 801.
- (‘03) 30 Cal 1060 (1063). (Decision to contrary in 32 Cal 494 is not sound law especially in view of Privy Council decision in 2 Ind App 219 (PC).)
12. (‘32) AIR 1932 Mad 188 (188).
13. (‘34) AIR 1934 Bom 252 (254) : 58 Bom 485.
- (‘38) AIR 1938 Nag 148 (149) : 1 L R (1939) Nag 536. (Section 145 permits the execution of a decree (passed against a stranger) against the surety as though it were a decree passed against the surety — It may be that he is a party only for a limited purpose.)
14. (‘33) AIR 1933 Nag 287 (289). (This Section must be read with S. 128 of the Contract Act.)
- (‘29) AIR 1929 Lah 393 (394).
- (‘13) 20 Ind Cas 540 (541) : 7 Sind L R 19.
- (‘26) AIR 1926 All 657 (657).
- (‘29) AIR 1929 Lah 205 (206).
- (‘25) AIR 1925 Lah 552 (555).
- (‘21) AIR 1921 Nag 99 (100).
15. (‘27) AIR 1927 Lah 846 (846). (Cf. AIR 1928 Lah 209.)
- (‘79) 4 Cal 331 (334).
- (‘95) 19 Bom 578 (581). (Partition decree—Judgment-debtor depositing in Court property in obedience to decree—Execution must first proceed against property.)
- [See also (‘32) AIR 1932 P C 131 (133) (PO). (Surety for deficiency in mortgage suit pending

surety's liability extends to any amount recoverable from the judgment-debtor.¹⁶ Where a surety undertakes a liability not contained in the decree, he cannot afterwards dispute it.¹⁷ The fact that security has been given does not take away any legal rights which the decree-holder may otherwise have. Hence, where security has been given by the judgment-debtor, the decree-holder is not bound to proceed only against the properties specified in the security bond but is entitled to attach and sell any property of the judgment-debtor which he could otherwise proceed against.¹⁸ Where a Hindu father has become liable as a surety under this Section, the liability can be enforced by execution proceedings under this Section against the sons' share in the joint family property to the same extent as if a decree had been passed against the father.¹⁹

9. Discharge of surety. — The question whether a surety has incurred liability under his bond depends upon the terms of the bond.¹ Where there is a doubt

appeal—Surety liable only after hypotheca is exhausted and deficiency determined.]]

16. ('29) AIR 1929 All 905 (906).

('07) 30 Mad 167 (168). (Decree against judgment-debtor for Rs. 5,000 and against surety for Rs. 9,000. Amounts received on rateable distribution of assets recovered from judgment-debtor plus amount recoverable from surety must not exceed Rs. 5,000.)

('29) AIR 1929 Lah 386 (387). (Sapurdar's liability not limited to price of article but extends to decree amount.)

('16) AIR 1916 Pat 66 (67). (Surety for removal of attachment — Surety's liability extends to decree amount.)

('99) 23 Bom 478 (483, 484). (Surety not liable where liability expressly excluded.)

('10) 5 Ind Cas 189 (141) (Cal). (Surety liable for sale expenses and poundage fees.)

17. ('27) AIR 1927 Mad 416 (421). (Relying on 2 Ind App 219 (PC).)

[But see ('25) AIR 1925 Pat 128 (129).]

18. ('18) AIR 1918 Pat 384 (385).

19. ('38) AIR 1938 Nag 148 (149); ILR (1939) Nag 536.

('35) AIR 1935 Oudh 510 (514, 515) : 11 Luck 449.

Note 9

1. See the following cases:

('14) AIR 1914 Low Bur 54 (55).

('38) AIR 1938 Mad 360 (361, 362).

('16) AIR 1916 Lah 169 (170). (Surety for appearance of defendant—Notice not reaching defendant—Defendant not appearing—Surety not liable.)

('70) 14 Suth W R 410 (411). (Security for restitution of property taken in execution — No execution held—Surety not liable though decree reversed.)

('87) 14 Cal 757 (760). (Obligation to produce debtor not discharged by his voluntary appearance in Court for his own purposes and then disappearing.)

('17) AIR 1917 Mad 237 (238, 239). (Surety to produce debtor in Court—Bond providing for notice to surety—Surety may waive notice.)

('18) AIR 1918 Lah 134 (135). (Bond making surety liable if dispute not settled—Surety not liable if dispute is compromised.)

('28) AIR 1928 Lah 974 (975). (Surety to produce judgment-debtor on a day fixed—Decree-holder absent on that day—Surety is not exempt.)

('21) AIR 1921 Pat 72 (73) : 5 Pat L Jour 417. (Surety for debtor filing insolvency petitions—Failure of debtor to do so within the prescribed time—Surety liable.)

('28) AIR 1928 Lah 696 (697). (Surety to produce judgment-debtor on a particular day—Court closed on that day—Surety not bound to produce on any other day.)

('24) AIR 1924 Lah 490 (491, 492). (Surety for appearance of debtor on any hearing till final decision — Judgment-debtor appearing and obtaining an adjournment — Judgment-debtor not appearing at adjourned hearing—Surety is liable.)

('31) AIR 1931 All 243 (244) : 52 All 1014. (Surety for production of judgment-debtor—Judgment-debtor produced on the due date — Surety not liable for further default.)

('25) AIR 1925 Rang 209 (209) : 3 Rang 53. (Operative portion of bond and not recital controls its meaning.)

('24) AIR 1924 Rang 347 (347). (Surety to produce debtor obtaining adjournment on false affidavit and producing debtor on the adjournment date—Surety is released though he may be proceeded against criminally.)

('32) AIR 1932 Mad 168 (168).

('18) AIR 1918 Cal 488 (489). (Security on behalf of claimant of attached property.)

('37) AIR 1937 Rang 189 (192). (Preliminary decree on mortgage—Agreement between judgment-debtor and creditor to pay mortgage amount by instalments and on failure of one instalment, creditor to bring to sale mortgaged property—Sons of judgment-debtor also binding themselves as sureties to make up deficiency — Failure of debtor to pay instalment but property not brought to sale—Creditor proceeding against mortgagor and surety—No liability held attached to surety until mortgage property was sold.)

('38) AIR 1938 Nag 259 (261) : I L R (1939) Nag 276. (Appeal by judgment-debtor against decree—Execution stayed on judgment-debtor's providing surety for due performance of any decree likely to be passed against him by Appellate Court.—Surety using Form No. 3, Appendix G instead of Form 2, Appendix G of First Schedule to

decree also.¹³ The liability cannot, however, apply to a different proceeding altogether. Where a person gives security for production of property in one suit, he cannot be called upon to produce it in another.¹⁴ As regards the liability and discharge of a surety under Section 55 (4), see Note 12 to Section 55, *ante*, and the undermentioned cases.¹⁵

Section 17 of the Provincial Small Cause Courts Act requires that a defendant applying to set aside an *ex parte* decree should furnish security for the performance of the decree. It has been held that the security only applies to the *ex parte* decree itself in case the application should fail. Hence, where the *ex parte* decree is set aside the surety is discharged and he is not liable in respect of the decree that may be passed subsequently.¹⁶

A surety for the appearance of judgment-debtor is discharged if the judgment-debtor is in jail for a criminal offence and cannot be produced on the required date.¹⁷ A surety for the appearance of the judgment-debtor if a particular pending proceeding is dismissed, is discharged if on the dismissal of such proceeding the judgment-debtor surrenders himself before the Court.¹⁸ Where a judgment-debtor is released on security, but owing to the default of the decree-holder the execution petition is dismissed and the surety discharged, the liability is not automatically revived by the mere restoration of the execution petition.¹⁹ It has been held in Rangoon²⁰ that where the surety has bound himself to make the judgment-debtor pay the decree amount on a specified date or, in default, to pay it himself, the judgment-debtor's death before the prescribed date does not end the surety's liability. This view has, however, been dissented from in the undermentioned case.²¹ A surety under O. 38 R. 5 (attachment before judgment) is not discharged by the death of the defendant pending the suit where the cause of action survives against the legal representative and the legal representative is brought on the record.²² But where a person who is not the legal representative is brought on the record and a decree is passed against the estate of the deceased, neither the legal representative nor the surety is bound by the decree.²³

The surety's liability being co-extensive with that of the principal debtor, the extinction or diminution of the latter's liability operates as a discharge of the surety to a corresponding extent.²⁴ Conversely, a surety is bound as long as the judgment-debtor is bound. Hence, when the decree is sought to be executed against the surety, no uncertified

13. ('37) AIR 1937 All 682 (684).

14. ('24) AIR 1924 All 64 (65).

15. ('24) AIR 1924 Pat 487 (488). (Liability under Sec. 55 (4) enures to the benefit of the Court as well as to that of the decree-holder.)

(13) 21 Ind Cas 612 (613, 614) (Cal).

16. ('36) AIR 1936 All 593 (593).

(38) AIR 1938 Nag 75 (75, 76) : I L R (1939) Nag 371.

17. ('23) AIR 1923 Rang 26 (26) : 4 Upp Bur Rul 99.

[But see ('22) AIR 1922 All 390 (390) : 44 All 174. (Where surety knew at the time of entering into the bond about the impending imprisonment, he cannot claim to be discharged by such imprisonment.)]

18. ('33) AIR 1933 Cal 337 (338).

19. ('34) AIR 1934 Lah 349 (351).

[See ('37) AIR 1937 Mad 721 (723). (A surety who secures the release of an arrested judgment-debtor by undertaking to produce the judgment-debtor whenever called upon by the Court until the execution petition is finally disposed, cannot

claim to be discharged from his liability on such a dismissal of the execution petition; he continues liable, and his liability can be enforced in the subsequent application for revival.)]

20. ('10) 8 Ind Cas 985 (986) (Low Bur).

21. ('23) AIR 1923 Rang 26 (26) : 4 Upp Bur Rul 99.

22. ('16) AIR 1916 Bom 55 (56) : 41 Bom 402.

(24) AIR 1924 Lah 428 (429).

23. ('27) AIR 1927 Bom 63 (65) : 50 Bom 802.

24. ('70) 13 Suth W R 403 (406). (Decree against judgment-debtor being set aside in appeal.)

(88) 12 Bom 71 (76). (Decree against principal debtor being reversed in appeal.)

(23) AIR 1923 Mad 340 (341, 344). (Execution by merger of estates of principal debtor and creditor.)

(76) 25 Suth W R 250 (251).

(95) 19 Bom 578 (581). (Debtor himself performing one portion of obligation—Surety liable only for the rest.)

payment by the judgment-debtor can be recognized by the executing Court²⁵ [O. 21, R. 2 (3)]. The Sind Court has expressed a contrary view on this point.²⁶

Where the Court varies the terms of the security bond without the surety's consent, the surety is discharged.²⁷ But where the variation is obviously for the benefit of the surety, he is not discharged.²⁸ Similarly, if the Court in whose favour the surety bond is executed is not in the least responsible for the change in the situation of the surety, the surety is not entitled to ask the Court to relieve him of his obligation under the bond on the ground that the decree-holder has arrived at a certain arrangement with the debtor.²⁹

Is the surety discharged by the failure of the creditor to sue the principal debtor within the period of limitation? Yes, according to Allahabad,³⁰ Rangoon³¹ and Nagpur.³² No, according to Bombay,³³ Calcutta³⁴ and Madras.³⁵ The conflict is due to this reason. Under Section 134, Contract Act, *any omission* of the creditor, the legal consequence of which is the discharge of the principal debtor, operates as a discharge of the surety. Under Section 137 the mere forbearance of the creditor to sue the principal debtor does not discharge the surety. According to the first group of Courts mentioned above, Section 134 is the Section applicable to such cases; while according to second group it is Section 137. In a recent decision of the Allahabad High Court³⁶ it has been held that Section 134 of the Contract Act does not apply to a security bond executed in favour of the Court.

A contract³⁷ between the creditor and principal debtor, by which the creditor promises to give time to,³⁸ or not to sue,³⁹ the principal debtor, discharges the surety.

25. ('23) AIR 1923 Cal 313 (313).

('26) AIR 1926 Mad 674 (675) : 49 Mad 325.

26. ('26) AIR 1926 Sind 105 (107) : 20 Sind LR 362.

27. ('26) AIR 1926 Bom 565 (566).

28. ('26) AIR 1926 Sind 105 (108) : 20 Sind LR 362.

29. ('35) AIR 1935 Nag 253 (263, 264) : 31 Nag L R (Sup) 88. (The obligation which a surety incurs under the bond which he gives to the Court under the Code of Civil Procedure, is excluded from the definition of a "contract of guarantee" as contained in the Contract Act, and the provisions of Ss. 133 to 139 of the Act, cannot be made applicable to the bond given by a surety to the Court. The liability of the surety under such a bond may, however, be determined by the Court if it has itself been responsible for a change in the situation which materially affects the terms of the surety bond.)

[See also ('36) AIR 1936 Lah 470 (471).]

30. ('02) 24 All 504 (508).

('89) 11 All 310 (313).

('86) 8 All 259 (261).

[See ('16) AIR 1916 Pat 203 (204) : 1 Pat L Jour 497. (The Patna High Court without deciding the point has expressed a leaning to the Allahabad view.)]

31. ('96) 2 Upp Bur Rul 308 (310).

[See also (1900) 1 Low Bur Rul 150 (150). (Waiver of claim against principal debtor—By virtue of Section 134, Contract Act, surety is discharged.)]

32. ('06) 2 Nag L R 42 (44).

33. ('25) AIR 1925 Bom 244 (245) : 49 Bom 202.

('81) 5 Bom 647 (652).

34. ('86) 12 Cal 330 (333).

[See ('36) 40 Cal W N 465 (467). (The mere fact that an execution against the principal judgment-debtor has been allowed to be barred by lapse of time is no ground for the release or discharge of the surety.)]

35. ('10) 33 Mad 308 (310).

36. ('86) AIR 1936 All 549 (552).

37. See Section 136, Contract Act.

38. ('27) AIR 1927 Cal 239 (240).

('32) AIR 1932 Pat 313 (314) : 11 Pat 590.

('33) AIR 1933 Mad 309 (312) : 56 Mad 625.

('79) 4 Cal 331 (336) (PO).

('79) 4 Cal 132 (134). (Acceptance of interest in advance operates as promise to give time.)

(1900) 22 All 351 (352). (The agreement to give time must be supported by consideration.)

('37) AIR 1937 Mad 584 (585). (But there is one exception to this general rule and that is when the decree-holder gives concession to the judgment-debtor, but his right to proceed against the surety is specifically reserved.)

('33) AIR 1933 Mad 309 (312) : 56 Mad 625.

[See ('36) AIR 1936 Mad 576 (580). (Receiver appointed under consent order—Security for discharge of his duties—Consent order providing that on default being made by receiver plaintiff to have another person appointed as receiver—Receiver making default—Plaintiff granting time to receiver—Surety discharged as contract was varied.)]

[See also ('39) AIR 1939 Lah 368 (368) : 41 Pun L R 282 (283). (Judgment-debtor given time after time to pay decree without surety's consent—Surety is not liable.)]

39. [See ('26) AIR 1926 All 657 (658): (Mere col-

unless the surety assents to such contract.⁴⁰ Is the surety under this Section discharged by the creditor entering into a compromise with the principal debtor? The answer to this question depends on the terms of the security bond.⁴¹

Under Sections 142 and 143 of the Contract Act, 1872, a security which the creditor has obtained by misrepresentation or silence as to material circumstances is invalid.⁴² A surety is discharged by the failure of the consideration for his bond.⁴³ Where the surety has not performed his obligation because the decree-holder has expressly dispensed with its performance, the surety is not liable to be proceeded against, under his bond.⁴⁴ Where a surety dies after the accrual of his liability under the bond, the liability can be enforced against his legal representatives to the extent of his estate in their hands.⁴⁵ Where the surety is not otherwise discharged from his liability the Court has no power to make an order for his discharge⁴⁶ except in the case provided for by O. 38 R. 3 (arrest before judgment).⁴⁷ The High Court of Allahabad has, however, held in the undermentioned case⁴⁸ that the Court to which a guarantee is given has power in a proper case to exonerate the surety from all future transactions.

A surety may be precluded by estoppel⁴⁹ or *res judicata*,⁵⁰ from disputing his liability under the bond.

Where a bond is given to the Court, the liability of the surety cannot be determined by the surety by giving notice as in the case of a continuing guarantee.⁵¹

Where security for the appearance of a judgment-debtor in the course of certain execution proceedings has been given, the termination of such proceedings will not absolve the surety from a liability already incurred by him before such termination.⁵²

9a. Surety, if can recover sum forfeited. — Where a man stands surety for the appearance of another, he should take every precaution to ensure the carrying out of his undertaking and he cannot be allowed on grounds of public policy to recover any sum forfeited under the bond from the principal or from any one else; for, if he is so allowed, it would only tend to render the surety callous and the whole object of demanding the bond would be defeated.¹

lusion not amounting to such contract is not enough.]]

40. ('01) 23 All 137 (147) : 27 Ind App 168 (PC). [Surety may have consented that the dealings between the creditor and the principal debtor shall not affect his liability.]

41. ('31) AIR 1931 Bom 55 (56) : 55 Bom 97. (Terms not excluding compromise decree.)

('94) 1894 Bom P J 25 (25, 26). (Do.)

('28) AIR 1928 Cal 177 (178) : 55 Cal 91. (Decree on award by arbitrator—Bond construed as providing only for decree after contest.)

('20) AIR 1920 Mad 355 (357) : 43 Mad 272. (Terms not limiting liability to contest decree.)

('26) AIR 1926 Cal 518 (518). (Order giving leave to defend suit under O. 37—Security bond passed without knowledge and consent of surety—Surety discharged.)

42. ('71) 3 N W P H C R 264 (266).

43. ('25) AIR 1925 Lah 552 (555).

('29) AIR 1929 Lah 770 (771) : 11 Lah 77.

44. ('25) AIR 1925 All 5 (6).

('24) AIR 1924 Mad 241 (242). (Merely asking for production of debtor on a subsequent date does not amount to waiver of obligation to produce on a prior date.)

[See also ('37) AIR 1937 Nag 269 (269, 270) : I L R (1939) Nag 497. (Surety undertaking that judgment-debtor would file insolvency within one month—Surety and judgment-debtor filing within one month certificate showing application to Debt Conciliation Board—Execution case struck off thereon—Order accepted by decree-holder—Security cannot be realized.)

45. ('14) AIR 1914 Mad 328 (329) : 38 Mad 1120. ('26) AIR 1926 Sind 294 (295) : 19 Sind L R 165.

46. ('27) AIR 1927 Mad 294 (295).

('28) AIR 1928 Lah 61 (62).

47. ('29) AIR 1929 Lah 435 (436).

[But see ('70) 13 Suth W R 403 (405).]

48. ('32) AIR 1932 All 262 (262, 263) : 54 All 293.

49. (06) 4 Cal L Jour 311 (315, 316).

('36) AIR 1936 Mad 990 (991).

50. ('07) 31 Bom 128 (135, 136). (Abandonment of plea—*Res judicata*.)

('30) AIR 1930 Lah 80 (80). (*Res judicata*.)

51. ('36) AIR 1936 Mad 576 (578).

52. ('39) AIR 1939 Sind 270 (272) : I L R (1939) Kar 401.

Note 9a

1. ('32) AIR 1932 Lah 23 (23).

10. Form of surety bond. — A surety bond may be in favour of the Court or the decree-holder. No particular form is necessary.¹ To make the Section applicable, it is not necessary that the surety's liability must have accrued upon an application presented to the Court or a security bond filed in the proceedings.² According to the High Court of Madras,³ however, the Section does not apply to surety bonds executed *outside Court*.

It has been held that a surety bond charging immovable property with a sum exceeding Rs. 100 is compulsorily registrable, and is inadmissible in evidence without registration.⁴

10a. Enforceability of surety bond in execution apart from the Section. — A security can be enforced in execution under the inherent powers of the Court apart from the provisions of this Section.¹

11. Maintainability of separate suit by or against the surety. — As has been seen in Note 63 to Section 9 *ante*, a regular suit is not barred by the fact that a summary and concurrent remedy is also provided for. It was held under the old Section that the summary remedy under it was *additional* and not exclusive, and therefore it did not bar a regular suit to enforce the security.¹ The present Section provides that the surety "shall, for the purposes of appeal, be deemed a party within the meaning of Section 47." This does not make the surety a party to the suit for all purposes.² He is a party only for the limited purpose of appeal. Hence, a *suit* to enforce the security is not barred under the present Section also.³ Similarly, a suit *by* the surety to negative

Note 10

1. ('26) AIR 1926 Cal 877 (879): 53 Cal 515. (Obiter—Contract of suretyship may be oral.)
- ('33) AIR 1933 Lah 913 (914): 15 Lah 44. (It need not be in the form of a security bond or in writing or in favour of the Court.)
- ('35) AIR 1935 Mad 209 (210): 58 Mad 777.
- ('36) AIR 1936 Lah 463 (464). (Surety making statement before Court and undertaking liability.)
2. ('12) 16 Ind Cas 859 (860) (Cal).
- ('30) AIR 1930 Lah 185 (186). (Surety signing deed of compromise, enough.)
- ('35) AIR 1935 Mad 209 (210): 58 Mad 777. (Letter addressed to decree-holder by surety undertaking to discharge the decree debt held sufficient.)
- [See also ('39) AIR 1939 All 517 (517). (On dismissal of his objection to attachment of certain property in execution of a decree against the judgment-debtor, objector suing decree-holder for a declaration of his title to the same but compromising suit, and on decree-holder's reducing his claim undertaking to pay the amount within a certain time—Objector is a surety under S. 145 and is liable as the judgment-debtor; and the intention of the parties being to keep alive the original suit the decree-holder at his option can proceed in either of the suits.)]
3. ('19) AIR 1919 Mad 813 (815). (Surety bond taken out of Court and not recorded by Court—Section not applicable.)
- ('19) AIR 1919 Mad 527 (527). (Security bond taken out of Court and filed in Court—Section applies.)
- [But see (1935) 41 Mad L W 144 (146). (Section applicable to suretyship outside Court. AIR 1919 Mad 813, Dissented from.)]

4. ('99) 26 Cal 222 (224). (However the bond can be admitted to prove personal liability of the surety.)
- ('08) 31 Mad 330 (332).
- ('10) 8 Ind Cas 985 (986). (However if the bond contains personal covenant it may be admitted as regards such personal covenant.)
- [But see ('34) AIR 1934 Lah 138 (141): 15 Lah 282 (FB).]

Note 10a

1. ('33) AIR 1933 Mad 691 (693): 56 Mad 989.
- ('33) AIR 1933 Mad 722 (723).
- ('26) AIR 1926 Mad 1005 (1007).

Note 11

1. ('04) 7 Oudh Cas 210 (211).
- ('74) 6 N W P H C R 261 (264).
- ('03) 1903 Pun L R No. 31 page 94.
2. ('28) AIR 1928 All 527 (528). (Application by surety to have sale set aside does not fall within S. 47.)
- ('31) AIR 1931 Rang 206 (207): 9 Rang 434.
- ('39) AIR 1939 Lah 175 (176).
3. ('11) 12 Ind Cas 549 (550): 36 Bom 42.
- ('28) AIR 1928 Rang 249 (251): 6 Rang 474.
- ('35) AIR 1935 All 373 (374). (AIR 1939 All 266 dissented — Case law referred — Suit against superddar.)
- ('37) AIR 1937 Cal 625 (627): 1 I L R (1937) 2 Cal 638.
- ('39) AIR 1939 Lah 175 (176).
- ('38) AIR 1938 Nag 148 (149): 1 I L R (1938) Nag 536. (Hindu father incurring liability as surety — Decree-holder can sue to enforce the surety's liability, and in execution proceed against the sons' share also—But this does not mean that

his liability is not barred.⁴ But a suit for injunction restraining the *executing Court* from executing the decree against the surety cannot be maintained.⁵

Until an application is made for execution against the surety he does not become a "party". Hence, he cannot apply to the executing Court for cancellation of his bond.⁶ Nor will the rejection of such application made by him, where he makes one, constitute *res judicata*.⁷ But when it is sought to enforce the decree against him, he becomes a "party" and his objections therefore have to be determined in the proceedings and he cannot be compelled to file a separate suit to vindicate his objections.⁸ For the same reason, his omission to raise any objection in proceedings against him under this Section will make the decision as to his liability *res judicata* and he cannot dispute it afterwards.⁹

A surety cannot have a sale set aside by separate suit, where it is vitiated only by irregularities and not for want of jurisdiction.¹⁰

See also Note 9 to Section 47.

12. Appeal. — This Section provides that the decree or order may be executed against the surety "in the manner herein provided for the *execution of the decrees*" and that the surety shall for the purposes of appeal "be deemed a party within the meaning of Section 47." Hence an order enforcing¹ or refusing to enforce² a security under this Section is appealable as a *decree*. This was also the law under the old Code.³ It has been held by the High Court of Madras that even where Section 145 does not apply, but the surety bond is enforced without recourse to suit in the manner mentioned by the Privy Council in A. I. R. 1919 Privy Council 55 referred to in Note 2b, *ante*, there is a right of appeal.⁴

the sons' shares cannot be proceeded against by execution proceedings under this Section.)

[But see ('29) AIR 1929 All 266 (266).]

4. ('27) AIR 1927 Bom 63 (66) : 50 Bom 802.

('25) AIR 1925 Lah 618 (618). (Left open.)

('37) AIR 1937 Lah 658 (660) : I L R (1938) Lah 140.

[See ('11) 9 Ind Cas 862 (872) : 38 Cal 754. (Suit to enforce liability—Surety's objections to his liability can be gone into in such suit.)]

[But see ('05) 23 Mad 117 (118). (This was not followed in AIR 1920 Mad 75.)]

('29) AIR 1929 All 266 (266).]

5. ('25) AIR 1925 Lah 618 (618).

6. ('20) AIR 1920 Mad 75 (77) : 43 Mad 325.

7. ('25) AIR 1925 Lah 552 (553).

8. ('25) AIR 1925 Lah 552 (553).

('23) AIR 1923 Mad 340 (342).

9. ('28) AIR 1928 All 527 (530) : 51 All 346.

('30) AIR 1930 Lah 399 (400).

[See ('25) AIR 1925 Lah 618 (618).]

10. ('28) AIR 1928 All 527 (529) : 51 All 346.

Note 12

1. ('15) AIR 1915 Cal 688 (688).

('34) AIR 1934 Lah 538 (539). (When surety does not appeal, the order is final and cannot be questioned in subsequent proceedings.)

('11) 9 Ind Cas 862 (872) : 38 Cal 754.

('15) AIR 1915 Cal 287 (287, 288).

('32) AIR 1932 Bom 77 (78).

('35) AIR 1935 Rang 39 (41).

[See also ('33) AIR 1933 Rang 64 (66) : 11 Rang (134).]

2. ('17) AIR 1917 Upp Bur 16 (17) : 2 Upp Bur Rul. 103. (Security under S. 55 (4).)

('15) AIR 1915 Mad 653 (654).

('33) AIR 1933 Nag 287 (288).

[See also ('36) AIR 1936 Lah 684 (684). (Order of District Judge under S. 299, Succession Act, refusing to assign a bond should not be considered to be of a purely formal or interlocutory nature and as such not open to appeal. The order might be considered to be in some respects similar to one under S. 145, C. P. C., and an order under that Section is appealable, so order under S. 299 is also appealable.)]

3. ('88) 12 Bom 71 (76).

('03) 13 Mad L Jour 484 (484, 485). (Surety under S. 336 (now S. 55) can also appeal.)

('71) 15 Suth W R 538 (540).

('67) 8 Suth W R 24 (24).

('86) 1886 Pun Re No. 104, page 249.

('93) 15 All 183 (185). (But surety under S. 336, now S. 55, could not appeal as he was not a surety for the payment of the amount of the decree and so could not be considered to be a party.)

[But see ('02) 1902 Pun L R No. 58, p. 210.

('02) 1902 Pun Re No. 72, p. 261.]

4. ('33) AIR 1933 Mad 780 (781) : 56 Mad 909.

('38) AIR 1938 Mad 215 (217). (Surety depositing money in Court and therefore not personally liable—S. 145 therefore not applicable—Still there is right of appeal as under Privy Council ruling in A I R 1919 P C 55 surety is "party" to proceedings.)

[But see ('33) AIR 1933 Mad 342 (342). (Per Walsh, J.)]

But, until an application is filed for execution against a surety under this Section, he is not a *party*⁵ and hence an order discharging him before such application is made is not appealable.⁶

This Section does not apply to an order for refund of security. Such refund can be ordered only under Section 151. Hence no appeal lies from an order for refund of security.⁷

13. Limitation. — The general trend of opinion is that an application for execution against a surety is governed by Article 182 of the Limitation Act, whether the security was given before or after the decree.¹ The Chief Court of Oudh has, however, held that where security is given after decree, the application does not fall within any of the clauses of Article 182 of the Limitation Act and is therefore governed by Article 181 of that Act,² though in a later decision the same Court has proceeded on the footing of the applicability of Article 182 to such cases.³ Even among the High Courts which hold that Article 182 applies, there is a difference of opinion as to whether the application is governed by Explanation I to that Article or clause (5) of that Article. According to the High Courts of Calcutta,⁴ Lahore⁵ and Patna,⁶ where security is given after the passing of the decree, the decree cannot be said to have been "jointly passed" against the judgment-debtor and the surety within the meaning of Explanation 1 to Article 182 and that an application for execution filed against the judgment-debtor alone or the surety alone does not save limitation against the other. The same view has been expressed by the High Courts of Bombay⁷ and Rangoon⁸ even when the security is given in the suit *before* the passing of the decree. The High Court of Allahabad, while agreeing that the decree passed in such cases is not a joint decree, nevertheless holds that an application against the one will save limitation against the other under clause (5) of Article 182.⁹ The Chief Court of Oudh has also held the same view in the undermentioned case.¹⁰

Where an appeal is preferred against a decree for the performance of which security has been given, limitation for an application to execute the decree against the surety under this Section is three years from the date of the *appellate* decree under clause (2) of Article 182 of the Limitation Act.¹¹

As to whether a decree-holder who has allowed his remedy against the judgment-debtor to become time-barred is entitled to proceed against the surety, see Note 9 above.

14. Notice to surety. — Notice to the surety is a condition precedent to the validity of the proceedings against him under this Section.¹ The surety may, however,

5. ('20) AIR 1920 Mad 75 (77) : 43 Mad 325.

6. ('33) AIR 1933 All 382 (383, 384) : 55 All 548.

(Application by surety for cancellation of surety bond—Order passed thereon is not open to appeal by decree-holder.)

('31) AIR 1931 Lah 503 (503). (Do.)

See also cases cited in foot-notes 6 and 7 in Note 11, *supra*.

[See ('16) AIR 1916 Bom 55 (56) : 41 Bom 402. (Revision lies if S. 115 applicable.)]

[But see ('25) AIR 1925 All 344 (345).]

7. ('26) AIR 1926 Lah 544 (544).

Note 13

1. See cases cited in foot-notes 4 to 9, *infra*.

('37) AIR 1937 Cal 452 (454).

2. ('33) AIR 1933 Oudh 209 (212, 213) : 8 Luck 427.

3. ('37) AIR 1937 Oudh 351 (353) : 13 Luck 353.

4. ('26) AIR 1926 Cal 267 (269).

5. ('22) AIR 1922 Lah 203 (209).

[See ('35) AIR 1935 Lah 174 (175). (In this case it seems to have been assumed that Art. 181 will apply to such cases.)]

6. ('28) AIR 1928 Rang 282 (283) : 6 Rang 334.

('29) AIR 1929 Pat 597 (601).

7. ('07) 31 Bom 50 (54).

('93) 23 Bom 478 (483).

8. ('28) AIR 1928 Rang 282 (283) : 6 Rang 334.

9. ('21) AIR 1921 All 291 (293) : 43 All 152.

('22) AIR 1922 All 481 (483) : 44 All 743.

10. ('37) AIR 1937 Oudh 351 (353) : 13 Luck 353.

11. ('20) AIR 1920 Bom 331 (331) : 44 Bom 34.

Note 14

1. ('78) 3 Cal 318 (319).

wave the notice, in which case it need not be given.² The notice need not be "in writing"³ as was necessary under the old Code. Nor need it necessarily be given by the Court.⁴ It may be given by the decree-holder.⁵ It may also be given by the Court to which the decree is sent for execution.⁶ It has been held that only one notice is required by this Section and where such notice has been given, a fresh notice is not necessary each time an application for execution is made against the surety.⁷

The mere *arrest* of the surety does not constitute the execution of the decree but *detention in prison* does constitute it. (See O. 21 R. 30.) Where notice is given to the surety at the same time as the order for arrest, *but before the order for imprisonment* (which is really the order for execution) the notice is valid.⁸

146. [New.] Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

[1882, *cf.* S. 582A. See Order 22.]

Synopsis

1. Legislative changes.
2. Scope and object of the Section.
3. "Save as otherwise provided."
4. Application for execution by or against representatives.
5. Proceeding or application.
6. Appeal. See Note 5.
7. Application to set aside *ex parte* decree.
8. "Claiming under," meaning of.
9. Legal representative need not be brought on the record in order to maintain an application under this Section.

('16) AIR 1916 Mad 1078 (1078, 1079).
 ('81) AIR 1931 Mad 828 (829). (Court cannot order execution against surety directly on failure to produce judgment-debtor after a notice to produce. A further notice to show cause against execution is necessary.)
 ('31) AIR 1931 Oudh 311 (311). (Pending order directing the sapurdar to deliver property in his custody on a certain date attachment of his property without notice is illegal.)
 ('23) AIR 1923 Rang 26 (26) : 4 Upp Bur Rul 99.
 ('28) AIR 1928 Rang 249 (251) : 6 Rang 474.
 ('25) AIR 1925 Rang 135 (137) : 2 Rang 567.
 ('29) AIR 1929 Lah 205 (206).
 ('25) AIR 1925 Lah 170 (171).
 ('36) 40 Cal W N 465 (467). (Service of notice—Proof—Record of service and of appearance of party in order sheet of Court is sufficient.)
 ('38) AIR 1938 Lah 593 (593) : I L R (1938) Lah 624. (It is immaterial however whether such notice is given by the Court which passed the decree or the Court to which it is sent for exe-

cution.)
 ('35) AIR 1935 Lah 145 (146).
 2. ('16) 19 Mad L Tim (Jour) 81 (82).
 ('37) AIR 1937 Lah 772 (777). (Objection of want of notice not raised in executing Court—Objection deemed to be waived.)
 3. ('37) AIR 1937 Lah 772 (776). (All that is necessary under the law is that before the attachment actually takes place, the surety should have notice of the order directing attachment, the object being that he may be able to raise objections, if any, to the validity of the order.)
 4. ('05) 29 Bom 29 (33).
 5. ('05) 29 Bom 29 (34).
 6. ('05) 29 Bom 29 (34).
 [See ('38) AIR 1938 Lah 593 (593) : I L R (1938) Lah 624. (It is immaterial whether notice is given by the Court which passed the decree or the Court to which it is sent for execution : AIR 1929 Lah 205 and 29 Bom 29, Relied on.)]
 7. ('36) 40 Cal W N 465 (466).
 8. ('27) AIR 1927 Lah 131 (132).

3. *A* files a suit for partition against *B*, *C* and *D*, and pending the suit mortgages his share to *X*. *A* thereafter dies leaving his widow. *X* applies to be impleaded as co-plaintiff or supplemental defendant. The application is not maintainable. The reason is that O. 22 R. 10 which governs such cases is not applicable inasmuch as there is no devolution or assignment absolutely of the plaintiff's interest on *X*, but only a derivative interest in the subject-matter. Section 146 cannot also be applied because, there is a specific provision governing such cases and a party cannot be allowed to avoid the conditions of such provision by purporting to proceed under the general provision.³

Similarly, O. 21 R. 16 precludes any one who is not a decree-holder or transferee of the decree by assignment in writing or by operation of law from applying to execute the decree. (See Note 4.)

See also the undermentioned decision.⁴

4. Application for execution by or against representatives. — Order 21 Rule 16 makes it clear that besides the decree-holder any person to whom the decree has been transferred by assignment in writing or by operation of law, may execute the decree. Section 146 cannot be read as extending the scope of O. 21 R. 16 as the former is expressly made subject to the other provisions of the Code. Hence, a transferee of property which is the subject-matter of a suit¹ or which is covered by a decree² is not entitled to apply for the execution of a decree in favour of the transferor, although he may be a person "claiming under" the decree-holder within the meaning of this Section.³ Further, such a transferee is not a transferee of the decree within the meaning of O. 21 R. 16.⁴

The expression "transferee" in Order 21 Rule 16 is however not confined to a transferee of the whole decree, but includes a transferee of a portion of the decree and hence such a person can apply to execute the decree.⁵

A decree may be executed against the property in the hands of a transferee thereof pending the suit.⁶

Where a decree-holder dies during the pendency of an execution application, his legal representatives may be substituted in the execution application and be allowed to continue the execution proceedings without a fresh application for execution.⁷ The same principle applies where the execution has to proceed against the legal representatives of a judgment-debtor who dies during the pendency of an execution application.⁸ It has also been held that an application by the legal representative of the decree-holder under O. 21 R. 16, in a pending execution application, is only a continuation of prior proceedings and not a fresh application for the purposes of Section 48 of the Code.⁹ (For fuller discussion, see O. 22 R. 12 Note 1.)

3. ('34) AIR 1934 Mad 485 (489).

4. ('35) AIR 1935 Cal 738 (739). (S. 73 permits rateable distribution only when decrees are against the same judgment-debtor. S. 146 cannot enlarge its scope as it is expressly made subject to the other provisions of the Code. By reason of S. 146 the words 'passed against the same judgment-debtor' in S. 73 cannot be read as 'passed against the same judgment-debtor or the legal representative of the same judgment-debtor'.)

Note 4

1. ('12) 17 Ind Cas 512 (513) (All).

('22) AIR 1922 Pat 563 (564).

2. ('27) AIR 1927 Mad 240 (241).

('08) 30 All 28 (30).

('24) AIR 1924 Bom 426 (427, 428). (30 All 28, Followed.)

('22) AIR 1922 All 98 (99). (Decision to contrary in AIR 1924 Mad 709 is opposed to authority. Moreover the judgment does not refer to O. 21 R. 16 or any of the rulings bearing upon it.)

3. ('19) AIR 1919 Mad 755 (756) : 41 Mad 510.

4. ('24) AIR 1924 Cal 661 (665) : 51 Cal 703.

5. ('21) AIR 1921 Mad 599 (601, 603, 605) : 44 Mad 919.

('28) AIR 1928 Lah 70 (71).

6. ('21) AIR 1921 Mad 126 (132).

7. ('32) AIR 1932 Mad 73 (80, 82, 83) : 55 Mad 352 (FB). (Dissenting from AIR 1927 Mad 184.)

('31) AIR 1931 Bom 423 (423).

('30) AIR 1930 Sind 283 (284) : 24 Sind L R 195.

('37) AIR 1937 Pesh 18 (19). (Transferee of decree or his legal representative can continue execution.)

8. ('31) AIR 1931 Mad 303 (308).

('28) AIR 1928 P C 162 (164) : 55 Ind App 227-3 Luck 314 (PC).

('09) 4 Ind Cas 839 (841) : 34 Bom 142.

('20) AIR 1920 All 171 (172) : 42 All 570.

[See also ('29) AIR 1929 Mad 275 (280).]

9. ('27) AIR 1927 All 165 (167) : 49 All 509.

('24) AIR 1924 Pat 576 (578) : 3 Pat 596.

5. Proceeding or application. — An appeal is a “proceeding” contemplated by the Section. Hence a person claiming under a party to the suit may prefer an appeal from the decree in the suit although he was not himself a party to the suit.¹

Applications under O. 21 R. 2,² or under O. 21 R. 94,³ or under O. 21 R. 95 and 98,⁴ or under O. 34 R. 5,⁵ are all examples of applications contemplated by the Section.

As to when a person can be said to “claim under” another, see Note 8 below.

6. Appeal. — See Note 5 above.

7. Application to set aside *ex parte* decree. — As has been observed in Note 2 above, there was a conflict of decisions under the old Code as to whether the legal representative of a defendant against whom an *ex parte* decree had been passed, could apply to set it aside. The present Section now makes it clear that such an application is maintainable.¹

8. “Claiming under,” meaning of. — A person “claiming under” a party to a litigation is one who —

- (1) has succeeded to the position of the latter in the litigation,¹ or
- (2) has acquired from him, subsequently to the commencement of the litigation, an interest in its subject-matter.² In this case he can be said to claim under the party *only in respect of the rights and interests* in property which he has so acquired.³ Further, the person claiming under the original party must be one who by a title derived from or under the party has *himself the right to take the proceeding or make the application* and not merely one who has a derivative interest in the property (like that of a mortgagee subsequent to suit) which may, in some manner, be affected by the result of the proceeding.⁴

Illustrations

(1) An *ex parte* decree is passed against A, a defendant in a suit. Subsequently, A dies. B, his legal representative, may apply to set aside the *ex parte* decree.⁵

(2) A, who has obtained a preliminary decree in a mortgage suit assigns the decree to B. B, as a person claiming under A, may apply for a final decree.⁶

(3) A, an auction-purchaser, transfers the property purchased by him to B. B may apply to the Court under O. 21 R. 95 for possession of the property transferred.⁷

[In the above illustrations, B has *succeeded to A's position* in the litigation.

The following illustration will show that this is not always necessary. It is

(‘21) AIR 1921 Pat 180 (182) : 6 Pat L Jour 358.

Note 5

1. (‘18) AIR 1918 Mad 409 (410). (Appeal by plaintiff's mortgagee.)

(‘19) AIR 1919 Mad 755 (756) : 48 Mad 510. (Transferee *pendente lite* of the suit property.)

(‘17) AIR 1917 Oudh 176 (177). (Appeal may be filed by assignee of subject-matter.)

2. (‘12) 17 Ind Cas 617 (618) (Mad). (Assignee of a decree may apply to record satisfaction of it without applying for execution or having the assignment recognised.)

3. (‘36) AIR 1936 Bom 137 (138). (Application under O. 21 R. 94 may be made by assignee from auction-purchaser.)

4. (‘18) AIR 1918 All 405 (405) : 40 All 216. (Application under O. 21 R. 95 may be made by transferee from auction-purchaser.)

(‘11) 34 Mad 450 (452). (Application under R. 98 may be filed against judgment-debtor's representative.)

(‘20) AIR 1920 Mad 943 (944). (Application under O. 21 R. 98 may be made against judgment-debtor's representative.)

5. (‘27) AIR 1927 Mad 560 (561). (Assignee of preliminary decree may apply for final decree.)

Note 7

1. (‘15) AIR 1915 Mad 1204 (1205) : 38 Mad 422 (444.)

(‘23) AIR 1923 All 30 (30).

(‘25) AIR 1925 Oudh 370 (371) : 27 Oudh Cas 299.

Note 8

1. (‘12) 17 Ind Cas 512 (513) (All).

2. (‘37) AIR 1937 Oudh 488 (490) : 13 Luck 554.

3. (‘10) 33 Mad 459 (462).

4. (‘34) AIR 1934 Mad 485 (490).

5. (‘15) AIR 1915 Mad 1204 (1205) : 38 Mad 442.

(‘23) AIR 1923 All 30 (30).

(‘25) AIR 1925 Oudh 370 (371) : 27 Oudh Cas 299.

6. (‘27) AIR 1927 Mad 560 (561).

7. (‘18) AIR 1918 All 405 (405) : 40 All 216.

enough if *B* has acquired from *A* an interest in the property concerned in the litigation, *subsequently to the commencement thereof*]:

(4) *A* sues *B* to establish his right to certain property. While the suit is pending, *B* mortgages the property to *C*. The suit is decreed against *B*. *B* does not appeal from the decree. *C*, as a person claiming under *B*, may appeal from the decree.⁸ If, in the above case, *B* had mortgaged the property to *C*, prior to the institution of the suit, *C* would not be a person claiming under *B*. This is shown by the next illustration.

(5) *A*, a mortgagee of immovable property, sues *B*, the mortgagor, for the enforcement of the mortgage. Prior to the suit, *B* has granted to *C*, a puisne mortgage of the property. *C* is not made a party to the suit. An *ex parte* decree is passed against *B* in the suit. *C* cannot apply to set aside the *ex parte* decree as a person claiming under *B*, because *C*'s interest was not acquired *subsequently to the institution of the suit* but was acquired *before*.⁹

(6) *A*, a member of a Hindu joint family, obtains a preliminary decree for partition of his share of the family property. Then he transfers his rights in the family property to *B*. *B* takes no steps to be impleaded in the suit, but after the final decree, applies to execute it as a person claiming under *A*. *B* is not entitled to do so.¹⁰ The reason is that *B* claimed under *A* only in respect of the preliminary decree which gave *A* merely an unspecified share in the family property. The right to secure separate possession granted by the final decree did not vest in *A* himself on the date of the transfer and could not pass to *B* under the transfer. *B* cannot therefore be said to "claim under" *A* in respect of that right which alone would enable him to execute the decree.

(7) *A* sues *B* and attaches before judgment, a debt due to *B* from *C*. The suit is decreed in *A*'s favour. Upon this, under O. 38 R. 11, *A*'s attachment before judgment ripens into attachment in execution. Then *B* sues *C* and obtains a decree on the debt. *A* does not attach this decree but applies for its execution as a person claiming under *B*. It was held by Venkatasubba Rao, J., that *A* was entitled to do so and by Reilly, J., that he was not.¹¹ It is respectfully submitted that the view of Reilly, J., is correct. *A* was neither the legal representative of *B* nor the assignee of *B*'s decree. Hence, he had not succeeded to *B*'s position as a decree-holder. Nor can he be said to have acquired any interest in the subject-matter of the suit inasmuch as his attachment cannot be said to create any interest in it; and even if it does, it cannot be said to have been acquired *subsequently to the institution of B's suit*, because the attachment was complete before *B* filed his suit. Under O. 21 R. 53 (3), a decree-holder, who attaches another decree of the nature specified in the said Rule, becomes a representative of the holder of the latter decree for the purposes of execution.¹²

(8) Under O. 21 R. 53, where *A* attaches in execution of his decree against *B*, a decree obtained by *B* against *C*, *A* becomes the representative of *B*. But *A* becomes the representative of *B* only for the limited purpose of executing the decree against *C*. *B* has no right to adjust the attached decree and release *C* from his liability under the decree.¹³

It has been held that a Hindu co-parcener is not a person 'claiming under' the manager of the joint family against whom a suit is filed.¹⁴

8. ('19) AIR 1919 Mad 755 (756): 41 Mad 510. ("Claiming under" is wide enough to cover the case of devolution of interest mentioned in O. 22 R. 10.)

('24) AIR 1924 Mad 709 (710). (Do.)

See also the following cases decided on the same principles:

('17) AIR 1917 Oudh 176 (177). (Assignee of the subject-matter of the litigation between the date of decision of the first Court and the filing of appeal ought to be allowed to join in the appeal under this Section.)

('21) AIR 1921 Mad 126 (132). (Per Seshagiri Aiyer J.—Execution proceedings can be continued against the purchaser *pendente lite*.)

('29) AIR 1929 Oudh 353 (354). (Decree for arrears of rent may be executed against transferee of holding.)

('24) AIR 1924 Mad 470 (471). (Private purchaser from judgment-debtor after the property has been sold in auction claims under judgment-debtor.)

('20) AIR 1920 Mad 943 (944). (Auction-purchaser under simple money decree of property against which mortgage decree has been passed is representative of the judgment-debtor for purpose of O. 21 R. 98 against whom proceedings can be taken under S. 146.)

('11) 34 Mad 450 (452). (Application to remove obstruction caused to delivery of possession to decree-holder purchaser by a purchaser from the judgment-debtor of the attached property after attachment must be disposed of under O. 21 R. 98.)

9. ('26) AIR 1926 Cal 1015 (1015).

[See also ('37) AIR 1937 Oudh 488 (490): 13 Luck 554.]

10. ('26) AIR 1926 Mad 1129 (1129).

11. ('26) AIR 1926 Mad 371 (372, 376).

12. ('30) AIR 1930 All 659 (661).

13. ('37) AIR 1937 Cal 468 (472, 473).

14. ('37) AIR 1937 Sind 94 (95): 30 Sind LR 467.

9. Legal representative need not be brought on the record in order to maintain an application under this Section. — To entitle a person to take a proceeding under Section 146 as a person claiming under a party to a litigation, it is not necessary that he should have been brought on the record as such.¹ Again, where *A*, *B*, *C* and *D* are entitled as persons claiming under *E* to make an application, and *A* alone presents the application within limitation, *B*, *C* and *D* being brought on the record subsequently, the presentation of the application by *A* alone is not invalid in view of this Section though it may be defective and the Court may not proceed with it.²

147. [New.] In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

[R. S. C., Order 16 Rule 21. See Order 32.]

Synopsis

1. Legislative changes.
2. Scope of the Section.
3. "Person under disability."
4. "As to any proceeding."
5. Leave must be express.

1. **Legislative changes.** — This Section is new. It is based on O. 16 R. 21 of the Rules of the Supreme Court. It has not made any substantive alteration in the law.

2. **Scope of the Section.** — Order 32 Rule 7 provides that a minor's guardian for suit or next friend *shall not enter* into any compromise or agreement with reference to the suit without the leave of the Court expressly recorded in the proceedings. The present Section enacts the *substantive rule* that a minor *shall be bound* by a compromise entered into by his guardian in the prescribed manner.

3. **"Person under disability."** — The Section applies to consent or agreement given or made on behalf of a person who is deemed incapable of prosecuting or defending a suit personally, such as a minor or a lunatic. See Order 32 and compare also Contract Act, Section 11.

4. **"As to any proceeding."** — The Section does not apply to an agreement *merely relating to the conduct of a suit*, e. g., an agreement that an issue in a suit (not the suit itself) should be determined by the oath of the defendant.¹ See the Indian Oaths Act, Section 11. Such an agreement entered into by a guardian or a next friend

Note 9

1. ('15) AIR 1915 Mad 1204 (1205): 38 Mad 442.
(25) AIR 1925 Oudh 370 (371): 27 Oudh Cas 299.
2. ('27) AIR 1927 Bom 123 (124) : 51 Bom 143.

Section 147.— Note 4

1. ('27) AIR 1927 All 584 (584) : 49 All 842.
(89) 12 Mad 483 (485).
(1900) 27 Cal 229 (231).

prescribed or allowed by the Code, it may be extended by the Court from time to time.¹ There are, however, two important exceptions to this general rule —

(1) Where the Court *ceases to have jurisdiction* over the matter, after the order granting the period is passed. Thus, where a Court orders a plaint to be returned under O. 7 R. 10 for presentation to the proper Court and in that order a period is fixed within which such presentation is to be made, the period cannot be extended, as, after the order for return, the Court has no *jurisdiction* over the matter.² Similarly, where the order fixing time finally disposes of the matter and the Court has no longer seisin of the matter, the time fixed cannot be enlarged.³ Thus, where an order provides that a suit dismissed for default should be restored to the file on condition that the plaintiff pays the costs of the opposite party on or before a particular date and directs that in case of default, the application for restoration is to stand dismissed, the time cannot be enlarged under this Section.⁴

(2) Where a period is fixed or granted by a *decree*.⁵

('10) 6 Ind Cas 723 (723) : 1910 Pun Re No. 44.

Note 2

1. ('14) AIR 1914 All 55 (56) : 36 All 77. (Order for setting aside ex parte decree on payment of a sum within a period fixed.)

('18) AIR 1918 Mad 638 (640) (Do).

('24) AIR 1924 Lah 222 (222) (Do).

('33) AIR 1933 All 261 (262). (Order remanding a suit for retrial provided a certain act is done within a fixed time—The time is not fixed by a decree as the order of remand is not a decree and hence it can be extended.)

('33) AIR 1933 All 262 (264) : 55 All 326 (F B). (Affirming A I R 1933 All 261 on L. P. Appeal.)

('32) AIR 1932 Lah 235 (236). (Order of remand directing payment of additional court-fee within time—Time can be extended.)

('34) AIR 1934 Nag 109 (111) : 30 Nag L R 258. (Application to extend before decree—Court must consider it—Omission to consider through mistake—Mistake must be rectified though decree has to be re-opened—Party should not suffer for Court's negligence.)

('26) AIR 1926 Nag 44 (48) : 21 Nag L R 111. (Order for restoration of suit on payment of costs within time.)

('26) AIR 1926 Pat 409 (411) : 5 Pat 306. (Order for withdrawal of suit with liberty—Condition as to payment of costs within certain time.)

('05) 8 Oudh Cas 241 (244). (Not a decree but an order for production of letters of administration.)

('36) AIR 1936 Pat 310 (311). (Court has under O. 7 R. 11 and S. 148 full discretion to extend time for payment of deficit court-fee.)

('38) AIR 1938 Mad 542 (543) : (Power to grant time for payment of deficit court-fee is discretionary.)

('36) AIR 1936 Cal 221 (223). (In view of S. 148 time granted to pay deficit court-fee can be enlarged from time to time.)

('36) AIR 1936 Oudh 56 (58) : 11 Luck 567. (Lease for running mill owned by company in liquidation — Money to be deposited by lessee within fixed period not deposited — Court can extend time.)

('36) AIR 1936 All 371 (372). (Time fixed for depositing decree amount as condition of applying for setting aside ex parte decree was held not to be an essential part of the order and it was held that it could be extended.)

See also Note 5 below.

[See ('32) AIR 1932 Bom 615 (617) : 56 Bom 281.. (The High Court of Bombay has framed R. 288, similar to this Section.)]

2. ('26) AIR 1926 Mad 133 (134).

3. (36) AIR 1936 Oudh 125 (127, 128) : 11 Luck 241. (Where an application for restoration of an appeal which was dismissed for non-appearance of the appellant is allowed by the Court on condition that the appellant pays a certain amount to the opposite party by a certain date and that otherwise it should stand dismissed, and the appellant fails to pay that amount on the due date, the Court has no power to restore the application or to set aside the order of dismissal.)

('39) AIR 1939 Cal 581 (581, 582) : 1 L R (1939) 1 Cal 468. (Application to set aside sale granted subject to applicant's depositing decretal amount within fixed period—Application to stand rejected on default—On applicant's failure to comply with order time cannot be extended.)

('39) AIR 1939 Cal 309 (309). (Application for setting aside sale granted subject to applicant's depositing amount within certain period—Application to stand dismissed on default—Upon applicant's failure to comply with order, Court has no jurisdiction to extend time for making deposit.)

('36) AIR 1936 All 477 (478, 479).

[See also ('35) 61 Cal L Jour 512 (514). (Appellate Court allowing amendment of plaint on payment of costs and providing that in case of default, appeal should stand dismissed — Payment of portion of costs only as per order of lower Court—Extension of time cannot be granted in absence of evidence to show that plaintiff was misled by order of trial Court.)]

4. (36) AIR 1936 All 477 (478).

5. See the next paragraph in the Notes.

The second exception above noted is based upon another general rule which is enacted in O. 20 R. 3, that when once a decree has been signed it shall not afterwards be altered or added to save as provided by Section 152 or on review. Section 148 cannot be allowed to operate so as to nullify this rule and it, therefore, follows that where a period is fixed or granted by a decree it cannot be extended by the Court,⁶ though the decree itself may be varied or reversed by the Appellate Court under O. 41 R. 32 by granting a different period to that fixed by the lower Court.⁷ There has been, however, a conflict of decisions on the point due to the general principle abovementioned not being always kept in view. It was held by the Patna High Court in the undermentioned case⁸ that where time is fixed for payment in a pre-emption decree, it could be

('35) AIR 1935 Rang 341 (343). (The Court has, therefore, no power to extend the time for payment of an instalment of decretal amount.)

6. ('15) AIR 1915 Oudh 197 (193). (Pre-emption decree.)

('14) AIR 1914 Oudh 383 (388): 17 Oudh Cas 377. (Do.)

('11) 8 Ind Cas 812 (813) (Lah). (Do.)

('34) AIR 1934 Oudh 17 (18): 9 Luck 215. (Do.)

('34) AIR 1934 Cal 21 (22).

('34) AIR 1934 Oudh 44 (45): 9 Luck 387. (Mortgage suit—Compromise decree providing for payment by instalments—Default in payment—Time cannot be extended.)

('13) 18 Ind Cas 600 (601) (Lah).

('22) AIR 1922 Oudh 131 (132): 25 Oudh Cas 74.

('18) AIR 1918 All 13 (14): 41 All 47.

('21) AIR 1921 Lah 6 (7) (FB). (18 Ind Cas 86, Dissented from.)

('12) 17 Ind Cas 912 (913) (All). (Payment of money into Court within a fixed time in pursuance of a decree is not an act prescribed or allowed by the Code within the meaning of S. 148.)

('13) 19 Ind Cas 347 (347): 16 Oudh Cas 5. (Pre-emption decree—S. 148 relates to proceedings antecedent to the passing of final decree.)

('13) 21 Ind Cas 585 (586): 35 All 582. (O. 20 R. 14 merely prescribes the form of the decree.)

('23) AIR 1923 Nag 210 (211): 19 Nag L R 8. (Pre-emption decree.)

('28) AIR 1928 Oudh 492 (493). (Only applies to proceedings antecedent to final decree.)

('24) AIR 1924 Lah 359 (359). (Payment under pre-emption decree is not an act prescribed or allowed by the Code—Follows 35 All 582.)

('23) AIR 1923 Lah 372 (373). (Pre-emption decree.)

('09) 3 Ind Cas 497 (498) (All) (Do.)

('20) AIR 1920 Oudh 25 (29): 23 Oudh Cas 254 (Do.)

('96) 18 All 223 (227) (Do.)

('23) AIR 1923 Lah 162 (163) (Do.)

('18) AIR 1918 All 98 (99): 40 All 579. (Direction in decree to pay court-fee within a particular period—Dissents from A I R 1917 All 164.)

('26) AIR 1926 Mad 1059 (1060). (Time for succession certificate granted in decree.)

('23) AIR 1923 Cal 612 (614). (Time for additional court-fee.)

('31) AIR 1931 All 318 (319).

('28) AIR 1928 Mad 154 (156, 157). (Test is to see if the proceedings in which time was originally granted is still pending or has been disposed of

—Following A I R 1918 Mad 638.)

('24) AIR 1924 Pat 663 (664): 3 Pat 337. (In the special circumstances of the case the Court was held to have power to re-instate the appeal after it had been rejected for failure to pay the required court-fee within the time allowed.)

('20) AIR 1920 All 173 (174): 42 All 639. (Suit for possession for setting aside transfer—Decree on condition of payment of certain sum.)

('15) AIR 1915 Oudh 226 (227): 18 Oudh Cas 58. (Decree in suit for possession of mortgaged property by puisne mortgagees against prior mortgagee.)

('24) AIR 1924 Oudh 330 (331). (Suit for cancellation of instrument—Conditional decree.)

('15) AIR 1915 Mad 69 (70). (Decree directing delivery of property to plaintiff on paying a certain sum within a certain time.)

('32) AIR 1932 Mad 223 (223, 224).

('12) 15 Ind Cas 941 (942): 1912 Pun Re No. 99. (Suit for cancellation of lease—Conditional decree.)

('18) AIR 1918 Nag 66 (66): 15 Nag L R 39. (Decree for rent providing that on failure to pay within a certain time defendant should be ejected.)

('24) AIR 1924 Oudh 179 (179). (The general provisions of S. 148, O. P. C., relate only to proceedings antecedent to the passing of a decree.)

('14) AIR 1914 Mad 85 (86).

('10) 7 Ind Cas 96 (98) (All).

('10) 5 Ind Cas 443 (444): 13 Oudh Cas 38.

('33) AIR 1933 All 497 (499, 501). (Judgment signed under O. 20 R. 3 directing plaintiff to pay deficiency in court-fee within certain time and adding that in default decree would be nullity—Court has no jurisdiction to extend period so fixed.)

[See ('33) AIR 1933 Cal 20 (21). (Appellate decree allowing amendment of plaint on condition of paying additional court-fee and costs of defendant—Time extended for both—Order is correct as to the former though it is not so as to the latter.)]

7. ('28) AIR 1928 Oudh 32 (33): 2 Luck 425.

('10) 6 Ind Cas 275 (276): 37 Cal 548 (550).

('90) 13 Mad 524 (526).

('21) AIR 1921 Lah 6 (7) (FB).

8. ('16) AIR 1916 Pat 268 (269): 1 Pat L Jour 92. (It was also held by the Lahore High Court in earlier decisions (e. g., 8 Ind Cas 86 (Lah)) that a Court could extend the period fixed in a

extended by the Court. The decision was based simply on S. 148 without any reference to O. 20 R. 3. The correctness of the decision was, however, doubted in a later case⁹ of the same High Court. The High Courts of Madras,¹⁰ Calcutta¹¹ and Rangoon¹² have held that where a decree for *specific performance of a contract* is passed on condition of a party paying a certain sum by a certain date, the Court could extend the time. The decisions rest their view on the provisions of Section 35(c) of the Specific Relief Act, 1877, and on the view that a decree for specific performance of a contract on certain conditions is in the nature of a preliminary decree, the original Court keeping control over the action and having full powers to make any just and necessary orders therein including extension of the time fixed by the decree. The Patna High Court¹³ and the Oudh Chief Court¹⁴ hold that the time fixed, even in a decree for specific performance, cannot be extended by the Court under Section 148.

The rule that time granted by a *decree* cannot be extended by the Court has also got an exception and that is furnished by Order 34 Rules 2, 4 and 7 (as amended by Act XXI of 1929) of the Code. Under those provisions the time fixed by a *preliminary decree for sale, redemption or foreclosure* may, at any time, *before the passing of the final decree*, be extended by the Court from time to time. For another exception to the rule, see Note 3 below.

Where a plaintiff in whose favour a conditional decree is passed, neither fulfils the condition within the time allowed nor applies for extension of time, he cannot execute the decree.¹⁵

3. Extension of time fixed by consent decree. — Another exception to the rule that time fixed by a *decree* cannot be extended by the Court under Section 148 is furnished by *consent decrees*. It has been held in the undermentioned cases¹ that a Court can extend the time fixed in a consent decree for the doing of an act directed thereby, where time is not of the essence of the contract of compromise. The reason is that a consent decree cannot have greater validity than the compromise on which it is based, and hence, the Court can, in the exercise of its equitable jurisdiction, grant such *relief against forfeiture* as it might have granted if there had been no consent decree and a suit had been instituted to enforce the compromise. The Allahabad,² Lahore³ and Patna⁴ High Courts and the Oudh Chief Court⁵ have held that the general rule holds good even in the case of consent decrees and that, therefore, the time fixed by the decree could not be extended.

pre-emption decree for the payment of purchase money. But this view has not been followed in the later decisions. See cases cited in foot-note 3 above.)

9. ('30) AIR 1930 Pat 279 (280).

10. ('23) AIR 1923 Mad 284 (285) : 46 Mad 148. (Dissenting from AIR 1917 Mad 838.)

('26) AIR 1926 Mad 144 (145).

11. ('33) AIR 1933 Cal 580 (580).

12. ('27) AIR 1927 Rang 311 (312) : 5 Rang 615.

('16) AIR 1916 Low Bur 74 (74).

13. ('30) AIR 1930 Pat 279 (280).

14. ('23) AIR 1923 Oudh 16 (17).

15. ('24) AIR 1924 Rang 375 (376).

Note 3

1. ('21) AIR 1921 Cal 356 (358, 359).

('29) AIR 1929 Nag 164 (168, 169) : 25 Nag L R 110. (Distinguishing AIR 1926 Nag 280 which was a case of a mortgage decree fixing a period by consent and in which there was no question of equities or forfeiture.)

('19) AIR 1919 Cal 68 (69).

('24) AIR 1924 Mad 796 (796). (Extension cannot be granted where time is of the essence of the contract.)

('23) AIR 1923 Nag 88 (90).

2. ('29) AIR 1929 All 666 (666).

3. ('12) 15 Ind Cas 941 (942) : 1912 Pun Re No. 99.

4. ('30) AIR 1930 Pat 308 (310) : 9 Pat 332.

('33) AIR 1933 Pat 563 (564) : 13 Pat 1.

('33) AIR 1933 Pat 677 (678). (Compromise decree directing payment by instalments on fixed dates — Court has no power to grant extension of time for payment of instalments.)

[See also ('37) AIR 1937 Pat 542 (545) : 16 Pat 395. (Where time is of the essence of the contract, it cannot be extended.)]

[But see ('24) AIR 1924 Pat 387 (387) : 2 Pat 906.

('25) AIR 1925 Pat 691 (692).]

5. ('15) AIR 1915 Oudh 197 (198).

('15) AIR 1915 Oudh 226 (227) : 18 Oudh Cas 58.

As to the power of the Court to extend the time fixed for payment of the mortgage money under a compromise decree in a suit to enforce or redeem a mortgage, see Notes to Order 34 Rules 2, 4 and 7.

4. Extension of time fixed by award. — A valid award is final and conclusive as between the parties to it and a Court cannot interfere with any portion of it. Hence, the Court cannot extend the time fixed by an award.¹ It may also be noted that time fixed by an award is not time fixed by a Court and hence Section 148 does not apply to it. (See Note 1 above.)

5. "Act prescribed or allowed by this Code." — The Section applies only where time is fixed for doing an act prescribed or allowed by the Code.¹ Where a period is fixed by the Court to do a particular act under its inherent powers, it is an act allowed by Section 151 of this Code and therefore this Section will apply to such a case.² "Code" includes not only the *body* of the Code but also the Schedules and the Rules made under Section 122 or Section 125 [see Section 2 (18)]. See, for instance, the following provisions :—

- (1) *Section 55 (4)*. — Security for the production of the judgment-debtor within the time fixed by Court.³
- (2) *Section 143*. — Time for payment of postage.
- (3) *Order 6 Rule 18*. — Amendment of pleadings.
- (4) *Order 7 Rule 11 (b)*. — Correction of valuation of suit.
- (5) *Order 7 Rule 11 (c)*. — Supply of deficient stamp paper.⁴
- (6) *Order 8 Rule 9*. — Time for filing written statement or additional written statement.
- (7) *Order 9 Rule 9*.—Restoration of suit (dismissed for default) on applicant paying costs within a given time.
- (8) *Order 9 Rule 13*.—Setting aside *ex parte* decree on applicant paying costs within given time.
- (9) *Order 21 Rule 17*. — Amendment of application for execution.
- (10) *Order 23 Rule 1*. — Allowing suit to be withdrawn with leave to bring fresh suit on plaintiff paying costs within a given time.
- (11) *Order 25 Rule 1*. — Security for costs of suit.
- (12) *Order 41 Rule 3*. — Amendment of memorandum of appeal.
- (13) *Order 41 Rule 10*. — Security for costs of appeal.
- (14) *Order 41 Rule 19*. — Re-admission of appeal dismissed for default, on appellant paying costs within given time.
- (15) *Order 41 Rule 21*. — Re-hearing appeal decided *ex parte*, on respondent paying costs.
- (16) *Order 41 Rule 26*. — Objections to the finding returned by the lower Court on remand.
- (17) *Order 47 Rule 7 (2)*.—Restoration of application for review dismissed for default, on applicant paying costs within given time.

Note 4

1. ('18) AIR 1918 Cal 554 (555).

Note 5

1. ('39) AIR 1939 Cal 30 (31, 32). (Court under S. 148 has no power to extend time fixed for making deposit provided under S. 174 (5), Bengal Tenancy Act.)
2. ('33) AIR 1933 Mad 563 (564). (Order of stay

under inherent powers fixing a time for payment of certain sums of money.)

3. ('25) AIR 1925 Rang 135 (137): 2 Rang 567. [See also ('34) AIR 1934 Lah 424 (425). (Memorandum of appeal insufficiently stamped without any bona fide mistake — No extension of time granted.)]
4. ('09) 32 Mad 305 (311) (FB).

The Section does not apply when time is fixed for doing an act *not prescribed or allowed by the Code*.⁵

But in so far as the provisions of the Code are made applicable to proceedings under any other Act, the Section applies to steps to be taken under such Act. Thus, according to the High Courts of Madras, Lahore and Nagpur, an Insolvency Court can extend the time fixed for applying for discharge, even after the time originally fixed has expired,⁶ though the High Courts of Rangoon and Patna have taken a contrary view.⁷ Further, even without recourse to Section 148 it may be possible to construe a particular Section in such a way as to admit of an extension of the time fixed by the Court. Thus, it was held under the former Code that a Court could extend the time fixed for security for costs of appeal under S. 549 (now O. 41 R. 10),⁸ or for paying deficit court-fee under Section 54 (now O. 7 R. 11).⁹ On similar reasoning, it has been held that a Court can extend the time fixed for payment of deficit court-fee under the Court-fees Act, Section 10 clause (2)¹⁰ or Section 11,¹¹ or for deposit of one-fifth of the purchase-money in a suit for pre-emption under Section 22 (4) of the Punjab Pro-emption Act.¹² Paragraph 8 of Schedule II expressly confers on the Court the power to extend the time fixed for making an award, even after the expiry of the period originally fixed.¹³ Hence, there is no necessity for resort to Section 148 for extension of time in such a case.

See also the undermentioned case.¹⁴

6. Discretion of Court. — The power to enlarge time under this Section is discretionary.¹ The Appellate Court should not interfere with the discretion of a Court under Section 148 except on very strong grounds.² A Court passing orders for extension of time should be taken, on the record as it stands, to have exercised its discretion as

5. ('20) AIR 1920 Pat 111 (112). (Security under S. 17, Provincial Small Cause Courts Act.)

('16) AIR 1916 Mad 224 (227). (Payment of court-fee under S. 11, Court-fees Act.)

('25) AIR 1925 Pat 153 (154). (Remand — Appellant directed to pay costs within a given time as a condition—Payment is not act directed by the Code.)

('24) AIR 1924 All 818 (824) : 46 All 864.

('39) AIR 1939 Cal 30 (32). (Deposit under S. 174 (5) Bengal Tenancy Act.)

[But see ('11) 10 Ind Cas 268 (269) (Cal). (Where it was held that the language of S. 11 itself admitted of an extension of time.)]

6. ('24) AIR 1924 Mad 635 (637, 638). (Waller, J., dissenting.)

('30) AIR 1930 Mad 389 (392) : 53 Mad 288 (FB).

('25) AIR 1925 Lah 416 (416).

('39) AIR 1939 Nag 103 (104) : I L R (1939) Nag 478.

7. ('30) AIR 1930 Rang 166 (172) : 8 Rang 187.

('25) AIR 1925 Pat 355 (356) : 4 Pat 51. (No reference was, however, made to S. 148 of the Code.)

8. ('90) 17 Cal 512 (515) : 17 Ind App 1 (PO).

('90) 17 Cal 1 (3) (PO).

('97) 21 Bom 576 (579).

9. ('04) 31 Cal 75 (78).

('26) AIR 1926 Nag 312 (312).

('85) 7 All 79 (92, 93). (Observations of Mahmood, J.)

(The cases in this foot-note and foot-note (5) above have been cited only as instances of the language

of a Section empowering a Court to extend the time fixed by it. The acts in those cases were however acts prescribed or allowed by the "Code".)

See also cases cited in foot-notes (6) and (7) in Note 1, *supra*.

10. ('97) 19 All 240 (243).

11. ('11) 10 Ind Cas 268 (269) (Cal).

[But see ('16) AIR 1916 Mad 224 (227). (Where it was held that S. 148, C. P. C., did not apply to such a case as the act was not one allowed by the "Code".)]

12. ('23) AIR 1923 Lah 643 (645).

13. ('19) AIR 1919 Pat 93 (98) : 4 Pat L Jour 265.

('15) AIR 1915 Cal 101 (103).

('92) 15 Mad 384 (386).

('11) 12 Ind Cas 13 (14) : 38 Cal 522. (But where an award has been actually made out of time the Court cannot extend the time — This case was doubted in AIR 1915 Cal 101—See also AIR 1919 Pat 93 where it was held that the parties were estopped from raising any objections as to the validity of the award.)

14. ('38) AIR 1938 Oudh 50 (51) : 13 Luck 666. (U. P. Temporary Regulation of Execution Act S. 7—Court can enlarge period fixed by it but not exceeding 30 days.)

Note 6

1. ('38) AIR 1938 Mad 542 (543, 544).

2. ('25) AIR 1925 Pat 299 (302) : 4 Pat 190.

('34) AIR 1934 Mad 82 (84).

prosecution,⁹ or is withdrawn,¹⁰ or summarily dismissed under O. 41 R. 11,¹¹ there is no decree of the Appellate Court in which the lower Court's decree may be said to have merged, and hence the period fixed does not get a fresh start from the decree of the Appellate Court.

Where a decree awarding future *mesne profits* is confirmed in appeal, the three years' period under O. 20 R. 12 runs from the *appellate* decree.¹² The reason is that the term "decree" in O. 20 R. 12 refers to the *executable* decree in a case, and where an appeal is preferred against a decree, the only *executable* decree is that of the Appellate Court, whether it affirms, reverses or modifies the lower Court's decree. See also Note 5 to O. 34 R. 3, *infra*.

10. Court to which application for extension should be made. — Where an appeal has been preferred from a decree, the only Court that can extend the time fixed by it, assuming that the case is one in which time can be extended, is the Appellate Court.¹ *A fortiori* the lower Court has no jurisdiction to extend the time fixed in an appellate decree.² But it has been held by the Rangoon High Court that where an appeal has been dismissed, the trial Court has power to enlarge the time fixed by the order appealed from.³ See also the undermentioned case.⁴

11. Appeal. — No appeal lies from an order under this Section as it is neither a decree nor an appealable order under Section 104.¹

After a *final* decree, the Court cannot extend the time fixed by it under S. 148. Hence, if the Court does extend the time it should be deemed to be acting not under Section 148 but under Section 47, and its order is therefore appealable as a *decree*.²

12. Revision. — An order under this Section is not appealable but is open to revision provided the conditions of Section 115 are satisfied.¹ See Note 11 above. But

9. ('96) 18 All 101 (103) (FB). (Order of dismissal under O. 41 R. 10 for non-payment of security for costs.)

('17) AIR 1917 All 892 (893) : 39 All 893. (Dismissal of appeal for default.)

('17) AIR 1917 Cal 728 (730) : 44 Cal 954. (Dismissal for default.)

('14) AIR 1914 P O 65 (66) : 36 All 284 : 41 Ind App 104 (P O). (Dismissal of appeal for non-prosecution.)

('14) AIR 1914 P O 66 (67) : 36 All 350 (P O). (Do.)

10. ('91) 15 Bom 370 (374).

('92) 16 Bom 248 (248).

11. ('24) AIR 1924 Bom 98 (99) : 47 Bom 956. (But some cases have held that dismissal of appeal under O. 41 R. 11 (1) is a decree: see for instance AIR 1926 Cal 368 and the cases cited therein.)

('97) 21 Bom 548 (551). (Do.)

12. ('01) 23 All 152 (158) : 27 Ind App 209 (PO).

Note 10

1. ('10) 37 Cal 548 (550).

2. ('11) 12 Ind Cas 139 (139) (Mad).

('33) AIR 1933 Cal 83 (85). (Remand order of Appellate Court fixing time for doing an act — Lower Court cannot extend time.)

3. ('35) AIR 1935 Rang 500 (501).

4. ('38) AIR 1938 All 497 (499). (Subordinate Judge passing preliminary decree and directing

decree-holder to pay deficiency in court-fee within certain time adding that in default decree would be nullity—Munsif merely in charge of routine duties of Subordinate Judge has no jurisdiction to extend time so fixed for payment of court-fee.)

Note 11

1. ('29) AIR 1929 All 666 (667).

('20) AIR 1920 Pat 281 (282). (Order granting time under S. 148 cannot be questioned in appeal.)

('16) AIR 1916 Mad 694 (695) : 39 Mad 876.

('13) 21 Ind Cas 585 (586) : 35 All 582. (Reversing 17 Ind Cas 912 and distinguishing 14 All 520.)

('24) AIR 1924 Oudh 330 (331). (Order refusing to extend time not appealable.)

('23) AIR 1923 Lah 162 (163).

('35) AIR 1935 Rang 500 (501). (Executing Court granting extension of time for payment of money — Decree-holders fruitlessly appealing — Execution Court again granting extension of time — Such order is not appealable.)

2. ('24) AIR 1924 Oudh 179 (179). (It was held in this case that even under S. 47 the Court cannot extend the time fixed by the decree though for the purpose of appeal, the order must be deemed to have been passed under S. 47.)

Note 12

1. ('34) AIR 1934 Lah 537 (538). (Court refusing to extend time for payment of deficient court-fee on ground of want of power, fails to exercise.

the High Court will not interfere in revision unless it is necessary in the interest of justice to do so.²

149. [New.] Where the whole or any part of any fee⁶ prescribed for any document⁴ by the law for deficiency of court-fees. the time being in force relating to court-fees has not been paid, the Court may, in its discretion,⁵ at any stage,⁷ allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

[1882, *cf.* S. 582A.]

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope of the Section. 3. Payment of court-fees after the period of limitation. 4. "Any document." 4a. "For the time being in force." 5. "Discretion of Court." 6. Whole or any part of any fee. 7. "At any stage." 8. Power of Appellate or Revisional Court to interfere with the discretion of the lower Court. | <ol style="list-style-type: none"> 9. Plaints and memoranda of appeals. 10. Application for leave to sue or appeal as pauper. 10a. Power to call for court-fees after judgment is pronounced. 11. Conversion of proceedings. 12. Extension of time by admission Court. 13. Appeal. 14. Revision. 15. Review. |
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Other Topics (miscellaneous)

Levy of the stamp duty. See Notes 5 and 9.

Presumption when court-fee paid and accepted by Court. See Note 8.
Section 149 and Order 7 Rule 11. See Note 9.

1. Legislative changes. — This Section corresponds to Section 582A introduced into the old Code by Act IV of 1892. The material changes in the present Section are the following —

- (1) Section 582A applied only to *appeals* and *applications for review*. The present Section applies to *all documents* chargeable with court-fees. See Note 4.
- (2) The insufficiency of the stamp must under Section 582A have been caused by mistake on the part of the appellant or applicant for review as to the amount of the requisite stamp. There is no such restriction in the present Section. See Note 5.

2. Scope of the Section. — It is provided under the Court-fees Act, 1870, Sections 4 and 5, that no document chargeable with court-fee under that Act shall be filed, or recorded in any Court of Justice, unless the court-fee payable in respect thereof is paid. The institution of a suit or other proceeding or the presentation of a

discretion within the meaning of S. 115.)

2. ('30) AIR 1930 Pat 279 (280).

('26) AIR 1926 Mad 1059 (1060).

('33) AIR 1933 Cal 20 (21). (Even if the order of the lower Court is erroneous.)

('25) AIR 1925 Pat 153 (154).

5. "Discretion of Court." — There are certain cases in which the Court is bound to give some time for making up the deficient court-fee. Thus under O. 7 R. 11 (c) where a *plaint* is insufficiently stamped, the Court is bound to grant some time to supply the deficient court-fee.¹ In all other cases the Court has a *discretion* under the Section to allow the court-fee to be paid at any stage. The High Courts of Calcutta,² Lahore³ and Patna⁴ and the Nagpur Judicial Commissioner's Court⁵ have held that this discretion cannot be exercised in favour of a party who has not been *bona fide*, that is, who is not under any honest mistake or doubt or who has not made an honest attempt to comply with the law. Mere poverty or ignorance is not a ground for indulgence under the Section.⁶ The reason is that where an appeal is not filed in time with a proper court-fee, the appeal becomes barred and the respondent gets a valuable right. The Court should not, therefore, exercise its discretion under this Section to his prejudice except where sufficient grounds exist for the non-payment of

Note 5

1. See note 9 below.

2. ('18) AIR 1918 Cal 193 (194).

('14) AIR 1914 Cal 735 (736): 41 Cal 1092.

('19) 21 Ind Cas 866 (867) (Cal). (Delay excused where non-payment was due to mistake.)

('32) AIR 1932 Cal 482 (484, 485): 59 Cal 388. (Court-fee stamp of one rupee in appeal memo to avoid limitation.)

3. ('26) AIR 1926 Lah 689 (690).

('34) AIR 1934 Lah 424 (426). (Counsel presenting appeal with insufficient stamp—Mistake pointed out but counsel persisting that court-fee paid was adequate—Question being simple one, mistake is not *bona fide* and extension of time cannot be granted.)

('33) AIR 1933 Lah 264 (265). (Honest belief of appellant regarding adequacy of court-fee—Delay in giving adequate court-fee may be condoned.)

('27) AIR 1927 Lah 884 (895). (Gross negligence on the part of the appellant's counsel, cannot be condoned.)

('24) AIR 1924 Lah 325 (327). (Insufficiency brought to notice of appellant's pleader—Deliberate refusal—No extension to be allowed.)

('32) 33 Pun L R 187 (188). (Do.)

('31) AIR 1931 Lah 343 (343). (Do.)

('28) AIR 1928 Lah 274 (275). (Shortage of court-fee stamp in treasury, valid ground.)

('21) AIR 1921 Lah 371 (372). (Appellant disputing order for more court-fee.)

('23) AIR 1923 Lah 309 (309). (Disputing demand for more court-fee—Party not entitled to indulgence.)

('21) AIR 1921 Lah 43 (44). (Ignorance of law and poverty, no excuse.)

('19) AIR 1919 Lah 252 (253).

('29) AIR 1929 Lah 748 (748). (Court-fee paid according to the old practice, following 17 Ind Cas 764.)

('30) AIR 1930 Lah 24 (26).

('25) AIR 1925 Lah 381 (383): 6 Lah 233.

('23) AIR 1923 Lah 185 (187). (Debatable point—*Bona fide* mistake made—Delay may be excused.)

('13) 19 Ind Cas 788 (788): 1913 Pun Re No. 55. (Reasonable diligence in the prosecution of appeal, necessary.)

('23) AIR 1923 Lah 629 (630). (*Bona fide* mistake—Delay may be excused.)

('22) AIR 1922 Lah 440 (441). (In absence of *bona fide* mistake Court should not resort to Section 149.)

('26) AIR 1926 Lah 509 (510).

('21) 67 Ind Cas 130 (130) (Lah).

('25) AIR 1925 Lah 246 (246).

('19) AIR 1919 Lah 280 (281): 1919 Pun Re No. 10.

('20) AIR 1920 Lah 92 (93): 1 Lah 234.

('19) AIR 1919 Lah 65 (65): 1 Lah 220.

('09) 4 Ind Cas 554 (555) (Lah).

('21) AIR 1921 Lah 371 (372).

('36) AIR 1936 Lah 935 (936). (Error of counsel not *bona fide*—Extension of time not granted.)

4. ('20) AIR 1920 Pat 818 (820).

('24) AIR 1924 Pat 663 (664): 3 Pat 337. (Time of grace expired during the vacation—After the vacation the stamp could not be procured as the stamp vendor had none.)

('17) AIR 1917 Pat 26 (27): 3 Pat L Jour 74. (Deliberately and to suit their convenience the appellants had paid deficient court-fee.)

('29) AIR 1929 Pat 731 (732): 8 Pat 906.

('18) AIR 1918 Pat 336 (338): 3 Pat L Jour 484. (Failure of the plaintiff to affix sufficient stamp was due to gross negligence of his legal advisers.)

('25) AIR 1925 Pat 435 (438): 4 Pat 180. (Deficit amount paid to pleader—Pleader's clerk misappropriating it—Suit rejected in consequence—Suit can be restored subsequently.)

5. ('29) AIR 1929 Nag 294 (295).

('08) 4 Nag L R 168 (176).

6. ('19) AIR 1919 Lah 252 (253).

('34) AIR 1934 Cal 659 (661): 61 Cal 668. (Inability to raise money is not sufficient ground for permitting payment of deficit court-fee.)

('21) AIR 1921 Lah 43 (44).

('35) AIR 1935 Rang 336 (339): 13 Rang 50. (Mere inability to pay funds is not sufficient ground for Court exercising discretion.)

('36) 40 Cal W N 1294 (1295). (But where it is shown that the party lives in a district where an acute famine prevails and that in consequence he was unable to procure the necessary funds, an exception should be made to the rule, and the Court in such a case will exercise its discretion in his favour under S. 149.)

the full court-fee in the first instance. The Bombay High Court⁷ has, on the other hand, held that the discretion is not limited to cases where the party is under a *bona fide* misunderstanding of the law as to valuation. This view is based on the fact that the present Section omits the provision which occurred in Section 582A of the old Code restricting the exercise of discretion to cases where the insufficiency of the stamp is caused by *mistake* on the part of the appellant or applicant. It has been held in a recent Full Bench decision of the Lahore High Court that the discretion conferred on the Court by this Section is normally expected to be exercised *in favour* of the litigant except in cases of contumacy or positive *mala fides* or reasons of a similar kind.⁸ The Peshawar Judicial Commissioner's Court⁹ also has held that where the failure to pay the requisite court-fee is due to a *bona fide* mistake, the Court can allow the deficiency to be made up under this Section.

Where a party has been contesting with some show of justification the correctness of the order requiring him to pay an enhanced court-fee, he should be allowed reasonable time in which to pay the deficiency on an adverse order being finally passed against him.¹⁰

6. Whole or any part of any fee. — The discretion under Section 149 applies not only where the court-fee paid is not sufficient but also where no court-fee has been paid at all.¹ It has been held by the Madras High Court that Section 149 contemplates cases in which payment of duty is insufficient *ab initio*. Hence, it does not apply where a plaintiff is allowed to sue on the basis of a *tentative* valuation, as in suits for accounts or mesne profits, and, on a decree for a higher amount being passed, is required under Court-fees Act, Section 11, to pay additional court-fees.² It is however open to a Court on the construction of the Court-fees Act, Section 11, itself to enlarge the period fixed for payment of additional court-fee under that Section.³

As to the right of an appellant in an insufficiently stamped appeal to be heard on the proportionate part of his claim in appeal, see the undermentioned cases.⁴

[See ('88) AIR 1938 Nag 322 (323). (Substantial portion of court-fee paid—Poverty pleaded—Time can be extended.)]

7. ('14) AIR 1914 Bom 249 (251); 21 Ind Cas 337 (338); 38 Bom 41.

8. ('88) AIR 1938 Lah 361 (365) (FB). (The question of *bona fides* in this connexion should be construed in the sense that the word is used in the General Clauses Act and not as used in the Limitation Act.)

[See also ('95) AIR 1935 Lah 448 (450); 17 Lah 122. (Appeals presented without proper court-fee accepted by office without objection—Question of court-fee payable not free from doubt—Appellants not guilty of deliberate attempt to avoid payment of proper court-fee—They are entitled to grant of time for payment of proper court-fee.)]

('36) 88 Pun L R 262 (263). (Where the mistake is *bona fide*, Court should allow deficiency to be made up.)

('37) AIR 1937 Lah 276 (276). (Court-fee on objections to award not paid through inadvertence, owing to *bona fide* mistake of party's counsel—Requisite court-fee paid at earliest opportunity—Court should accept it under S. 149.)

('37) AIR 1937 Lah 688 (688). (Appeal filed within time on insufficient stamp on basis of valuation of suit—Appellant making good deficiency

within time allowed but after limitation—Appeal is not barred—Delay can be condoned under S. 149.)]

9. ('37) AIR 1937 Pesh 3 (4).

('37) AIR 1937 Pesh 31 (32).

10. ('38) AIR 1938 Mad 921 (922).

Note 6

1. ('29) AIR 1929 P C 147 (148); 56 Ind App 232; 10 Lah 737 (P C).

('17) AIR 1917 Low Bur 179 (180). (Court-fees Act, S. 12 (ii) which does not apply when no fee at all has been paid.)

('35) AIR 1935 Pat 110 (111). (The Court is not precluded from considering the question of set-off even if the written statement does not bear the requisite court-fee at the time it is filed.)

('34) AIR 1934 Lah 701 (703). (Memorandum of Letters Patent appeal.)

[But see ('38) AIR 1933 Cal 796 (797).]

2. ('16) AIR 1916 Mad 224 (227).

[See also ('33) AIR 1933 Mad 330 (331, 332); 56 Mad 705.]

3. ('11) 10 Ind Cas 268 (269) (Cal).

4. ('26) AIR 1926 Lah 558 (559). (Appeal not to be dismissed but to be heard to the extent of court-fee paid.)

('31) AIR 1931 Lah 297 (238) (Do—Pre-emption suit.)

7. "At any stage." — Under the former Code it was held by the High Courts of Bombay,¹ Calcutta² and Madras,³ the Chief Courts of the Punjab⁴ and Lower Burma,⁵ that where the deficiency in court-fee is supplied after the period of limitation but within the time allowed by the Court, the suit or appeal was not barred by limitation. The reason given was that the suit or appeal should be deemed to be instituted on the date of the original presentation of the plaint or memorandum of appeal and not on the date on which the deficit court-fee was made up. The Allahabad High Court did not accept this view.⁶ According to that Court, the presentation of an insufficiently stamped plaint or memorandum of appeal was not a valid presentation, and the suit or appeal could be deemed to be instituted only when the full court-fee was paid. But, as has been seen in Note 1 above, in the case of appeals and applications for review a different rule was provided by Section 582A which was introduced into the Code by Act IV of 1892.⁷ The Section superseded the undermentioned decisions which held that a Court could not allow deficient court-fee on an appeal⁸ or an application for review⁹ to be made good after the expiry of limitation unless the memorandum of appeal or application for review had been received through the mistake of the Court or of an officer thereof. The principle embodied in the Section was extended to *plaints* in the Full Bench case of *Hari Ram v. Akbar Hussain*.¹⁰ The learned Judges in that case relied upon Section 28 of the Court-fees Act which enables deficit court-fees to be made up where insufficiently stamped documents have been received or filed through mistake or inadvertence. Their Lordships interpreted the expression "mistake or inadvertence" in Section 28 so as to include the mistake not only of the Court or its officers but also of the party. The present Section gives legislative effect to this view and enables a defective document to be retrospectively validated at any stage if the insufficiency of the stamp is subsequently made up within the time allowed by the Court.¹¹

Note 7

1. (188) 27 Bom 330 (332).
2. (132) 19 Cal 739 (753). (Dissenting from 2 All 241 (P C).)
3. (133) 20 Cal 41 (43).
4. (1900) 27 Cal 814 (815). (Following 20 Cal 41 and 17 Cal 750.)
5. (189) 31 Cal 75 (77).
6. (132) 19 Cal 747 (749).
7. (102) 25 Mad 335 (333).
8. (109) 32 Mad 305 (311) (F B).
9. (130) 22 Mad 491 (503).
10. (132) 15 Mad 23 (31). (Following 1 All 230.)
11. (132) 15 Mad 79 (79). (Following the principle laid down in 2 All 241 (P C).)
12. (137) 23 Mad 319 (321). (A different note was struck in this case but the case was not followed in other decisions.)
13. (107) 1907 Pun Re No. 123, page 600.
14. (108) 1908 Pun Re No. 74, page 309.
15. (174) 6 N W P H C B 153 (141). (No time fixed—Payment of deficiency within reasonable time held sufficient.)
16. (171) 3 N W P H C B 202 (203).
17. (1900) 1 Low Bur Bal 32 (33).
18. (101) 23 All 433 (426).
19. (100) 27 All 411 (414).
20. (103) 23 All 310 (312).
21. (102) 21 All 213 (220).
22. (103) 13 All 65 (74).

23. (102) 1902 All W N 153 (153).
24. (107) 23 All 619 (620).
25. (100) 12 All 129 (113).
26. (100) 12 All 57 (59).
27. (107) 23 All 749 (764, 765) (F B).
28. (129) AIR 1929 P C 147 (148); 10 Luck 737: 55 Ind App 232 (P C).
29. (134) AIR 1934 All 740 (765).
30. (134) AIR 1934 All 100 (100).
31. (109) 2 Ind Cas 1 (3) (Cal).
32. (113) 20 Ind Cas 767 (767) (Mad).
33. (122) AIR 1922 Lah 225 (226); 3 Lah 35.
34. (129) AIR 1929 Nag 156 (157).
35. (109) 3 Ind Cas 425 (436) (Mad).
36. (109) 3 Ind Cas 557 (558) (All).
37. (113) 21 Ind Cas 666 (567) (Cal).
38. (114) AIR 1914 All 215 (216).
39. (115) AIR 1915 Mad 423 (127).
40. (116) AIR 1916 Pat 136 (137, 138); 1 Pat LJ 420.
41. (116) AIR 1916 Cal 616 (616).
42. (122) AIR 1923 All 531 (532); 45 All 519.
43. (126) AIR 1926 Lah 346 (347).
44. (109) 32 Mad 305 (311).
45. (110) 3 Ind Cas 532 (535); 37 Cal 330.
46. (136) AIR 1936 Oudh 340 (354).
47. (135) AIR 1935 Oudh 231 (232); 10 Luck 503.
48. (135) AIR 1935 Pat 261 (261).
49. (137) AIR 1937 Pat 550 (551); 16 Pat 67.
50. (138) AIR 1938 All 539 (540); 1 L

POWER TO MAKE UP DEFICIENCY OF COURT-FEES

The Court can also enlarge the time even after the lapse of the period originally by it.¹² (See Section 148.)

Deficit court-fees on a plaint may be allowed to be made good even in appeal.¹³ it is desirable that in such cases the matter is disposed of at the earliest possible moment after the deficit is discovered.¹⁴

As to the power of a Court to extend time for payment of court-fees fixed by own decree, see Note 2 to Section 148.

Where no time is fixed in the decree for the payment of the court-fee which is payable under it, the executing Court can allow time for such payment.¹⁵ Where a decree is passed on condition that a certain court-fee is deposited and the decree-holder deposits the same after three years and the Court accepts it, it cannot be said that execution is barred by limitation inasmuch as the decree is complete only when the court-fee is deposited and limitation cannot begin to run under Article 182 of the Limitation Act until there is a decree capable of execution.¹⁶

8. Power of Appellate or Revisional Court to interfere with discretion of the lower Court.—An Appellate Court should not interfere with discretion of the lower Court under the Section except on very strong grounds.¹ Where a Judge has allowed deficient court-fee to be made up under this Section, he must be taken, on the record as it stands, to have exercised his discretion in the matter; it is not open to the Appellate Court to go into the question as to whether he exercised his discretion.² Nor is it open even for the Judge while granting time for the payment of extension of time is made.)

848. (Decree conditional on payment of court-fee—Acceptance of court-fee though after three years from the date of the order directing the payment of the necessary court-fee, is quite valid and time for execution of the decree begins to run only after the date when the court-fee was paid.)

(‘38) AIR 1938 Mad 560 (562). (Deficiency of court-fee ordered to be made good—Court rejecting plaint under O. 7 R. 11—Plaintiff filing restoration application after making good deficient court-fee—Court can treat such application as fresh plaint under O. 7 R. 13 and can allow court-fee paid on rejected plaint to be counted towards court-fee on fresh plaint under Ss. 149 and 151, C. P. C.)

12. (‘10) 6 Ind Cas 424 (425) (Cal).
(‘09) 2 Ind Cas 1 (3) (Cal).
(‘19) AIR 1919 Cal 261 (261).
(‘94) 1894 Pun Re No. 113, page 435.
(‘26) AIR 1926 Mad 676 (678).
(‘87) 9 All 252 (253).
(‘76) 1876 Pun Re No. 84, page 169.
(‘35) AIR 1935 Pat 201 (201).
(‘38) AIR 1938 Mad 560 (562).

[See also (‘36) AIR 1936 Cal 245 (246). (Where the Appellate Court orders the plaintiff in a suit to put in additional court-fee within a particular time and directs that in case of failure to do so on his part the suit is to stand dismissed, and the plaintiff applies for extension of time for putting in the deficit court-fee before expiry of the period, the Appellate Court has jurisdiction under S. 149 to extend the time as an appeal is not finally disposed of before the

13. (‘36) AIR 1936 Cal 245 (246).
(‘38) 40 Pun L R 33 (35). (Trial Court finds value of suit—Appellate Court finds insufficient—Time should be given for deficit Court-fee.)

14. (‘21) AIR 1921 Pat 88 (89); 6 Pat 1
15. (‘37) AIR 1937 Lah 720 (720). (Time for execution of that decree if time is not therefore barred by limitation, if it was paid within the period fixed by the executing Court.)

16. (‘38) AIR 1938 All 539 (540): All 848.

Note 8

1. (‘26) AIR 1926 Nag 156 (157).
(‘25) AIR 1925 Pat 299 (302): 4.
(‘14) AIR 1914 Cal 735 (736): 41.
(‘14) AIR 1914 All 216 (216).
(‘20) AIR 1920 Pat 281 (282).
(‘36) 38 Pun L R 262 (263).
(‘38) AIR 1938 Mad 560 (562).
2. (‘16) AIR 1916 Cal 616 (616).
(‘38) AIR 1938 Mad 542 (542).
Court should presume that exercise of discretion by the plaintiff is *esse acta.*)

[See (‘38) AIR 1938 Nag 31 (31). (Where the question whether there was failure to pay the court-fee within the proper time but within a reasonable time was raised, the Court held that the failure to pay the court-fee was unreasonable in allowing

of deficit court-fee to leave open the question of limitation.³ But where a Judge *refuses* to allow a party to make up deficient court-fee under this Section, there must be something to show that he did exercise his discretion in the matter.⁴ In a recent Special Bench decision of the Patna High Court⁵ it has been held that where the lower Court has exercised its discretion under this Section in an outrageous fashion, the aggrieved party must immediately move the High Court in revision and if he does not do so, he cannot afterwards impeach the order of the Court in the appeal from the final decision. (It may, however, be noted that there is a conflict of decisions as to the power of the High Court to interfere in revision with interlocutory orders: see Section 115 Note 5.)

9. Complaints and memoranda of appeals. — A person is not entitled, as a matter of right, to make up deficient court-fee under this Section. It is entirely left to the discretion of the Court to allow him to do so or not. But in a case of a plaint insufficiently stamped, the Court is bound under O. 7 R. 11 to allow some time to make up the deficiency, provided the plaint has been presented within the period of limitation.¹ Does the same rule apply to appeals? On this point there is a conflict of decisions. See Note 6 to O. 7 R. 11 for a full discussion of the subject.

10. Application for leave to sue or appeal as pauper. — (1) Where an application for leave to sue or appeal as a pauper is rejected, can the Court allow the court-fees to be paid under the present Section so as to treat the suit or appeal as filed on the date of the filing of the pauper application and not on the date on which the court-fee is paid?

(2) Has the Court power to convert an application for leave to sue or appeal as a pauper into a suit or appeal and by allowing time for the payment of court-fees on such suit or appeal under this Section treat the same as filed on the date on which the application for leave was made?

For a discussion of these questions, see Notes to O. 33 R. 7 and O. 44 R. 1.

10a. Power to call for court-fees after judgment is pronounced. — A Court has no power to call for deficient court-fee after it has pronounced its decision.¹ The reason is that thereafter it parts with the seisin of the case and becomes *functus officio*.

11. Conversion of proceedings. — When an application is made under Section 95 of the Code, the Court may allow it to be converted into a suit on payment of the requisite court-fee. In such a case, the suit will be deemed to be instituted when the application was made and not when the court-fee is paid.¹

3. ('33) AIR 1933 Lah 598 (599) : 14 Lah 312.

4. ('29) AIR 1923 All 349 (349).

5. ('37) AIR 1937 Pat 550 (552) : 16 Pat 600 (SB).

Note 9

1. ('15) AIR 1915 Mad 426 (427).

('69) 11 Suth W R 541 (542). (Court bound to allow time in case of plaint even at the appellate stage.)

('73) 19 Suth W R 159 (159).

('17) AIR 1917 Lah 377 (378) : 1917 Pun Re No. 27.

('22) AIR 1922 Pat 56 (56).

('26) AIR 1926 Mad 676 (677).

('03) 27 Bom 330 (332).

('38) AIR 1938 Mad 542 (543). (But when once

the time is fixed, plaintiff cannot demand extension as of right.)

('37) AIR 1937 Pat 550 (553) : 16 Pat 600 (SB).

[But see ('88) AIR 1938 Lah 361 (364) (FB). (Per Din Mohammad and Coldstream, JJ. in Order of Reference—AIR 1917 Lah 377, Dissented from.)

Note 10a.

1. ('33) AIR 1933 Mad 321 (321).

('33) AIR 1933 Lah 208 (208). (Following AIR 1919 Cal 194.)

('32) AIR 1932 Pat 228 (231) : 11 Pat 532.

('32) AIR 1932 All 316 (317).

Note 11.

1. ('12) 16 Ind Cas 443 (444) (Cal).

its order when it has been obtained by false pretences in the absence of the opposite party.¹ See also the undermentioned cases.²

150. [New.] Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

Synopsis

1. "Save as otherwise provided."
2. "Where the business of any Court is transferred to any other Court."
3. Abolition of Court.
4. Powers and duties of Court to which business is transferred.

1. "Save as otherwise provided." — The mere fact that the Court by which a certain power is to be exercised, is specified does not preclude any Court to which the business of the former Court is "transferred," from exercising the power under Section 150, unless it is expressly or impliedly provided that no Court other than the one specified can exercise the power. The following are some of the cases bearing upon this question —

Execution proceedings. — Section 38 provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. Section 37 defines what a "Court which passed the decree" includes. A decree is passed by a Court A. The business of Court A is transferred to Court B within the meaning of Section 150. But Court B does not come within any of the categories mentioned in Sections 37 and 38. Nevertheless Court B can execute the decree passed by Court A. The reason is that there is no express or implied exclusion of the competency of any Court not mentioned in Sections 37 and 38 to execute the decree.¹ As to whether a particular area concerned in a suit is transferred to another Court, see Note 5 to Section 37 and also Note 2 below.

Application to set aside ex parte decree. — Order 9 Rule 13 provides that an application to set aside an *ex parte* decree may be made to the Court by which the decree was passed. This does not mean that no other Court can set aside the *ex parte* decree. Hence, a Court to which the business of another Court is transferred under Section 150 can set aside the *ex parte* decree passed by the latter Court.²

Power to punish for disobedience of temporary injunction. — O. 39 R. 2 (2) empowers the "Court granting an injunction" to punish persons for disobeying the

Note 15

1. ('37) AIR 1937 Nag 87 (88) : I L R (1938) Nag 359.
2. ('39) AIR 1939 All 452 (454). (Court has jurisdiction to accept the court-fees and restore the plaint rejected as being insufficiently stamped if deficiency in court-fee could not be paid within time allowed due to illness of plaintiff.)
3. ('39) 69 Cal L Jour 379 (380). (If without an application for review, a Court sets aside its

own previous order rejecting a plaint for non-payment of deficit court-fees and gives a further extension of time under S. 149, C. P. C., its subsequent order is not a nullity but remains a perfectly good order until it is set aside by a superior Court or in proper proceedings.)

Section 150 — Note 1

1. ('20) AIR 1920 Cal 532 (533) : 47 Cal 1100.
2. ('22) AIR 1922 Mad 10 (11, 12) : 46 Mad 1.

as transfer of all the business, pending or otherwise, in that area to the transferee Court.⁵ Some of them also hold that the Court in which the suit or proceeding was instituted would at the same time continue to have jurisdiction thereon.⁶ This is an impossible position. As has been seen already, where a business is *transferred* from Court A to Court B, Court A has no longer *that business* before it and has no power to deal with it. If, on the other hand, Court A *continues* to have power over a particular business it cannot be said to have been transferred from it to another Court. For all the above reasons the decisions taking the second of the two views set forth above are not correct and have been overruled by a Full Bench of the Madras High Court in the undermentioned case.⁷ The Allahabad High Court has held in the undermentioned case⁸ that the Section cannot be invoked in a case where there has only been a transfer of jurisdiction as to future business subject to an express reservation as regards pending cases. Thus, a Court in which a suit was pending at the time of the transfer has exclusive jurisdiction to entertain an application for restitution arising out of such a suit.

There is a conflict of decisions as to whether an assignment of business by the District Judge under the Civil Courts Act is a *transfer of business* within the meaning of Section 150. The Calcutta⁹ and Patna¹⁰ High Courts hold that it is not. The High Court of Madras¹¹ has, on the other hand, held dissenting from the Calcutta decision, that the word "transfer" is not inapplicable to a case where the District Judge fixes the jurisdiction of the Court under the Civil Courts Act, and transfers the whole of the business within the area to it.

3. Abolition of Court. — Where a Court is abolished, its proceedings can be continued by the Court which would have jurisdiction to entertain the suit if it was instituted at the time when the proceedings are sought to be continued.¹ (See Section 37 of the Code.) If a new Court is established in the place with the same jurisdiction as the old one, it can continue the proceedings² unless they have been transferred to some

('27) AIR 1927 Mad 627 (628, 629) : 50 Mad 882.
(It has power to entertain execution application and transmit it to the Court having territorial jurisdiction to execute it.)

('68) 5 Bom H C R A C 26 (28, 29).

('24) AIR 1924 Mad 697 (700).

('10) 7 Ind Cas 864 (864) (Mad). (Point left open.)

('29) AIR 1929 Mad 852 (854, 856). (In this case the question was left open.)

[See also ('24) AIR 1924 Mad 32 (32).

('36) AIR 1936 Pat 546 (547) : 15 Pat 704.
(Transfer of local area to jurisdiction of another Court — Former Court ceases to have jurisdiction to pass decree.)]

5. ('14) AIR 1914 Mad 162 (167) : 37 Mad 462.

('15) AIR 1915 Mad 1075 (1075).

('15) AIR 1915 Mad 362 (363) : 37 Mad 477.

('24) AIR 1924 Mad 697 (700).

6. ('20) AIR 1920 Mad 427 (433) : 42 Mad 821
(F B). (The point was however discussed obiter.)

('10) 7 Ind Cas 864 (864) (Mad). (Point left open.)

7. ('32) AIR 1932 Mad 418 (420, 421) : 55 Mad 801 (S B).

8. ('37) AIR 1937 All 515 (522) : I L R (1937) All 670.

9. ('22) AIR 1922 Cal 41 (42).

('38) AIR 1938 Cal 193 (194).

[See also ('98) 25 Cal 315 (317, 319).

('36) 163 Ind Cas 622 (623) (Cal). (S. 150 refers to the change of the territorial limits of a Court's jurisdiction by notification or by special order and not to a mere distribution of work among Courts exercising the same jurisdiction—Hence where a temporary injunction in a suit filed in the Court of the Central Munsif is granted by that Court, and subsequently in the usual course of practice, the suit is allocated to the Court of the third Munsif, the latter Court has no jurisdiction to punish for breach of the injunction, as that is not "the Court granting the injunction," within the meaning of O. 39 R. 2 (3), C. P. C.—The Central Munsif's Court alone has jurisdiction to deal with the breach.)]

10. ('21) AIR 1921 Pat 152 (155) : 6 Pat L Jour 364. (Transfer of business must be proved for the Section to apply.)

11. ('23) AIR 1923 Mad 92 (94) : 46 Mad 83.

('32) AIR 1932 Mad 260 (262).

Note 3

1. ('06) 4 Cal L Jour 473 (474).

('04) 31 Cal 1057 (1063).

('12) 13 Ind Cas 542 (543, 544) (Cal).

('15) AIR 1915 All 219 (220) : 37 All 450.

('20) AIR 1920 Cal 532 (532) : 47 Cal 1100.

2. ('26) AIR 1926 Pat 209 (210) : 4 Pat 688.

question and to reserve another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorise a Judge to do what in this matter was justice and for the advantage of the parties; to remand a suit in a case to which neither Section 562 nor Section 566 (1882) applies; to stay the drawing up of the Court's own orders or to suspend their operation, if the necessities of justice so require : to stay, apart from the question whether the case falls within Section 545, the carrying out of a preliminary order pending appeal ; to stay proceedings in a lower Court pending appeal and to appoint temporary guardian of a minor upon such stay ; to apply the principles of *res judicata* to cases not falling within Sections 13 and 14 of the Code (1882) and so forth."

In *Nandkishore v. Ramgolum*,¹¹ further instances were added, *viz.*—

"Punishing for contempt of Court committed when the Court is not sitting : deciding questions of jurisdiction though the Court is ultimately found not to have jurisdiction over the suit : directing a party who has applied for leave to appeal to His Majesty in Council to pay costs on the dismissal of his application : amending decrees or orders : granting restitution in cases of reversal of execution sales and orders in execution proceedings : restraining by injunction a person from proceeding with a suit in the Small Cause Court : staying proceedings pursuant to its own order in view of an intended appeal ; and treating an application for revision as an appeal and *vice versa*."

The Court has an inherent power under such circumstances to act according to justice, equity and good conscience¹² especially in India, where every Court is a Court of Equity as well as of Law.¹³

This Section does not confer any new powers on the Courts but only *saves* their inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.¹⁴ The object of enacting the Section is to show that the powers expressly conferred by the Code apply only so far as they go, but cannot restrict the scope of the Court's inherent powers to do complete and substantial justice¹⁵ for the administration of which alone Courts exist.¹⁶

11. ('13) 40 Cal 955 (959, 960).

12. ('84) 6 All 351 (355, 357).

('67) 4 Bom H C R O C 1 (27).

('25) AIR 1925 All 280 (281, 282) : 47 All 538.

(Inherent power to strike off defence for failure to obey order of Court.)

('32) AIR 1932 Mad 263 (264). (Do.)

('28) AIR 1928 Oudh 262 (263). (Do.)

[See also ('35) AIR 1935 Cal 39 (72). (Every Court has an inherent power to make order *ex debito justitiæ*, with a view to the shortening of litigation, preventing duplication of proceedings and saving the parties from harassment and expense.)]

13. ('14) AIR 1914 Cal 129 (131) : 41 Cal 137.

('84) 6 All 370 (373).

('24) AIR 1924 Bom 231 (231) : 47 Bom 593.

(Section applies to Courts and not to a commissioner appointed by Court for examining accounts — No inherent power to review.)

('25) AIR 1925 Oudh 264 (265).

('30) AIR 1930 Mad 618 (621) : 53 Mad 533.

(Court or officer exercising quasi-judicial functions has inherent jurisdiction.)

('36) AIR 1936 Bom 250 (255) : 60 Bom 645.

(With the limitation that though these powers are wide and undefinable the Court cannot use them to override the express provisions of law.)

[See however ('30) AIR 1930 Lah 657 (658).

(Section 151 is not one of the Sections open to commissioner under Workmen's Compensation Act.)]

14. ('13) 35 All 331 (336, 337) : 40 Ind App 151 : 16 Oudh Cas 194 (P C).

('12) 16 Ind Cas 966 (966) (Cal).

('13) 18 Ind Cas 207 (203) : 40 Cal 955.

('18) AIR 1918 Cal 850 (857) : 44 Cal 504.

('17) AIR 1917 Mad 159 (161).

('25) AIR 1925 Cal 420 (421).

('26) AIR 1926 All 212 (213) : 48 All 356.

('31) AIR 1931 All 427 (428).

('14) AIR 1914 Sind 61 (62) : 8 Sind L R 327.

('18) AIR 1918 Pat 52 (53) : 2 Pat L Jour 205.

(Though Section 151 does not confer any new jurisdiction yet the result has been to widen the exercise of power of Civil Courts.)

('20) AIR 1920 Lah 346 (347).

('09) 2 Ind Cas 874 (912) (Bom). (It can take evidence in camera.)

('21) AIR 1921 Pat 409 (410). (Court can suo motu raise attachment which becomes invalid by operation of law.)

('35) AIR 1935 Cal 707 (709).

('36) AIR 1936 All 555 (557).

('35) AIR 1935 All 27 (28).

('35) AIR 1935 All 599 (599) : 57 All 977 (F B).

('36) AIR 1936 Rang 203 (210) : 14 Rang 173 (F B).

15. ('06) 3 Cal L Jour 29 (31).

('33) AIR 1933 All 295 (297) : 56 All 216.

('07) 34 Cal 860 (862). (Legal order can be executed though no provision exists.)

('26) AIR 1926 All 212 (213) : 48 All 356.

('28) AIR 1928 All 103 (110) : 50 All 325.

16. ('09) 1 Ind Cas 677 (681) (Cal).

('10) 7 Ind Cas 19 (20, 21) (Cal).

The inherent powers of the Court being very wide and indefinable¹⁷ the *limits* of such jurisdiction should be carefully guarded and its exercise in an arbitrary and capricious manner effectively prevented.¹⁸ It has been seen that the inherent power of a Court is recognized only to meet those cases for which no provision is made by the Code. It follows, therefore, that where there are *express provisions* of law applicable to a particular case, there is no inherent power in the Court to override them.¹⁹ The words "nothing in this Code shall be deemed to limit or otherwise affect" do not mean that the Code stands repealed where a Court decides to exercise its inherent powers, for the inherent powers can be exercised *only where there is no express provision of the Code*.²⁰ Another limitation on the exercise of such power by the Court is that it must be consistent with sound general principles of law, and with the intention of the Legislature.²¹

The inherent powers of a Court under Section 151 can be exercised, as the Section itself indicates, only —

- (1) for the *ends of justice*, or
- (2) to prevent the abuse of the process of the Court.²²

2. Court cannot override express provisions of law. — It has been seen in Note 1 above that the inherent power of a Court exists only where there is *no* express provision of law applicable to the case.¹ Thus, where there is a specific *prohibition* of a

(24) AIR 1924 Oudh 403 (410).

17. ('24) AIR 1924 Oudh 11 (13). (It is dangerous to attempt definition of the inherent powers of the Court.)

18. ('20) AIR 1920 Pat 56 (59).

(13) 18 Ind Cas 207 (208) : 40 Cal 955.

(36) AIR 1936 Rang 208 (210) : 14 Rang 173 (FB).

[See ('20) AIR 1920 Oudh 84 (85). (Hard cases must not be allowed to make bad law.)]

[See also ('33) AIR 1933 Rang 96 (98). (Not to nullify principles of law of limitation.)]

(32) AIR 1932 All 524 (526). (Order for production of defendant for medical examination — Defendant, woman — Her consent not got — Order of arrest on default — Illegal.)

(39) AIR 1939 All 497 (497) : 1939 All L Jour 398 (400). (S. 151 does not confer an unlimited jurisdiction on the Courts to do what they please.)]

19. ('14) AIR 1914 All 314 (316) : 36 All 354. (Exercise irregular and uncalled for — Condemned.)

(06) 33 Cal 927 (931).

(34) AIR 1934 Mad 199 (200, 201) : 57 Mad 635.

(32) AIR 1932 Lah 238 (239).

(32) AIR 1932 Lah 443 (443). (Remand under O. 41 R. 25 available — Remand under S. 151 not justified since appeal is thereby denied.)

(33) AIR 1933 Sind 29 (31) : 26 Sind L R 395.

(35) AIR 1935 Cal 707 (709). (By the exercise of inherent power, the Court cannot exonerate a litigant from an obligation imposed upon him by the statute.)

(36) AIR 1936 Bom 250 (255) : 60 Bom 645.

(39) AIR 1939 Sind 137 (142) : I L R (1939) Kar 330. (New plea allowed to be argued without amendment of pleading and raising proper issue — Order cannot be allowed to stand.)

[See also ('31) AIR 1931 All 443 (447) : 53 All 804.

(No inherent power in Courts to make complaints apart from Ss. 195 and 476, Cr. P. C.)]

20. ('12) 15 Ind Cas 53 (53) (Cal).

(29) AIR 1929 Lah 694 (695).

(25) AIR 1925 Mad 42 (44) : 48 Mad 494.

(27) AIR 1927 Cal 657 (658). (Section applies only when remedies in the Code are not ample or sufficient.)

(16) AIR 1916 Lah 350 (351).

(34) AIR 1934 Pat 582 (582). (Compromise signed by only one of two plaintiffs who was the manager of the family — Procedure under O. 23 R. 3, and not under S. 151.)

(34) AIR 1934 All 624 (625).

[See ('35) AIR 1935 Bom 222 (225) : 59 Bom 430. (Courts should not, as far as possible, travel beyond the provisions of the Code.)]

21. ('06) 33 Cal 927 (931).

(10) 5 Ind Cas 532 (534, 535) : 37 Cal 399.

(27) AIR 1927 Cal 420 (420).

(36) AIR 1936 Rang 208 (210) : 14 Rang 173 (FB).

[See also ('33) AIR 1933 Pat 196 (202, 203) : 12 Pat 216. (Interest on equitable grounds not available in the face of Interest Act.)]

22. ('28) AIR 1928 Mad 522 (523).

(18) AIR 1918 Oudh 163 (166).

(22) AIR 1922 Sind 6 (9) : 16 Sind L R 79.

(15) AIR 1915 All 172 (173) : 37 All 380.

[See also ('33) AIR 1933 Bom 200 (202). (Decree in wrong name owing to misdescription — Real person can be brought on record in execution proceedings.)]

Note 2

1. ('76) 2 Cal 233 (261) : 4 Ind App 23 (P C).

(29) AIR 1929 Cal 17 (19).

(28) AIR 1928 Cal 179 (180).

(18) AIR 1918 Oudh 311 (312).

(12) 17 Ind Cas 583 (584) (Mad).

adopted in a particular case or a class of cases is provided for by the Code, and a case in which the inherent powers are invoked falls within the intendment of such provision, there is no inherent power to act except under the conditions specified by such provision.¹² The reason is that the provision must be deemed to be *exhaustive of the matters dealt with by it*.¹³ Thus, a Court cannot, under its inherent powers, refuse to be bound by the periods of limitation prescribed by the Limitation Act, 1908.¹⁴

12. ('76) 2 Cal 233 (261) : 4 Ind App 23 (PC).
('82) AIR 1932 Lah 537 (537, 538). (O. 21 R. 18 exhaustive.)
('19) AIR 1919 Cal 44 (45). (Contempt outside Court premises cannot be punished summarily under Section 151.)
('23) AIR 1923 Mad 331 (331).
('20) AIR 1920 Upp Bur 37 (37) : 3 Upp Bur Rul 198.
('21) AIR 1921 Oudh 46 (46) : 24 Oudh Cas 215.
('80) AIR 1930 Lah 789 (790).
('80) AIR 1930 Lah 26 (31, 32) : 11 Lah 342. (Modification of award in contravention of Sch. II Para. 12.)
('12) 16 Ind Cas 521 (521): 1912 Pun Re No. 8. (No inherent power to force witness to sign deposition in the face of O. 18 R. 5.)
('16) AIR 1916 Lah 95 (96): 1917 Pun Re. No. 11. (Cannot wholly ignore the provisions of S. 22, C. P. Code.)
('82) AIR 1932 Lah 238 (239). (No inherent power to disregard default in deposit of five per cent. under O. 21 R. 89.)
('18) AIR 1918 Lah 368 (368): 1918 Pun Re No. 58. (Court cannot entertain claims against attachment contrary to the terms of O. 21 R. 58.)
('16) AIR 1916 Cal 371 (372). (Section 73, C. P. Code—Execution petition after realisation of asset—No rateable distribution.)
('11) 12 Ind Cas 719 (720) (Mad). (Order 11 R. 21 exhaustive—No inherent power.)
('24) AIR 1924 Cal 1054 (1055).
('25) AIR 1925 Cal 274 (275).
('26) AIR 1926 Cal 897 (898).
('24) AIR 1924 Cal 251 (256): 50 Cal 853.
('26) AIR 1926 Cal 957 (958).
('27) AIR 1927 Cal 158 (159).
('27) AIR 1927 Cal 850 (853) : 55 Cal 219.
('11) 9 Ind Cas 246 (247) (Cal).
('09) 2 Ind Cas 173 (178) 34 Bom 72.
('29) AIR 1929 Sind 110 (111). (An inquiry into pauperism under O. 21 R. 40 cannot be made until the conditions in the rules are satisfied — No inherent power.)
('37) AIR 1937 All 141 (142) (FB). (Court cannot revoke its order of reference to arbitration in the exercise of its inherent power under S. 151, C. P. C.—Such power does not exist apart from the provisions contained in Sch. II, C. P. Code). [See ('23) AIR 1923 Lah 514 (515).]
[See also ('33) AIR 1933 Pat 582 (583). (Inherent power only when powers expressly conferred are exhausted.)]
13. ('06) 33 Cal 927 (931).
('02) 29 Cal 707 (715) : 29 Ind App 196 (PC).
('24) AIR 1924 Mad 114 (115, 116) : 47 Mad 171.
14. ('24) AIR 1924 All 668 (669) : 46 All 631. (AIR 1924 All 446, Followed.)
('33) AIR 1938 Pat 132 (133, 134).
('15) AIR 1915 Cal 530 (531). (No mesne profits for more than three years.)
('20) AIR 1920 Lah 261 (262).
('20) AIR 1920 Lah 309 (310) : 1 Lah 363.
('22) AIR 1922 Lah 266 (266).
('25) AIR 1925 Lah 321 (321).
('26) AIR 1926 Lah 135 (135).
('22) AIR 1922 Pat 479 (480) : 1 Pat 277. (Petition under O. 9 R. 13 after time.)
('10) 6 Ind Cas 901 (902) (Bom). (Do.)
('28) AIR 1928 Nag 91 (92) : 23 Nag L R 183. (Petition under O. 9 R. 9 after time.)
('31) AIR 1931 Cal 319 (320). (Do.)
('26) AIR 1926 Mad 980 (984) : 50 Mad 67.
('17) AIR 1917 Mad 176 (177). (No valid deposit under O. 21 R. 89 after time.)
('22) AIR 1922 Mad 417 (421).
('20) AIR 1920 Lah 346 (347).
('32) AIR 1932 Oudh 220 (222).
('33) AIR 1933 Mad 258 (258, 259).
('33) AIR 1933 Rang 96 (98). (S. 5, Limitation Act, not to be nullified by powers under this Section.)
('34) AIR 1934 Nag 43 (44). (Time for deposit to set aside *ex parte* decree in small cause suit not to be extended.)
('37) AIR 1937 Oudh 426 (427): 13 Luck 425. (Application for re-admission of appeal under O. 41 R. 19, C. P. C., made after 30 days of order of dismissal—Application is time-barred under Art. 168, Limitation Act even if it is assumed to be one made under S. 151.)
('35) AIR 1935 Rang 466 (471) : 13 Rang 595. (S. 151 only declares nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court.)
('35) AIR 1935 Pesh 146 (147). (Court has no inherent power to enlarge period of limitation laid down by statutory law.)
('39) AIR 1939 Cal 310 (312) : 1 L R (1939) 1 Cal 452. (An application under O. 21 R. 91, C. P. C., made more than 30 days from the date of the sale cannot be treated as an application under S. 151.)
('35) AIR 1935 Lah 60 (61).
('36) AIR 1936 Pat 270 (273) : 15 Pat 422. (Certification of payment—Art. 174, Limitation Act, cannot be overridden.)
('36) AIR 1936 Lah 495 (496). (Application for restoration of suit dismissed for default — Art. 163, Limitation Act, applies—Having recourse to S. 151, C. P. C., cannot help limitation.)
[See also ('33) AIR 1933 Mad 418 (420, 424) : 56 Mad 490 (FB).]
('33) AIR 1933 Mad 315 (319) : 56 Mad 453. (Decree already barred by limitation cannot

Where, however, there is a doubt or difficulty as to which provision will apply to a particular case, the inherent powers may be invoked.¹⁵

It may be useful to refer to certain classes of cases in which the question of the inherent powers of the Court to act has been discussed —

1. Setting aside ex parte decisions and restoration of suits dismissed for default.

— It has been held by the High Courts of Allahabad,¹⁶ Calcutta,¹⁷ Lahore,¹⁸ Madras,¹⁹ Patna²⁰ and Rangoon²¹ and the Judicial Commissioner's Courts of Nagpur, Oudh and Sind²² that there is no inherent power to set aside an *ex parte* decree or to restore a suit dismissed for default, except under the circumstances and conditions mentioned in O. 9 R. 13 and R. 9 respectively. Where a case is outside the scope of O. 9 R. 13, as where a person, *not a party to the suit* applies to set aside an *ex parte* decree under peculiar circumstances, the Rangoon High Court has held that it can set the decree

- be revived for execution by subsequent amendment.)
- (‘36) AIR 1936 Pesh 191 (192). (Restoration of execution application consigned to record room — No power to restore on ground that fresh application would be barred by time.)
- (‘33) AIR 1933 Mad 258 (259). (Court has no inherent power to restore an application to restore a suit after that application was itself time-barred.)]
15. (‘25) AIR 1925 Pat 435 (437) : 4 Pat 180.
16. (‘25) AIR 1925 All 610 (614) : 48 All 175 (FB).
- (‘22) AIR 1922 All 441 (441).
- (‘31) AIR 1931 All 294 (296) : 53 All 612 (FB).
[See also (‘33) AIR 1933 All 41 (42).]
- [But see (‘12) 14 Ind Cas 187 (188) : 34 All 426.
- (‘29) AIR 1929 All 811 (812). (Court wrongly dismissing suit under O. 9 R. 8 even when pleader for party is present—Error can be rectified and suit restored under Section 151.)
- (‘12) 16 Ind Cas 677 (678) : 34 All 518.
- (‘17) AIR 1917 All 125 (127).
- (‘29) AIR 1929 All 721 (721) : 51 All 901.
- The Full Bench decision was not referred to — The decisions, it is submitted, are not good law.]
17. (‘30) AIR 1930 Cal 387 (388).
- (‘30) AIR 1930 Cal 488 (489).
- (‘29) AIR 1929 Cal 158 (159).
- (‘35) 39 Cal WN 894 (895). (Suit cannot be restored under S. 151 after finding that sufficient cause for non-appearance was not proved.)
- [But see (‘19) AIR 1919 Cal 979 (980). (Appellate Court restored a suit under S. 151 — Held not without jurisdiction.)
- (‘32) AIR 1932 Cal 770 (771) : 59 Cal 1834.
- (‘28) AIR 1928 Cal 772 (774) : 55 Cal 473. (High Court on the original side — O. 9 R. 13 not strictly applicable—Inherent power to set aside lies.)
- (‘05) 32 Cal 253 (256) (FB). (Under Section 89 of T. P. Act—Before the Code of 1908.)
- (‘08) 35 Cal 767 (772, 773). (Under S. 90, Transfer of Property Act—Before Code of 1908.)]
18. (‘27) AIR 1927 Lah 622 (624, 625).
- (‘23) AIR 1923 Lah 147 (147).
- (‘25) AIR 1925 Lah 321 (321).
- [But see (‘28) AIR 1928 Lah 534 (535). (Case under O. 9 Rr. 3 and 4.)
- (‘19) AIR 1919 Lah 105 (106) : 1919 Pun Re No. 53. (Case under O. 41 R. 19.)]
19. (‘20) AIR 1920 Mad 640 (642, 643) : 42 Mad 94 (FB). (23 Mad 445 ; 26 Mad 599 and 14 Ind Cas 823 cannot be considered now to be good law.)
- (‘25) AIR 1925 Mad 209 (211). (O. 9 R. 9.)
- (‘24) 20 Mad L W 490 (490). (O. 9 R. 13.)
- (‘13) 18 Ind Cas 360 (362) (Mad). (Do.)
- (‘26) 97 Ind Cas 936 (936) (Mad). (Do.)
- (‘34) AIR 1934 Mad 428 (429) : 57 Mad 1069.
20. (‘27) AIR 1927 Pat 369 (369). (Dismissal under O. 9 R. 3—Not restored under O. 9 R. 4 but under Sec. 151 by Munsif — Held it could not be done so.)
- (‘22) AIR 1922 Pat 479 (480) : 1 Pat 277.
- [But see (‘24) AIR 1924 Pat 274 (275). (Refusing to restore under O. 9 R. 4— Held, Court can, under inherent powers.)
- (‘24) AIR 1924 Pat 698 (700) : 5 Pat L Jour 567.
- (‘21) AIR 1921 Pat 491 (493).
- (‘30) 122 Ind Cas 585 (585) (Pat.)]
21. (‘30) AIR 1930 Rang 65 (67).
- [But see (‘12) 15 Ind Cas 358 (359) (Low Bur).
- (‘09) 4 Ind Cas 816 (816) (Upp Bur).
- (‘20) AIR 1920 Low Bur 35 (36).
- (‘24) AIR 1924 Rang 274 (275).
- (‘26) AIR 1926 Rang 109 (110) : 4 Rang 18.
- (‘27) AIR 1927 Rang 58 (58).]
22. (‘30) AIR 1930 Nag 48 (49) : 26 Nag L R 30.
- (‘11) 11 Ind Cas 344 (345) : 14 Oudh Cas 111.
- (‘14) AIR 1914 Sind 92 (93) : 8 Sind L R 241. (Restoration of appeal.)
- (‘20) AIR 1920 Sind 34 (36) : 14 Sind L R 239 : 60 Ind Cas 948 (950, 951).
- (‘21) AIR 1921 Sind 38 (41) : 15 Sind L R 61.
- (‘26) AIR 1926 Sind 249 (250) : 20 Sind L R 266.
- (‘27) AIR 1927 Sind 223 (224) : 22 Sind L R 192.
- [See also (‘37) AIR 1937 Oudh 364 (364) : 13 Luck 263. (In this case it was held by the Oudh Chief Court that a suit dismissed for non-payment of additional court-fee cannot be restored to hearing on an application under S. 151.)]
- [But see (‘26) AIR 1926 Nag 409 (409, 410).
- (‘31) AIR 1931 Sind 153 (153). (Dismissal of appeal for non-payment of paper book charges — Restoration under S. 151.)]

2. *Interim injunctions and appointment of receivers.* — In cases falling within the scope of Section 94 and O. 39 R. 1 and Order 40, there is, according to the general rule, no inherent power to grant an injunction or to appoint a receiver.²⁹ But in cases *outside* the scope of those rules, *e. g.*, arbitration proceedings, the Court can grant such reliefs under its inherent powers.³⁰

3. *Amendments.* — See Section 152, *infra*.

4. *Remand.* — All the High Courts except the High Court of Allahabad are agreed that an Appellate Court has an inherent power of remand in cases not covered by O. 41 R. 23.³¹ See Note 10 to Order 41 Rule 23.

5. *Restitution.* — "It is inherent in the general jurisdiction of the Court to act rightly and fairly according to circumstances towards all parties involved."³² Hence if,

29. ('26) AIR 1926 Mad 258 (258).
 ('33) AIR 1933 Mad 500 (501) : 56 Mad 563.
 ('27) AIR 1927 Mad 687 (688).
 ('24) AIR 1924 Mad 797 (798) : 47 Mad 700.
 ('38) AIR 1938 Mad 190 (192).
30. ('25) AIR 1925 Sind 102 (102) : 18 Sind L R 303. (Appointment of receiver in arbitration proceedings.)
 ('34) AIR 1934 Lah 79 (80).
 ('33) AIR 1933 Lah 73 (74). (Injunction.)
 ('15) AIR 1915 Cal 565 (567). (Temporary injunction in probate proceedings.)
 ('25) AIR 1925 Lah 242 (243). (Temporary injunction by High Court.)
 ('26) AIR 1926 Mad 1126 (1127). (High Court has power to stay execution in another suit.)
 ('25) AIR 1925 Lah 618 (618). (Non-chartered High Court cannot restrain executing Court from executing a decree.)
 ('27) AIR 1927 Mad 210 (211, 212). (Temporary mandatory injunction.)
 ('09) 4 Ind Cas 609 (610) : 3 Sind L R 128. (Arbitration proceedings—Injunction.)
 ('20) AIR 1920 Lah 436 (437). (Injunction to restrain a person from proceeding with arbitration proceedings.)
 ('31) AIR 1931 Cal 279 (280, 281) : 57 Cal 1280. (Injunction by a High Court against a person living within jurisdiction of another Indian High Court.)
 ('32) AIR 1932 Mad 180 (181). (High Court can grant injunction independent of O. P. Code.)
 ('27) AIR 1927 Lah 833 (834). (Strong prima facie case needed for grant of temporary injunction under inherent power.)
 [See ('36) AIR 1936 Lah 567 (568). (Applicant not coming to Court with clean hands—Equitable relief by way of injunction not granted.)]
 [See also ('33) AIR 1933 Lah 437 (439) : 14 Lah 68.
 ('37) AIR 1937 Sind 315 (316). (Interim injunction can be ordered even in execution proceedings.)
 ('35) AIR 1935 Pesh 182 (184). (Injunction cannot be addressed by one Court to another—O. R. No. 57 of 1926 Reversed and AIR 1921 Pat 92, Approved.)]
31. ('30) AIR 1930 Lah 224 (225).
 ('33) AIR 1933 Pat 706 (707).
- ('33) AIR 1933 Sind 327 (328) : 27 Sind L R 194.
 ('28) AIR 1928 Cal 812 (814).
 ('13) 18 Ind Cas 207 (209) : 40 Cal 955.
 ('27) AIR 1927 Oudh 629 (630).
 ('28) AIR 1928 Mad 991 (992, 994).
 ('32) AIR 1932 Lah 311 (311).
 ('32) AIR 1932 Lah 443 (443). (Findings on all issues given by trial Court—Still remand—O. 41, R. 25 or S. 151 — Not O. 41 R. 23 — Inherent powers under exceptional circumstances — No remand after adverse finding.)
 ('28) AIR 1928 Lah 116 (116).
 ('33) AIR 1933 Lah 157 (158).
 ('34) AIR 1934 Pat 234 (237). (Order of remand can be made under this Section only on its finding that the trial Court has not tried the case properly and not otherwise.)
 ('30) AIR 1930 Lah 441 (442).
 ('31) AIR 1931 Lah 299 (299).
 ('31) AIR 1931 Lah 302 (302).
 ('30) AIR 1930 Mad 72 (73).
 ('35) AIR 1935 Bom 216 (217, 218). (But it has no power to remand disregarding method of procedure enjoined by Code—Where it so acts, High Court can interfere in revision.)
 ('36) AIR 1936 Pat 491 (492).
 ('36) AIR 1936 Nag 140 (141) : I L R (1936) Nag 188.
 ('35) AIR 1935 Pat 68 (68). (Appellate Court should not without sufficient cause order retrial where it can effectively deal with matter under O. 41 R. 25 — S. 151 can be resorted to only when specific provisions are exhausted.)
 ('35) AIR 1935 Mad 715 (716). (But merely because it finds that the lower Court has fallen into errors here and there, is no ground for remanding under inherent powers.)
 [See also ('33) AIR 1933 Pat 220 (222). (Inherent powers to remand for particular purpose alone. Whole matter not re-opened.)]
 [See however ('31) AIR 1931 Mad 791 (791). (Held no inherent power to remand where there is express provision in O. 41 Rr. 25 and 27.)]
32. ('22) AIR 1922 P C 269 (271) : 2 Pat 10 : 49 Ind App 351 (PC).
 (1871) L R 3 P C 465 (475), *Rodger v. The Comptoir D'escompte de Paris*.
 ('32) AIR 1932 Cal 29 (31) : 58 Cal 1070.
 ('31) AIR 1931 Cal 42 (44).

away.⁴¹ Thus, it can stay the execution of a decree on an application for leave to appeal to the Privy Council⁴² or on special leave thereto.⁴³

Apart from execution proceedings a Court has also inherent powers to stay a suit pending the decision in a connected proceeding, apart from Section 10 of the Code.⁴⁴ An Appellate or Revision Court has similarly inherent power to stay further proceedings in the suit in the lower Court apart from O. 41 R. 5 of the Code.⁴⁵ There is a difference of opinion as to whether, where an appeal has been preferred to the Privy Council, the High Court can, under its inherent powers, stay further proceedings in the trial Court apart from O. 45 R. 13. According to the High Courts of Calcutta and Lahore it can.⁴⁶ According to the High Court of Allahabad it has no jurisdiction to do so.⁴⁷ See also the undermentioned cases.⁴⁸

('27) AIR 1927 Cal 37 (38).

('23) AIR 1923 Lah 490 (491).

41. ('27) AIR 1927 Cal 581 (585).

('34) AIR 1934 Pat 637 (637).

('23) AIR 1923 Lah 514 (515). (To stay execution on the ground that the *ex parte* decree was obtained by fraud.)

('24) AIR 1924 Lah 602 (603). (After appeal filed lower Court cannot under inherent power stay execution, for its jurisdiction is taken away by filing the appeal.)

('01) 5 Cal W N 781 (796).

('10) 1910 Pun Re No. 82, p. 239. (Staying execution not only pending suit but even appeal.)

('34) AIR 1934 Pat 637 (637). (But if stay is ordered without putting the unsuccessful claimant to terms, High Court will interfere in revision and set aside the order.)

[See also ('33) AIR 1933 Mad 563 (564). (Order of stay of delivery of possession conditional on payment of kist and rent by certain date is one under S. 151 and S. 148 applies to such order.)

('87) 9 All 36 (42).]

42. ('25) AIR 1925 Sind 216 (217).

('33) AIR 1933 All 18 (18).

('31) AIR 1931 Cal 79 (81). (Pending appeal before Privy Council—High Court granted stay of proceedings in the suit.)

43. ('13) 18 Ind Cas 207 (210) : 40 Cal 955.

44. ('29) AIR 1929 Lah 12 (14).

('33) AIR 1933 Lah 50 (50, 51).

('15) AIR 1915 Mad 608 (611). (Staying a suit, suit being an abuse of process of Court.)

('24) AIR 1924 Cal 757 (760). (To postpone hearing of a suit pending decision of selected action.)

('24) AIR 1924 Bom 90 (93).

('29) AIR 1929 Oudh 341 (346) : 4 Luck 573.

('30) 123 Ind Cas 50 (50) (Oudh).

('30) AIR 1930 Lah 527 (528).

('31) AIR 1931 Oudh 313 (314). (Inherent power assumed — But sufficient grounds held not to exist.)

('30) AIR 1930 Lah 525 (525, 526). (Do.)

('17) AIR 1917 Sind 95 (96) : 10 Sind L R 1. (Pending an arbitration out of Court.)

('35) AIR 1935 Rang 355 (356). (Suit for possession to be stayed pending decision of suit for declaration of title to same property by opposite party.)

('36) AIR 1936 Pat 408 (409).

[See also ('38) 1938 Nag L Jour 120 (121).

(The High Court has ample jurisdiction under S. 151, C. P. Code, to stay the proceedings in connected suits.)]

45. ('04) 31 Cal 722 (724) (F B). (Further proceedings on a decree under O. 20 R. 16.)

('32) AIR 1932 All 655 (656). (Appeal from order confirming a sale—Stay of proceedings for delivery of possession to auction-purchaser.)

('34) AIR 1934 Lah 909 (910). (Revision against decree pending—High Court can stay execution.)

('21) AIR 1921 Pat 328 (329, 330). (Taking accounts on a decree for partition under appeal.)

('32) AIR 1932 All 238 (238) : 54 All 344. (Staying execution of final decree in a mortgage suit pending the appeal from preliminary decree.)

('31) AIR 1931 Bom 384 (384) : 55 Bom 801. (Arbitration Act — Refusal to set aside award—Appeal to High Court — Execution of award stayed pending appeal.)

('28) AIR 1928 Lah 912 (912). (Appeal under Guardians and Wards Act—Stay of proceedings in lower Court.)

('34) AIR 1934 Lah 909 (910). (Under S. 151 High Court has ample power to stay execution of decrees which form the subject-matter of petitions for revision.)

[See ('37) AIR 1937 Oudh 359 (360) : 13 Luck 581. (Chief Court of Oudh has no power either under S. 151 or under O. 41 R. 5, C. P. C., to stay the proceedings under Ss. 18 and 35 of the U. P. Encumbered Estates Act pending an appeal filed before it against the decree of the Special Judge under S. 14 (7) of that Act. The proper procedure is to move the Collector to stay proceedings until the decision of the appeal filed in the Chief Court.)]

46. ('34) AIR 1934 Cal 823 (824).

('34) AIR 1934 Lah 238 (238, 239).

('39) AIR 1939 Cal 308 (309).

47. ('34) AIR 1934 All 585 (586) : 56 All 907.

48. ('39) AIR 1939 Mad 204 (208). (Administration suit — Creditor obtaining preliminary decree is entitled to order, against another decree-holder attaching property of deceased judgment-debtor staying all proceedings taken by him and restraining him from executing his decree — Court is entitled to pass appropriate orders to safeguard interests of all creditors—Such orders cannot be

In exercising inherent powers in cases not provided for, the Courts may apply

- ('25) AIR 1925 Mad 42 (43) : 48 Mad 494. (To grant time to surety before actual arrest of judgment-debtor—Compare O. 21 R. 40.)
- ('07) 34 Cal 860 (862). (To order costs on dismissal of application for leave to appeal to Privy Council.)
- ('25) AIR 1925 All 280 (282) : 47 All 538. (Striking off defence for default in payment of adjournment costs before date fixed.)
- ('29) AIR 1929 All 123 (124). (To set aside an order striking off objection of judgment-debtor for default.)
- ('33) AIR 1933 Nag 176 (176) : 29 Nag L R 176 (Do.).
- ('32) AIR 1932 Cal 569 (570). (Do.)
- ('37) AIR 1937 Cal 199 (201) : I L R (1937) 2 Cal 48. (S. 51 of the Code contemplates sale without attachment and so even if a share of debt be not attachable under O. 21 R. 46 or under any other rule prescribed, a Court can pass prohibitory orders similar to one under O. 21 R. 46 under its inherent powers for the ends of justice.)
- ('36) AIR 1936 All 97 (101) : 58 All 538. (Court has inherent power to amend scheme passed under S. 92.)
- ('33) AIR 1933 All 49 (49). (Court has inherent jurisdiction to set aside its own order passed under a misunderstanding of the case and signed inadvertently—Court can re-hear the case.)
- ('35) AIR 1935 All 281 (282). (Two out of three arbitrators related to one of parties—Court has inherent power to supersede reference.)
- ('36) AIR 1936 Pat 506 (508). (Adjustment of decrees effected by next friend of minor decree-holder, during execution proceedings, without sanction of Court sought to be set aside—S. 47 bars fresh suit—Proper remedy is by application for review or by invoking inherent jurisdiction of Court.)
- ('38) AIR 1938 Cal 287 (290) : I L R (1938) 1 Cal 53. (Plaintiff in interpleader suit can apply on completion of pleadings that he should be removed from proceedings—Court can grant such relief under S. 151.)
- ('38) AIR 1938 Bom 510 (512) : I L R (1938) Bom 743. (High Court has inherent power to order security for costs from applicant for revision.)
- ('36) AIR 1936 Cal 342 (343). (Inherent power to treat suit as application.)
- ('36) AIR 1936 Cal 751 (752) : I L R (1937) 1 Cal 573. (Decree in suit for partition making no provision for maintenance of some members of family—Appeal directed to question of maintenance only—Certified copy of portion of decree relating to allotment of property need not be filed—Appeal filed without such copy is in proper form—Court can also admit appeal as being in proper form in exercise of its inherent powers.)
- ('36) AIR 1936 Cal 409 (412) : I L R (1937) 1 Cal 57. (Executing Court can entertain and give effect to a claim to set-off even in case which does not come strictly under O. 21 R. 19, C. P. Code.)
- ('35) AIR 1935 Cal 231 (234) : 62 Cal 223. (On premature threat from Bench, pleader agreeing to settlement of case—Counsel *held* intimidated and Court had inherent power to set aside settlement.)
- ('35) AIR 1935 Lah 956 (957). (Executive order of interlocutory nature—Government not made party—Order *held* revisable under inherent powers read with S. 107, Government of India Act of 1915.)
- ('39) AIR 1939 Lah 380 (382). (*P* attaching property of *K* in execution of decree against *K*—*M* subsequently purchasing that property at auction sale in another execution proceedings against *K* contending that property is not liable to sale in execution of *P*'s decree—Application purporting to be under O. 21 R. 58—Execution Court *held* could inquire into title of *M* under S. 151 even if S. 47 did not apply, to prevent unnecessary complications which would otherwise result from a second sale.)
- ('35) AIR 1935 Mad 349 (350). (Court has inherent power to revoke reference, if arbitration is grossly irregular and defective.)
- ('33) AIR 1933 Oudh 229 (231) : 8 Luck 496. (Preliminary decree passed—Judgment-debtors' failure to pay—Application for final decree—Dismissal under O. 9 R. 3—Legality of—Application to set aside order—Inherent power of Court—Relief can be granted though applicant be negligent.)
- ('37) AIR 1937 Oudh 106 (107) : 12 Luck 739. (Collector passing order under S. 6, U. P. Encumbered Estates Act—Civil Court not staying execution proceedings but passing decree subsequent to Collector's order—Decree *held* could be set aside under S. 151.)
- ('35) AIR 1935 Pat 439 (444) : 14 Pat 356. (Where a Court passes a decree on the basis of a compromise without a formal order for recording the compromise, the decree is irregularly passed and such a decree can be set aside on an application under S. 151.)
- ('39) AIR 1939 All 452 (454) : 1939 All L Jour 335 (337). (Though a plaint is rejected under O. 7 R. 13 a Judge has jurisdiction under S. 151, C. P. Code, to restore the suit.)
- ('35) AIR 1935 All 985 (986). (Deficiency of court-fees ordered to be made good—Court rejecting plaint under O. 7 R. 11—Plaintiff filing restoration application after making good deficient court-fee—Court can treat such application as fresh plaint under O. 7 R. 13 and can allow court-fee paid on rejected plaint to be counted towards court-fee on fresh plaint under Ss. 149 and 151, C. P. Code.)
- ('36) AIR 1936 Pat 93 (94) : 15 Pat 51. (Mortgage suit—Application for final decree beyond time—Similar previous application made in time dismissed for failure to comply with some steps concerning service of notice on judgment-debtors—Though application was beyond time Court *held* could restore previous application for ends of justice.)

analogous provisions of the Code nearest in point to the circumstances before it.⁵⁴

3. Court cannot override general principles of law. — No inherent power can be exercised so as to conflict with sound general principles of law.¹ Thus, a Court has no inherent power to recall an order previously made by it, or entertain an application raising questions which had already been heard and finally decided by it, and which are consequently barred by the general principles of *res judicata*.³ Similarly it cannot under its inherent powers deal with matters over which it has no *jurisdiction*³ though it has always jurisdiction to determine *whether it has jurisdiction*.⁴ The

54. ('21) AIR 1921 Mad 599 (605) : 44 Mad 919 (FB). (For example assignee of portion of decree comes under O. 21 Rr. 15 and 16.)

('10) 6 Ind Cas 386 (387) (Cal). (Execution against Commissioner for recovery of excess fees.)

('24) AIR 1924 All 122 (123). (Execution in favour of Commissioner.)

('29) AIR 1929 All 211 (212). (Execution of orders not provided for.)

('07) 34 Cal 860 (862). (Do.)

('18) AIR 1918 Cal 133 (134). (Do.)

('26) AIR 1926 Mad 1005 (1006). (Enforcement of surety bond in execution, on the analogy of S. 145.)

('80) 5 Cal 819 (820). (To defend in *forma pauperis*.)

('29) AIR 1929 Mad 828 (829) : 53 Mad 43. (To continue suit in *forma pauperis*.)

('20) AIR 1920 Mad 230 (231). (Appeal to be continued in *forma pauperis*.)

('11) 12 Ind Cas 692 (693) (Mad). (Refund of amounts deposited as security.)

('10) 6 Ind Cas 120 (120, 121) (Cal). (Resistance outside O. 21 Rr. 97 to 99.)

('28) AIR 1928 Pat 187 (188). (Directing successful respondent to furnish security for restitution.)

('32) AIR 1932 Sind 33 (34) : 26 Sind L R 21 (Security for costs—Case outside O. 25.)

('93) 15 All 84 (95) (FB). (Dismissal of execution petition for default.)

('96) 20 Bom 541 (542). (Do.)

('31) AIR 1931 Mad 303 (306, 312). (Applicability of O. 22 Rr. 2 and 3 to execution applications.)

('38) AIR 1938 Bom 510 (512) : I L R (1938) Bom 743. (Revisional applications under S. 115, C. P. C., or S. 75 of the Provincial Insolvency Act—Under S. 151, C. P. Code, High Court can require security for costs from applicant on analogy of O. 25 R. 1 or O. 41 R. 10.)

[But see ('30) AIR 1930 Rang 280 (281) : 8 Rang 423. (No inherent power to grant application for review in *forma pauperis* of order in appeal.)]

Note 3

1. ('04) 26 All 407 (427) (FB).

('10) 7 Ind Cas 19 (20) (Cal).

('13) 20 Ind Cas 3 (5) (Lah). (Superior Court's decision cannot be upset.)

('22) AIR 1922 Cal 1 (1). (No inherent power to introduce a new form of procedure.)

('37) AIR 1937 All 18 (19). (Recourse should not be had to a general Section of the nature of

S. 151, C. P. Code, for a remedy which does not come under some positive rule of law—Court auction purchaser not entitled to refund of purchase money if subsequently a third party obtains a decree for possession.)

('37) AIR 1937 Pat 647 (650) : 16 Pat 729. (Court has no power under the Section to give compensation to a decree-holder, who after purchasing property in execution in satisfaction of his decree loses part of that property as the result of another suit.)

[See ('33) AIR 1933 All 343 (344). (Held that the circumstances of the case did not warrant the overriding of S. 115, by an application of the inherent powers of the Court).]

2. ('27) AIR 1927 Cal 57 (60).

('22) AIR 1922 Pat 204 (205).

('24) AIR 1924 Cal 830 (831) : 51 Cal 715. (Successor Judge should not condemn predecessor's order in strong words.)

('17) AIR 1917 Lah 306 (307) : 1917 Pun Re No. 14.

('24) AIR 1924 Mad 489 (489). (No inherent power to restore a suit once disposed of.)

('35) AIR 1935 Lah 60 (61).

('38) AIR 1938 Pat 593 (594). (Order passed by Court having jurisdiction to pass it cannot be recalled.)

[See ('38) AIR 1938 Oudh 103 (105). (Where a presiding officer of a Court has passed an order, his successor cannot and should not go behind that order and hold that order to be *ultra vires*.)]

[See also ('36) AIR 1936 Rang 77 (80) : 13 Rang 722.]

[But see ('23) AIR 1928 Lah 244 (245).

('17) AIR 1917 All 477 (479) : 39 All 8.

('30) AIR 1930 All 644 (645, 646) : 52 All 924.]

3. ('26) AIR 1926 Mad 631 (632). (Order in respect of suit not pending before it.)

('19) AIR 1919 Pat 240 (241). (No pending suit.)

('22) AIR 1922 Bom 444 (445, 446) : 47 Bom 250.

(Summoning a witness before a private person.)

('26) AIR 1926 Lah 284 (284). (Injunction against Government Officers not subordinate to Court.)

('09) 4 Ind Cas 108 (116) : 34 Bom 467. (Caste questions.)

('18) AIR 1918 Mad 580 (584) : 40 Mad 1069 (FB).

(No jurisdiction to send decrees to foreign Courts for execution—See S. 45, C. P. Code.)

('16) AIR 1916 Mad 554 (554). (Consent confers no jurisdiction.)

('25) AIR 1925 Oudh 142 (142). (No inherent power for Judges to find on facts and legal relations outside pleadings.)

4. ('15) AIR 1915 Cal 49 (51).

(1862) 1862 Marsh 99.

power of a Court to hear an appeal or to review a previous judgment exists *only if it is given by statute* and therefore when there is no such right given by statute, a Court cannot, under its inherent powers, hear an appeal or review its previous order⁵ or transfer a case.⁶ [But the Court has always power to rectify its own mistakes and where a previous order has been passed under a *mistake* the Court can rectify such mistake. See Note 6 *infra*.] Similarly, the High Court has no *inherent* power of revision over proceedings in subordinate Courts, because the power of revision is a creature of the statute and does not exist if it is not provided for by statute.⁷

4. Ends of justice. — The inherent powers saved by the Section are to be used only to secure the ends of justice or to prevent the abuse of process of the Court.¹ The following broad rules may be taken as a guide to determine what constitute the “ends of justice” :

(1) *It is in the ends of justice that an injury should be remedied and needless expense and inconvenience to parties avoided.*² Thus, a Court will remedy an obvious

5. ('19) AIR 1919 Mad 244 (246). (Religious Endowments Act—No provision therein for review—No inherent power.)

('33) A I R 1933 Lah 169 (171).

('26) AIR 1926 All 50 (55) : 48 All 160.

('18) AIR 1918 Cal 925 (927) : 45 Cal 519.

('27) AIR 1927 Cal 920 (921). (Review.)

('29) 1929 Mad W N 140 (141). (Do).

('29) AIR 1929 Cal 162 (162).

('39) AIR 1939 Sind 137 (140) : ILR (1939) Kar 330.

[See ('31) AIR 1931 Pat 409 (409) (Review).]

[See also ('18) AIR 1918 Bom 157 (157) : 42 Bom 363. (No inherent power for revision apart from S. 115.)]

('34) AIR 1934 Pat 229 (231) : 13 Pat 165. (Review can only be granted on grounds set out in O. 47.)]

[Compare ('27) AIR 1927 Cal 534 (536) : 54 Cal 405. — Dismissal of application for restoration—Inherent power to review—Followed in A I R 1929 Cal 17 .]]

[See however ('29) AIR 1929 Nag 185 (189, 190).]

[But see ('36) AIR 1936 Pesh 213 (214). (Order fixing court-fees — Trial Court has inherent power to review).]

6. ('05) 32 Cal 875 (881).

('34) AIR 1934 All 677 (679). (S. 151, C. P. Code cannot be invoked so as to treat an appeal filed on behalf of one party as the appeal of another, simply because it should have been filed on behalf of the other and it was the intention of the pleader filing it to appeal on behalf of the other.)

[But see ('24) AIR 1924 Lah 306 (310). (Inherent power of the High Court to transfer).]

('31) 133 Ind Cas 876 (876) (Lah).]

7. ('38) AIR 1938 F C 1 (3). (Court by the exercise of any inherent powers cannot extend its appellate jurisdiction or increase its revisional authority over other Courts.)

('35) AIR 1935 All 599 (600) : 57 All 977 (FB).

Note 4

1. ('21) AIR 1921 P C 80 (84) : 48 Ind App 76 : 48 Cal 481 (PC).

(1908) 1 Ch 471 (479, 487) Norton v. Norton.

('33) AIR 1933 Pat 84 (87) : 12 Pat 163. (Annulment without provision for protecting creditors—Insolvency Court can pass supplementary order under Provincial Insolvency Act (1920), S. 5 (1).)

('09) 4 Ind Cas 595 (595) : 34 Bom 135.

('22) AIR 1922 Pal 409 (411) : 1 Pat 149. (Execution application — Overstating amount — Amendment under S. 151.)

('29) AIR 1929 All 421 (428) : 51 All 780. (High Court refused to be bound by finding in a remand order even though neither party could question it.)

('17) AIR 1917 All 474 (475) : 39 All 147. (Obvious miscarriage of justice can be prevented.)

('30) AIR 1930 Bom 294 (295) : 55 Bom 368. (Interlocutory order by Judge in Chambers—Corrected to prevent injustice though review did not strictly lie.)

('32) AIR 1932 Lah 295 (296). (Lease by judgment-debtor after sale and before confirmation — Prohibitory order issued to lessee in the interests of justice.)

('38) AIR 1938 Bom 199 (205) (SB).

('38) AIR 1938 Rang 241 (241) : 1939 Rang L R 14. (Ends of justice — Objection that pleader engaged by opposite party should not be allowed to appear—Objection accepted in lower Court—Order is in accord with ends of justice.)

2. See the cases in footnotes 3 to 16 below.

('23) AIR 1923 Bom 419 (419). (Suit for maintenance—Quantum to be fixed in suit itself and not to be left to be decided in separate suit.)

('32) AIR 1932 Lah 295 (296). (Subsequent to court sale and before confirmation the judgment-debtor leasing the premises sold — Court can issue prohibitory order against the tenant and judgment-debtor under S. 151.)

('34) AIR 1934 Pat 683 (685). (Objection to execution — Objectors mentioning by mistake that they were in possession—Objection upheld but no order as to possession passed—Court should under S. 151 restore possession to objectors.)

[See also ('12) 17 Ind Cas 987 (988) (Mad). (Suit for ejectment by vendor—Conditional decree on refund of purchase money could be passed.)]

when that decree is subsequently restored.⁹ It can also, according to the Allahabad High Court, restore a suit, the decree in which has been set aside in a separate suit on the ground that the minor defendant was not properly represented.¹⁰ In order to avoid multiplicity of proceedings and needless expenses and inconvenience, it can re-hear a matter before final orders are passed in it¹¹ and consolidate suits,¹² appeals¹³ or other proceedings¹⁴ and can take notice of subsequent events¹⁵ or of

('32) AIR 1932 Pat 3 (5). (Omission of name of vakil in vakalatnama—Defect condoned.)

('27) AIR 1927 P C 264 (265) (P O). (Dismissal of appeal for technical defect in security bond under O. 41 R. 10, without giving opportunity for rectification—Dismissal reversed.)

('22) AIR 1922 Pat 368 (369).

('27) AIR 1927 Oudh 455 (456) : 2 Luck 731. (Fundamental defect undetected and not raised in grounds of appeal.)

('13) 20 Ind Cas 294 (294) (Cal). (High Court can consider an admitted document though not printed.)

('32) AIR 1932 Lah 267 (268). (An unregistered document becoming inadmissible, because of a Privy Council ruling—Court ought to receive the document on registration notwithstanding prior order of rejection.)

[See ('35) AIR 1935 All 391 (394).]

[But see ('11) 11 Ind Cas 77 (78) : 5 Sind L R 68. (Application cannot be construed as something essentially different from what it is.)]

9. ('30) AIR 1930 All 100 (100).

('20) AIR 1920 Cal 399 (400). (Appeal left undecided on parties agreeing to settle matter in dispute by separate suit—Separate suit not tenable—Appellate Court has power to restore appeal and determine the question.)

10. ('17) AIR 1917 All 477 (479) : 39 All 8. (Followed in 1928 Mad W N 275.)

('30) AIR 1930 All 644 (645, 646) : 52 All 924.

[See also ('31) AIR 1931 Cal 168 (169). (Case of a lunatic defendant.)]

('37) AIR 1937 All 552 (556).]

11. ('10) 37 Cal 259 (262).

('18) AIR 1918 Cal 173 (175).

('29) AIR 1929 All 403 (404). (Irregularity in Court Rules, Chap. VII R. 3, irregularity merely—No rehearing.)

(1837-41) 2 Moo Ind App 181 (216) (P O). (Re-hearing of an appeal before the Privy Council.)

('32) AIR 1932 All 656 (657). (There is no rule of law except S. 151, O. P. Code which can authorise a Court to revise its own order superseding a reference to arbitration.)

[See also ('33) AIR 1933 Lah 266 (266, 267).]

12. ('71) 15 Suth W R 110 (111).

('84) 10 Cal 58 (60).

('95) 22 Cal 511 (517).

('11) 11 Ind Cas 161 (163) (Cal).

('12) 15 Ind Cas 897 (898) (Cal).

(1841) 1 Cr. & Ph. 161 (181, 182), Rawson v. Samuel.

('17) AIR 1917 All 336 (337). (Even without the consent of parties.)

('22) AIR 1922 Pat 566 (566) : 1 Pat 669. (Do.)

('15) AIR 1915 Bom 146 (148); 39 Bom 604 (FB).

(However High Court has no jurisdiction for

consolidation of suits pending before a District Court.)

('37) AIR 1937 Nag 132 (133) : I L R (1937) Nag 6. (Consolidation is the exception and not the rule, and Courts should be slow to presume its existence when there is no express order to that effect, especially as the Code does not allow consolidation in express terms.)

('39) AIR 1939 Pat 30 (31). (In deciding whether two suits should be consolidated or not, the whole question is whether or not in the long run, it will be expeditious and advantageous to all concerned to have the two suits tried together as analogous cases.)

[See also ('24) AIR 1924 Nag 196 (198).]

13. ('18) AIR 1918 Mad 368 (369).

('28) AIR 1928 Mad 463 (463).

('23) AIR 1923 All 490 (491) : 45 All 506 (FB). (Two cross-appeals—One final decree.)

('25) AIR 1925 Pat 765 (769) : 4 Pat 448. (Order of consolidation must be express.)

('18) AIR 1918 Pat 196 (197) : 3 Pat L Jour 446. (Consolidation by High Court of Privy Council appeals—Compare O. 45 R. 4.)

[See ('30) AIR 1930 Mad 376 (379, 381); 53 Mad 248 (FB). (Overruling AIR 1928 Mad 463 on the question of number of vakalats to be filed in consolidated appeals.)]

('36) AIR 1936 All 832 (833) : I L R (1937) All 105. (Ordinarily inherent powers exist as regards matter relating exclusively to the proceedings in Court which exercises such powers. The High Court has no inherent power to pass orders under O. 45 R. 4 directing consolidation of appeals pending before their Lordships of the Privy Council, when there is no specific provision to that effect in O. 45 R. 4, and, when O. 45 R. 4 is confined to particular cases—AIR 1918 Pat 196, Not followed.)]

14. ('18) AIR 1918 Pat 415 (416). (Application to set aside *ex parte* decree—Another to set aside sale thereunder—Fraud—Joint trial.)

[See ('30) AIR 1930 Mad 381 (382); 53 Mad 262 (F B). (Several revisions against common respondent cannot be consolidated for purposes of vakalat and process fee.)]

15. ('17) AIR 1917 Cal 716 (719) : 44 Cal 47. (Taking notice of events subsequent to date of suit to do complete justice.)

('12) 13 Ind Cas 377 (381) (Cal). (Do.)

('15) AIR 1915 Cal 103 (104). (Do.)

('17) AIR 1917 Cal 822 (822). (Do.)

('21) AIR 1921 Cal 792 (795). (Do.)

('25) AIR 1925 Cal 561 (564). (Do.)

('23) AIR 1923 Lah 24 (25). (Do.)

('25) AIR 1925 Nag 104 (107). (Do.)

('24) AIR 1924 Nag 188 (189). (Do.)

('24) AIR 1924 Nag 204 (207). (Do.)

O. 9 R. 9 by the heir of the plaintiff the suit was restored. On revision the Judicial Commissioner reversed the order of restoration on the ground that the original dismissal was rightly made on default. On appeal to the Privy Council, Lord Shaw, after stating that the rules and orders applicable to a defaulter could not be applied to a dead man and quoting the words of Section 151, observed "in their Lordships' opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from Section 151 any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But Section 151 could never be invoked in a case clearer than the present." It follows from this ruling that where a Court employed a procedure in doing something which it never intended to do and there is miscarriage of justice, there is an abuse of the process of the Court.² The injustice so done must be remedied on the principle *actus curiæ neminem gravabit*—an act of the Court shall prejudice no person.³ Such an abuse by the Court may arise *either (a) by the default or mistake of the Court itself*⁴

2. ('29) AIR 1929 All 147 (148): 50 All 859. (Property other than the judgment-debtor's included in judgment, decree and map by accident.)
 ('09) 1 Ind Cas 913 (918): 36 Cal 193.
 ('17) AIR 1917 Pat 495 (497): 2 Pat L Jour 361.
 ('35) AIR 1935 All 27 (28). (Decree-holder being driven to the necessity of making fresh application for execution, which is barred by limitation—Order passed by oversight.)
 ('38) 32 Sind L R 215 (219). (Court can set aside its own order which is null and void and ought never to have been made—Power not confined to cases of fraud or deception practised upon the Court.)
3. ('20) AIR 1920 Cal 399 (400).
 ('26) AIR 1926 Nag 331 (331).
 ('09) 1 Ind Cas 913 (918): 36 Cal 193.
 ('14) AIR 1914 Sind 61 (62): 8 Sind L R 327.
 ('38) AIR 1938 All 8 (11): 1 L R (1938) All 71. (A Court has inherent jurisdiction to recall and cancel its invalid orders.)
 ('39) AIR 1939 Bom 51 (52): 1 L R (1939) Bom 27. (Court can vacate a prior wrong order made by it.)
 ('36) AIR 1936 Cal 343 (346): 63 Cal 1079. (This principle ought to be applied even when for relieving a party from such injury the Court has to consider the question of time and Court can grant extension of time though case not covered by S. 5, Limitation Act—Correctness of this view is questionable.)
 ('37) AIR 1937 Mad 150 (151). (Inherent power of restitution.)
 ('35) AIR 1935 Sind 214 (215): 29 Sind L R 251. ("The act of the Court" means not merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case: A I R 1922 P C 269, Relied on.)
4. ('16) AIR 1916 Cal 241 (244): 43 Cal 269. (Adverse order without notice—"Audi alteram partem".)
 ('16) AIR 1916 P C 85 (85) (PC). (Do.)
 ('12) 16 Ind Cas 677 (678): 34 All 518. (Do.)
 ('70) 13 Suth W R 232 (232). (Do.)
 ('06) 3 Cal L Jour 276 (279). (Do.)
 ('12) 16 Ind Cas 567 (569) (Cal). (Do.)
 ('17) AIR 1917 Cal 633 (634): 44 Cal 454. (Do.)
 ('17) AIR 1917 Cal 728 (731): 44 Cal 954. (Do.)
 ('27) AIR 1927 Cal 76 (77): 53 Cal 844. (Do.)
 ('17) AIR 1917 Mad 945 (946). (Do.)
 ('19) AIR 1919 Mad 14 (15). (Do.)
 ('21) AIR 1921 Mad 286 (291). (Do.)
 ('22) AIR 1922 Mad 485 (485, 486). (Do.)
 ('17) AIR 1917 Pat 672 (672): 1 Pat L Jour 245. (Do.)
 ('21) AIR 1921 Pat 293 (295). (Do.)
 ('23) AIR 1923 Pat 180 (183). (Do.)
 ('23) AIR 1923 Pat 597 (599). (Do.)
 ('33) AIR 1933 Oudh 229 (230, 231): 8 Luck 496. (Dismissal of final decree application for default—Application for restoration and for final decree—To be allowed though decree-holder negligent.)
 ('33) AIR 1933 Pat 135 (138).
 ('34) AIR 1934 Mad 506 (507): 58 Mad 84. (Disposal of appeal without full hearing owing to mistake—Re-heard.)
 ('20) AIR 1920 Cal 434 (435) (FB). (Dismissal of a petition under misapprehension.)
 ('68) 9 Suth W R 283 (284). (Case struck off under a misapprehension that the parties had settled it.)
 ('12) 13 Ind Cas 264 (266): 5 Sind L R 184. (Order based on erroneous assumption by Court.)
 ('28) AIR 1928 All 108 (110): 50 All 335. (Failure to enquire under O. 32 R. 15.)
 ('29) AIR 1929 All 147 (148): 50 All 859. (Judgment including property of person other than judgment-debtor owing to accidental slip.)
 ('24) AIR 1924 Mad 100 (101). (Sale ignoring injunction.)
 ('25) AIR 1925 All 622 (623): 47 All 546. (Application for final decree—Applicants' default—Dismissal of suit itself.)
 ('29) AIR 1929 Rang 158 (160): 7 Rang 88. (Error in drafting the decree.)
 ('31) AIR 1931 Oudh 346 (348). (Court omitting to include mesne profits in decree by mistake.)
 ('32) AIR 1932 Nag 31 (31): 27 Nag L R 341. (Decree directing partition in impossible manner.)
 ('27) AIR 1927 Oudh 276 (277). (Change of date and hasty procedure in the Munsif's Court.)

or its officers⁵ or (b) as the result of misrepresentation by or fraud of a party.⁶ But, where the fraud alleged in a petition under this Section for setting aside a decree

- (23) AIR 1923 Oudh 16 (17). (Execution granted to defaulting plaintiff.)
- (22) AIR 1922 Bom 210 (211). (Error in procedure on the part of the trial Court.)
- (32) AIR 1932 Cal 569 (571). (Improper dismissal of an application.)
- (21) AIR 1921 Pat 491 (493). (Ex parte decree under O. 34 R. 6 passed by oversight against a person who is not mortgagor.)
- (29) AIR 1929 Oudh 385 (387): 4 Luck 562 (FB). (Passing decree on a compromise not signed by a party or his authorized agent.)
- (10) 7 Ind Cas 91 (92) (Cal). (Only one lot sold—Sale certificate comprising all lots.)
- (08) 12 Cal W N 1027 (1028).
- (10) 6 Ind Cas 208 (209) (Cal). (Dismissal of suit for default under misrepresentation and by mistake.)
- (28) AIR 1928 All 301 (301). (Application for setting aside sale—Dismissal for default when no default.)
- (28) AIR 1928 Lah 534 (535) (Do.)
- (17) AIR 1917 Mad 157 (157).
- (24) AIR 1924 Nag 58 (59).
- (27) AIR 1927 Cal 636 (642): 54 Cal 836.
- (26) AIR 1926 Pat 218 (226, 231): 5 Pat 361 (FB). (Wrong order for payment of court-fee, and wrong dismissal on default of payment.)
- (25) AIR 1925 Oudh 418 (419).
- (19) AIR 1919 Cal 261 (263). (Refusal of Court to make a proper order.)
- (17) AIR 1917 Lah 209 (209).
- (23) AIR 1923 Mad 58 (59).
- (10) 5 Ind Cas 909 (910) (Mad).
- (17) AIR 1917 Mad 223 (224). (Expunging objectionable or unnecessary matter from judgments—Power of High Court—Compare Government of India Act, S. 107.)
- (19) AIR 1919 Mad 655 (655). (Do.)
- (85) 11 Cal 544 (545) (Do.)
- (24) AIR 1924 All 724 (726). (Do.)
- (21) AIR 1921 Bom 394 (395): 45 Bom 1127. (Do.)
- (35) AIR 1935 Mad 420 (421). (Wrong survey number entered in sale certificate—Court can amend it as well as the decree if the mistake occurs in the decree also.)
- (37) AIR 1937 Mad 95 (96). (Court paying to wrong person by mistake is bound to restore it to right person.)
- (38) AIR 1938 Lah 472 (473). (Error patent on face of record and previous order made by Court *suo motu* through oversight—Held, Court had inherent power to review.)
- (36) AIR 1936 Lah 759 (760). (A Court has inherent jurisdiction to restore a suit, which has been dismissed in default owing to a mistake of the Court itself: AIR 1928 Lah 534 and 6 Ind Cas 208, Applied.)
- (37) AIR 1937 Lah 204 (205). (Court failing to pass personal decree under O. 34 R. 6 through oversight—Court can correct mistake.)
- (34) AIR 1934 Nag 234 (235): 31 Nag L R 53. (Amendment of errors in judgment.)
- (38) AIR 1938 Pat 468 (469, 470). (Property wrongly taken away in execution against another under erroneous order of Court—Court is bound to make restitution on establishment of title.)
- (36) AIR 1936 Cal 343 (346): 63 Cal 1079. (Where rights of third parties have not intervened, it is not only in the power, but it is the duty of the Court to relieve a party of the injury done to him by it, by reason of its mistakes and defaults or mistakes or defaults of its officers inadvertently committed.)
- (34) AIR 1934 Mad 506 (507): 58 Mad 84. (Court discovering that judgment has been pronounced under mistaken belief that both parties have been fully heard—Duty of Court to remedy mistake by its inherent powers.)
- [See also (14) AIR 1914 Oudh 171 (173).]
- [See however (19) AIR 1919 Cal 673 (674).]
5. (14) AIR 1914 Sind 61 (62): 8 Sind L R 327. (Failure of Court officer to notify date of hearing.)
- (29) AIR 1929 Pat 391 (392). (Delivery of wrong property by plaintiff.)
- (24) AIR 1924 All 818 (824): 46 All 864. (Wrongful acts of the Court permitted or performed by its own officials.)
- (25) AIR 1925 Mad 1212 (1212, 1213). (Dishonesty of officer of Court in execution.)
- (31) AIR 1931 Lah 344 (344): 12 Lah 602. (Sale ordered free of, but sale conducted subject to a mortgage.)
- (35) AIR 1935 Sind 214 (216): 29 Sind L R 251. (Where the act of the Nazir and of the executing Court in parting with the money without safeguards caused prejudice to a person, it is within the competence of the Court in the exercise of its inherent powers to prevent its act causing injury and to see that the money was duly restored.)
- (36) AIR 1936 Pat 176 (177). (Application under O. 21 R. 58—Court requiring application to be put up on date fixed for hearing execution proceedings and also ordering information to be sent to decree-holder—Officers of Court not informing him—Order passed in absence of decree-holder—Court has inherent jurisdiction to recall such order.)
- (36) AIR 1936 Cal 343 (346): 63 Cal 1079.
- [But see (27) AIR 1927 Lah 372 (372). (Ex parte decree on the basis of return of summons in a different suit.)]
6. (06) 28 All 671 (673).
- (68) 9 Suth W R 394 (395).
- (32) AIR 1932 Lah 120 (121).
- (34) AIR 1934 Pat 229 (231): 13 Pat 165. (Fraud upon Court in a compromise.)
- (34) AIR 1934 Pat 41 (42). (Fraud in compromise.)
- (70) 13 Suth W R 256 (257).
- (05) 2 Cal L Jour 306 (309).
- (07) 6 Cal L Jour 662 (666).
- (23) AIR 1923 Mad 635 (636): 46 Mad 583. (Court misled in granting leave to bid and fixing upset price.)
- (11) 9 Ind Cas 918 (921) (Cal). (Sale of property not previously attached.)

is fraud on the *party* and not fraud on the *Court*, the decree cannot be set aside under this Section.⁷

Abuse by a party. — A party to a litigation may be guilty of an abuse of the process of the Court in any of the following cases —

- (a) Gaining an unfair advantage by the use of a rule of procedure.⁸
- (b) Contempt of the authority of the Court by a party or stranger.⁹
- (c) Fraud or collusion in Court proceedings as between parties.¹⁰
- (d) Retention of a benefit wrongly received.¹¹
- (e) Resorting to and encouraging multiplicity of proceedings.¹²

('28) AIR 1928 Mad 610 (611). (Getting an order by misleading the Court.)

('31) AIR 1931 Sind 111 (111). (Order obtained by misrepresentation of facts.)

('26) AIR 1926 Mad 119 (120). (Guardian of minor plaintiff withdraws claim against one defendant without leave under O. 32 R. 7.)

('15) AIR 1915 Cal 49 (51). (Appointment of guardian—Fact of majority suppressed.)

('04) 8 Cal WN 468 (470). (Ex parte adjudication in insolvency—Fraud.)

('05) 7 Bom L R 961 (963). (Suppression of facts.)

('15) AIR 1915 Cal 622 (624). (Compromise—Suppression of service of summons—False vakalatnama—Fraudulent consent.)

('15) AIR 1915 Mad 281 (282). (Satisfaction recorded by fraud in Court.)

('14) AIR 1914 Bom 123 (124) : 38 Bom 638. (Arbitration—No differences between parties.)

('10) 5 Ind Cas 968 (969) : 34 Bom 403. (Pleader not engaged—Consenting to decree.)

('26) AIR 1926 Oudh 315 (315) : 1 Luck 341. (Compromise decree — Compromise signed by pleader not authorized.)

('23) AIR 1923 Pat 483 (486, 487) : 2 Pat 731. (Fraudulent alteration of terms of compromise.)

('27) AIR 1927 Pat 354 (363) : 6 Pat 108. (Do.)

('24) AIR 1924 Oudh 408 (409). (Error in decree due to fraudulent inclusion of a property in plaint.)

('37) AIR 1937 Sind 101 (103) : 31 Sind L R 32. (Court has power under S. 151 to vacate an order obtained by misleading and practising fraud upon Court.)

('37) AIR 1937 Lah 29 (31). (Restoration of property wrongfully attached.)

('37) AIR 1937 Lah 631 (631). (A Court whether acting in its ordinary jurisdiction or under its special jurisdiction in insolvency, has got inherent power to set aside an ex parte order obtained by fraud or misrepresentation or to rectify a mistake inadvertently made.)

7. ('35) AIR 1935 Pat 439 (444) : 14 Pat 356.

('39) 69 Cal L Jour 533 (538). (Consent decree, setting aside of, on ground of consent of a party having been obtained by other by fraud—Remedy is by suit and not application under this Section because there is no fraud practised upon the Court which would justify it in exercising its inherent power.)

8. ('28) AIR 1928 Nag 106 (107, 108).

('24) AIR 1924 Oudh 230 (231). (Attempt to

ignore terms of compromise.)

('13) 18 Ind Cas 994 (996) (Lah).

('28) AIR 1928 Oudh 260 (261). (Valuation under S. 7, cl. iv (c) and (d) of Court-fees Act outrageously low—Court can interfere.)

9. ('84) 10 Cal 109 (131, 132) (PC). (Power to punish summarily for a contempt by the publication of a libel out of Court when the Court is not sitting—High Court—Common law.)

('25) AIR 1925 All 280 (282) : 47 All 538. (Disobedience of order as to costs.)

('18) AIR 1918 Pat 100 (103) : 4 Pat L Jour 20. (Suit against receiver without sanction.)

('29) AIR 1929 Sind 136 (136). (An application to sue in forma pauperis rejected for vexatious delay in impleading legal representative of a deceased respondent.)

('11) 9 Ind Cas 121 (121) (Cal). (Application for declaration of insolvency dismissed — Fresh application without leave of Court under R. 11, Sind Insolvency Rules.)

[See also ('26) AIR 1926 Rang 188 (189, 190) : 4 Rang 257.

('79) 4 Cal 655 (659).]

[But see ('19) AIR 1919 Cal 44 (45).]

10. ('79) 2 Mad 264 (267, 268). (Fraud between auction-purchaser and decree-holder.)

('82) 6 Bom 148 (150). (Fraudulent adjustment of decree.)

('27) AIR 1927 Mad 813 (815).

('15) AIR 1915 Mad 281 (282). (Fraud in procuring order.)

('10) 34 Bom 403 (410).

('27) AIR 1927 Pat 354 (363) : 6 Pat 108.

('15) AIR 1915 Cal 622 (623).

[See also ('26) AIR 1926 Oudh 315 (315) : 1 Luck 341.

[But see ('23) AIR 1923 Pat 483 (486) : 2 Pat 731. (Consent decree—Fraud upon Court — Court can summarily investigate question of fraud but not fraud in obtaining consent.)]

11. ('24) AIR 1924 Rang 181 (181) : 1 Rang 770. (Improper appointment of receiver — Refund from plaintiff of salary paid by defendant to receiver.)

('16) AIR 1916 Cal 241 (244) : 43 Cal 269. (Refund of money wrongly paid out.)

('18) AIR 1918 Pat 418 (419). (Sale set aside—Auction-purchaser withdraws sale-price — Sale confirmed on appeal — Refund by auction-purchaser.)

('17) AIR 1917 Pat 495 (497) : 2 Pat L Jour 361. (Do.)

12. ('24) AIR 1924 All 818 (824) : 46 All 864.

- (f) Circumventing of the law by indirect means.¹³
- (g) Presence of witness during examination of previous witness.¹⁴
- (h) Instituting vexatious, obstructive or dilatory actions.¹⁵
- (i) Introduction of scandalous or objectionable matter in proceedings.¹⁶
- (j) Executing a decree manifestly at variance with its purpose and intent.¹⁷

But no act done or proceeding taken as of right and in due course of law, is an abuse of the process of the Court simply because such act or proceeding is likely to embarrass another.¹⁸ A person who brings himself within the terms of a statute is not to be deprived of a right conferred by that statute on "so treacherous a ground of decision as an abuse of the process of the Court."¹⁹ Nor is the failure to conform to a mere rule of practice, an abuse of process in every case; the Court must find in each case what exactly the abuse is.²⁰ It has been held in the undermentioned case²¹ that the expression "abuse of the process" refers only to some process of the Court such as a writ of attachment, taken maliciously to the injury of another. It is submitted that this view is too narrow and is not in accord with the general trend of judicial decisions referred to above.

7. Criminal cases. — Where a Court issues notice to a party to show cause why he should not be proceeded against under Section 476, Criminal Procedure Code, for producing a forged receipt, and the question of forgery is before the High Court on appeal from the proceeding wherein the document was held to be a forgery, the High Court has inherent power to stay the proceedings under Section 476 pending disposal of the appeal.¹ See also the undermentioned cases.²

('26) AIR 1926 All 212 (214) : 48 All 356.

('29) AIR 1929 Lad 317 (318).

('12) 15 Ind Cas 845 (846) (Lah).

('10) 7 Ind Cas 94 (96) (Cal).

('26) AIR 1926 Pat 171 (173).

[See also ('34) AIR 1934 Mad 82 (84).

13. ('84) 10 Cal 757 (760). (Decree-holder purchasing in the name of another on Court refusing permission to bid.)

('09) 32 Mad 242 (245, 252). (Decree-holder permitted to bid but a minimum amount fixed for him—He purchasing in the name of another for less amount.)

('18) AIR 1918 Cal 598 (599). (Litigation conducted through vexatious desire to obstruct to pay costs.)

14. ('34) AIR 1934 All 840 (841). (Court can refuse to take his evidence.)

15. ('05) 28 Mad 560 (564, 565). (Dismissing vexatious suits without proof.)

('09) 4 Ind Cas 797 (799) (Nag). (Summoning witness with vexatious desire to obstruct.)

('05) 28 Mad 28 (32). (Do.)

('09) 31 All 116 (122) (P O). (Witness — Citing opponent as.)

('10) 32 All 104 (109) (P O). (Do.)

('13) 21 Ind Cas 737 (738) (Mad). (Do.)

('98) 25 Cal 203 (206). (Vexatious delay or default.)

('32) AIR 1932 Mad 263 (264). (Repeated disobedience of Court orders—Defence struck off.)

[See also ('93) 15 All 84 (90) (F B).]

[See however ('13) 21 Ind Cas 781 (781) (Mad). (Practice of citing opponent as witness is not illegal.)

('24) AIR 1924 Bom 90 (93). (Stay of vexatious and oppressive suit.)

16. ('80) 5 Cal 707 (710).

('99) 22 Mad 155 (158).

17. ('18) AIR 1918 Pat 352 (354); 3 Pat L Jour 435.

18. ('10) 8 Ind Cas 474 (475) (Upp Bur). (Applicant under O. 33 R. 5 a real pauper—Solvent coheirs putting him forward to get a decision of their rights also, is no abuse of the process of the Court.)

('15) AIR 1915 Mad 608 (612). (Choice of *forum* no abuse though defendant suffers.)

('15) AIR 1915 Mad 461 (463). (Second suit against same party for same relief on same cause of action pending first suit, is no abuse because first may fail on some technicality.)

19. ('16) AIR 1916 P C 64 (65) : 44 Cal 535 : 44 Ind App 11 (P O).

('15) AIR 1915 Mad 461 (463). (Second suit on same cause of action for same relief and against same party is not abuse of process of Court when first suit is not disposed of.)

20. ('28) AIR 1928 Mad 522 (523). (Rule 24 of the Madras Rules of Practice.)

[See also ('29) AIR 1929 Nag 251 (254) : 27 Nag L R 102 (F B).]

21. ('09) 32 Mad 242 (250). (Per Abdur Rahim, J.)

Note 7

1. ('25) AIR 1925 Lah 323 (323).

2. ('32) AIR 1932 Nag 86 (87, 88).

('32) AIR 1932 Oudh 31 (32). (Stay of criminal proceedings pending civil litigation in respect of the same matter.)

7a. Contempt of Court, proceedings for. — The High Court as a Superior Court of Record has an inherent power to punish for contempt of Court and that power is not affected in any way by the Codes of Civil or Criminal Procedure.¹ The High Court can also *enforce* its orders but does not possess the power to arrest for contempt a person outside its general jurisdiction.² It has been held that the High Court has jurisdiction to award costs in a criminal prosecution for contempt of Court and has inherent jurisdiction to order its recovery on the lines on which decrees are executed by the Civil Court.³

8. Insolvency Court. — As has already been observed in Note 1, *every* Court will, in the absence of express provision in respect of any matter, be deemed to possess, as inherent in its very constitution, all such powers as are necessary to do the right and undo a wrong in the course of the administration of justice.¹ An Insolvency Court has, therefore, inherent powers to pass just and necessary orders in cases not provided for by the Insolvency Act.² This is made clear by Section 5 of the Provincial Insolvency Act, 1920, read with Section 151 of the Civil Procedure Code. An Insolvency Court has thus power to grant *ad interim* protection before adjudication³ or to rectify mistakes in its proceedings,⁴ or to set aside an *ex parte* order obtained by fraud or misrepresentation.⁵ It has, however, no power to stay an execution sale going on in another Court⁶ though the *latter Court* may, on a claim by the Official Receiver under Section 51 or Section 52 of the Insolvency Act, stay the execution under its inherent powers.⁷

Where an applicant is entitled to an order of adjudication as of right under the Insolvency Act, there is no inherent power in the Courts to refuse adjudication on the ground that it is an abuse of the process of the Court.⁸

8a. General Clauses Act (1897), Section 21. — Under Section 21 of the General Clauses Act, 1897, where by Act of the Governor-General in Council a power to issue orders is conferred, that power includes, subject to like conditions, a power to add to, amend, vary or rescind any orders so issued. It has been held by the Chief Court of Oudh that the High Court has inherent jurisdiction to reinstate legal practitioners who have been dismissed from their profession.¹

See also Note 8b below.

8b. Legal Practitioners Act, cases under. — It has been held that although there is no express provision for a review of an order made under the Legal Practitioners Act, the High Court has inherent power to restore a pleader whose name has been struck off the rolls.¹

See also Note 8a above.

Note 7a

1. ('36) 40 Cal W N 1285 (1289, 1292).
2. ('36) 40 Cal W N 1285 (1289, 1292).
3. ('35) AIR 1935 All 1013 (1014) : 58 All 374.
(The High Court has jurisdiction to award costs in a criminal prosecution for contempt of Court and has inherent jurisdiction to order its recovery on the lines on which decrees are executed by the Civil Court.)

Note 8

1. See foot-note (7) Note 1.
2. ('33) AIR 1933 Pat 84 (87) : 12 Pat 163.
3. ('10) 6 Ind Cas 95 (97) (Cal).
4. ('34) AIR 1934 Lah 177 (178). (Cancelling prior order passed without hearing objections.)
5. ('34) AIR 1934 Mad 31 (31).

('33) AIR 1933 Mad 345 (346).

('32) AIR 1932 Lah 84 (84). (A I R 1920 Lah 361, Followed.)

('37) AIR 1937 Lah 631 (631, 632).

[See also ('19) AIR 1919 All 264 (264).]

5. ('37) AIR 1937 Lah 631 (631, 632).

6. ('17) AIR 1917 Mad 945 (946).

7. ('24) AIR 1924 Sind 69 (71). (Claim under S. 52.)

8. ('16) AIR 1916 P C 64 (65) : 44 Ind App 11 : 44 Cal 535 (P C).

('10) 7 Ind Cas 39 (41) : 32 All 645.

Note 8a

1. ('34) AIR 1934 Oudh 140 (142) (S B).

Note 8b

1. ('35) AIR 1935 All 321 (322) (F B).

9. Appeal. — An order under Section 151 is not an appealable order under Section 104 and no appeal, therefore, lies as an appeal from an order.¹ But if such an order amounts to a *decree* within the definition of Section 2 sub-section (2), an appeal will lie under Section 96.² Thus an order of remand under Section 151 which amounts to an adjudication under Section 2 (2) is appealable as a decree under Section 96.³ Where an order is made in execution under Section 151 and such order falls within Section 47, an appeal and a second appeal will lie therefrom.⁴ An order under Section 151 can also be challenged under Section 105 if it affects the decision of the case on the merits but not otherwise.⁵

• Note 9

1. ('27) AIR 1927 Cal 567 (568).
- ('32) AIR 1932 Nag 101 (102) : 29 Nag L R 83.
- ('33) AIR 1933 Lah 73 (74). (Injunction under inherent powers.)
- ('33) AIR 1933 Lah 135 (135).
- ('33) AIR 1933 Pat 561 (566).
- ('34) AIR 1934 Lah 79 (80).
- ('34) AIR 1934 Pat 41 (42). (Fraudulent compromise set aside under S. 151—No appeal.)
- ('24) AIR 1934 Lah 177 (178).
- ('31) AIR 1931 Lah 319 (350).
- ('28) AIR 1928 Lah 802 (803).
- ('30) AIR 1930 Lah 759 (790).
- ('23) AIR 1923 Oudh 177 (179) : 26 Oudh Cas 10.
- ('24) AIR 1924 Lah 487 (487).
- ('18) AIR 1918 Pat 505 (505) : 3 Pat L Jour 253.
- ('22) AIR 1922 Pat 479 (480) : 1 Pat 277.
- ('28) AIR 1928 Lah 114 (415).
- ('23) AIR 1923 Cal 450 (451).
- ('25) AIR 1925 Cal 181 (186).
- ('29) AIR 1929 Lah 854 (885).
- ('30) AIR 1930 Lah 496 (496).
- ('30) AIR 1930 Nag 195 (200) : 26 Nag L R 157.
- ('31) AIR 1931 Lah 311 (311) : 12 Lah 602.
- ('29) AIR 1929 Lah 245 (215). (Remand under Section 151.)
- ('20) AIR 1920 Mad 759 (760) : 60 Ind Cas 609 (609). (Do.)
- ('25) AIR 1925 Mad 229 (229) : 48 Mad 713. (Do.)
- ('27) AIR 1927 Mad 335 (336). (Do.)
- ('27) AIR 1927 Mad 859 (860). (Do.)
- ('27) AIR 1927 Mad 1190 (1190). (Do.)
- ('29) AIR 1929 Pat 232 (233). (Do.)
- ('24) AIR 1924 Rang 177 (177) : 1 Rang 656. (Do.)
- ('25) AIR 1925 Pat 336 (336). (Erroneous order of remand — Even though no appeal lay in this case the High Court intervened in the exercise of inherent powers.)
- ('35) 37 Pun L R 674 (676). (An order passed by a Court reviewing a prior order in exercise of the Court's inherent powers under S. 151, C. P. Code is not open to appeal.)
- ('36) AIR 1936 Lah 212 (213).
- ('37) AIR 1937 Cal 152 (155) : I L R (1937) 1 Cal 637.
- ('39) AIR 1939 All 28 (29).
- ('35) 158 Ind Cas 998 (999) (Nag).
- ('38) AIR 1938 Pesh 81 (82). (Order passed on

- appeal is without jurisdiction and open to further appeal or revision.)
- ('36) AIR 1936 Sind 166 (167) : 30 Sind L R 170. (Order in exercise of inherent jurisdiction in execution — No appeal lies.)
- ('37) AIR 1937 Cal 152 (156) : I L R (1937) 1 Cal 637.
- ('35) AIR 1935 Mad 420 (421).
- ('35) AIR 1935 All 27 (28).
- ('38) AIR 1938 Pat 447 (448). (Third party claimant establishing title to property sold in execution — Order of Court directing decree-holder to restore purchase money to auction-purchaser comes not under S. 144 but under S. 151 and is therefore not appealable.)
- ('36) AIR 1936 Pat 491 (492). (Where the appellate Court remands the case to be begun *de novo*, the remand is under S. 151 and not under O. 41 R. 23 and no appeal lies from such order of remand.)
- ('36) AIR 1936 Pesh 79 (80). (Order of remand by Appellate Court under S. 151, is not decree and hence not appealable.)
2. ('36) AIR 1936 Lah 212 (213).
[See ('39) 49 Cal W N 1028 (1029). (Held in this case that the order did not amount to a decree.)]
3. ('26) AIR 1926 Pat 457 (459) : 6 Pat 160.
('27) AIR 1927 Pat 296 (297) : 6 Pat 880.
('29) AIR 1929 Cal 606 (607). (The view that the remand order in this case amounted to a decree is unsustainable. Per Mookerjee, J.)
- ('28) AIR 1928 Cal 218 (219).
- ('24) AIR 1924 Mad 778 (779). (Order falling under S. 47.)
- ('35) AIR 1935 Pat 49 (51). (Order of remand not amounting to decree — Not appealable.)
[See also ('30) AIR 1930 Lah 468 (468).
('18) AIR 1918 Mad 545 (547).]
4. ('33) AIR 1933 Mad 399 (400).
('37) AIR 1937 Cal 152 (156) : I L R (1937) 1 Cal 637.
- ('36) AIR 1936 Lah 725 (727). (In considering whether an application is under S. 47 or not a Court must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by the applicant.)
- ('36) AIR 1936 Mad 636 (638).
- ('35) AIR 1935 All 27 (28).
5. ('34) AIR 1934 Lah 312 (312).

1. Legislative changes.—The third paragraph of Section 206 of the old Code ran as follows —

"If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error: provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment."

The present Section differs from the above provision in the following respects —

- (1) It does not provide for amendment where the decree is found to be at variance with the judgment. An application to amend the decree, so as to bring it into conformity with the judgment, should, under the present Code, be made to the Court in the exercise of its inherent power which is saved by Section 151.
- (2) The provision as to errors arising from any accidental slip or omission is new. Section 206 of the former Code referred only to clerical or arithmetical errors and errors due to discrepancy between the judgment and decree.
- (3) The present Section has omitted the proviso as to notice being given of the proposed amendment.

2. Amendment of judgments, decrees or orders. — It will be seen from O. 20 R. 3 that a judgment, once signed, cannot be afterwards altered or added to, save as otherwise provided by Section 152 or on review.¹ O. 20 R. 6 provides that the decree shall be drawn up so as to agree with the judgment. Reading this Section with O. 20 Rules 3 and 6, it is clear that as a general rule, a judgment, decree or final order, once drawn up and signed, cannot subsequently be altered, varied or amended in any manner even with the consent of the parties.² The only exceptions to the general rule are the following —

- (1) Under Section 152 a *clerical or arithmetical mistake or an error arising from an accidental slip or omission* may be corrected by the Court,³ even though the decree is in conformity with the judgment.⁴

Section 152 — Note 2

1. ('33) AIR 1933 Oudh 385 (386).

[See also ('33) AIR 1933 Lah 423 (424). (Conclusion arrived at by Judge should not be reversed by his successor unless by review or under S. 152.)]

2. ('01) 24 Mad 1 (10) : 27 Ind App 197 (PC).

('88) 15 Cal 211 (214). (Decree for specific performance is in the nature of preliminary decree—Decree-holder can ask Court under certain circumstances to enter up alternative relief claimed.)

('27) AIR 1927 Rang 311 (312) : 5 Rang 615. (Decree for specific performance being anomalous decree, time fixed can be extended.)

3. ('04) 14 Mad L Jour 359 (367).

('17) AIR 1917 Cal 184 (185) : 44 Cal 28.

('23) AIR 1923 Pat 354 (355) : 2 Pat 504.

('12) 17 Ind Cas 418 (418) : 1913 Pun Re No. 47.

('13) 20 Ind Cas 3 (5) (Lah).

('23) AIR 1923 Nag 109 (110).

('24) AIR 1924 Nag 325 (326). (Such mistakes may be corrected at any time.)

('24) AIR 1924 Bom 166 (167).

('22) AIR 1922 Mad 192 (192).

('95) 1895 All W N 237 (238).

('01) 24 Mad 1 (10) : 27 Ind App 197 (PC).

('80) 2 All 497 (506).

('23) AIR 1923 Mad 663 (664).

('28) AIR 1928 Lah 636 (637).

('68) 9 Suth W R 301 (304). (Clerical mistake.)

('18) AIR 1918 Mad 422 (424). (Wrong name added owing to clerical error.)

('23) AIR 1923 Lah 147 (148, 149). (Accidental slip or omission.)

('26) AIR 1926 P C 29 (30) : 4 Rang 513 (P C). (Mis-statement of fact due to accidental slip or omission—Judgment may be amended—If committed by High Court then it can be corrected by High Court and not by Privy Council.)

('29) AIR 1929 All 337 (337) : 51 All 672. (Accidental slip in judgment—May be done at any time and in any situation.)

('27) AIR 1927 Pat 25 (27). (Accidental omission of direction in judgment.)

('15) AIR 1915 All 188 (189) : 37 All 323. (Accidental omission of important thing in judgment.)

('17) AIR 1917 Lah 216 (216).

('20) AIR 1920 Nag 157 (157). (Application to correct the decree in the matter of costs.)

('35) AIR 1935 Cal 619 (620) : 63 Cal 181.

('35) AIR 1935 Oudh 92 (93) : 10 Luck 496.

4. ('27) AIR 1927 Mad 435 (436).

- (2) Under the inherent powers of the Court (Section 151) a decree which is *at variance with the judgment* can be amended so as to agree with the judgment.⁵
- (3) A decree or order may be varied or amended in *any other case* by a review of judgment or by an appeal from the decree.⁶

Without correcting the *decree itself*, the Court may, under O. 20 R. 11, order that the payment under a money decree may be made in instalments. A decree if made *ex parte* may also be *set aside* by a proceeding under O. 9 R. 13 or a suit in certain circumstances, or in appeal or revision.

Where the Court *can* amend a decree passed by it, the proper course is to apply for amendment and not to appeal.⁷ But neglect to apply for amendment does not preclude a party from obtaining the same result in appeal.⁸ But an amendment should not be made if it will have the effect of making the decree differ from the judgment. If the same mistakes are made in both the judgment and decree, both should be amended and not the decree alone.⁹

A decree may be amended though the applicant's pleader may have signed the decree.¹⁰

As to the powers of the Court to extend the time fixed by a decree, there is a conflict of opinion. See Section 148, Notes 2 and 3.

In an application to *amend* a decree or order under this Section, the Court has no power to *annul* the decree or order itself.¹¹

See also Notes to Order 20 Rule 6.

3. Clerical or arithmetical mistakes and errors arising from accidental slip or omission. — As has been seen in Note 2 above, a Court can always correct clerical or arithmetical mistakes and errors arising from accidental slip or omission even though the decree agrees with the judgment. Thus, where a direction as to costs,¹ or interest,² or leave to bring a fresh suit,³ or a provision fixing the period for payment in a redemption decree,⁴ or a relief asked by the plaintiff,⁵ is *inadvertently* omitted, the decree may be amended by adding the direction or provision.

5. See Note 3, below.

6. ('80) 2 All 497 (506).

('22) AIR 1922 Mad 192 (192).

('01) 24 Mad 1 (10) : 27 Ind App 197 (PC).

('27) AIR 1927 Mad 720 (722).

('71) 15 Suth W R 411 (414). (An omission to award costs—Review.)

7. ('70) 2 N W P H C R 184 (184).

('76) 25 Suth W R 63 (64).

('69) 1 N W P H C R 168 (170).

('81) 1881 All W N 60 (61).

('74) 21 Suth W R 41 (41).

('35) AIR 1935 Cal 619 (620) : 63 Cal 181. (Omission to appeal does not bar an application for amendment.)

8. ('85) 7 All 606 (611) (FB).

9. ('15) AIR 1915 Mad 939 (940).

('11) 11 Ind Cas 896 (897) (All).

('07) 31 Bom 447 (449).

('71) 15 Suth W R 4 (5).

('39) 41 Pun L R 119 (120). (The Court should not refuse to correct the error on the ground that since the mistake appears in the judgment,

the error in the decree is not accidental.)

10. ('25) AIR 1925 Oudh 373 (373).

11. ('19) AIR 1919 Low Bur 151 (153) : 9 Low Bur Rul 263.

Note 3

1. ('20) AIR 1920 Pat 180 (180).

('28) AIR 1928 Lah 800 (801).

2. ('10) 37 Cal 623 (625) : 37 Ind App 133 (PC). (Privy Council allowed amendment granting subsequent interest to plaintiff in appeal by defendant even though there was no cross appeal by former.)

('26) AIR 1926 Oudh 223 (224).

3. ('73) 20 Suth W R 401 (401).

4. ('17) AIR 1917 Oudh 141 (143).

5. ('30) AIR 1930 Lah 210 (211).

('37) AIR 1937 Oudh 191 (192) : 12 Luck 759. (Suit for possession and mesne profits—Court accepting oral request to determine mesne profits in execution — No mention as to mesne profits in judgment and decree — Amendment can be granted.)

2 The following are some instances of accidental slips that may be corrected by the Court under this Section —

- (1) Inadvertently passing a decree for foreclosure instead of one for sale.⁶
- (2) Inadvertently recording an order of dismissal, instead of an order decreeing the suit or appeal.⁷
- (3) Inadvertently misdescribing the property covered by the decree or judgment.³
- (4) Judgment accidentally including the property of a stranger.⁹
- (5) Passing a *personal* decree against the legal representatives of a party.¹⁰
- (6) Accidentally entering the name of a deceased party instead of his legal representatives who had been brought on the record.¹¹
- (7) Passing an erroneous order as to costs by oversight.¹²

See also the undermentioned cases.¹³

Where by an oversight or accidental slip the name of a wrong person is inserted in the decree as the guardian of a minor party, the Patna High Court has held that the mistake may be corrected under this Section.¹⁴ But where it is not a case of mere misdescription but a case of real non-representation of the minors by the proper guardian, it is a defect of substance and hence the Madras High Court has held¹⁵ that such a defect cannot be cured by substituting the name of the proper guardian under this Section.

Section 152 does not apply where there is no question of clerical or arithmetical mistakes or errors arising from accidental slips and omissions,¹⁶ even though the order

6. ('14) 22 Ind Cas 935 (936) : 7 Low Bur Rul 81.

7. ('15) AIR 1915 All 323 (324).

('24) AIR 1924 Oudh 144 (144).

8. ('15) AIR 1915 Cal 586 (586).

('18) AIR 1918 All 78 (78).

9. ('29) AIR 1929 All 147 (147) : 50 All 859.

10. ('23) AIR 1923 Bom 414 (415). (It may be amended though the application is made at a later stage.)

('24) AIR 1924 Lah 621 (622).

('39) 43 Cal W N 490 (492, 493).

11. ('30) AIR 1930 Sind 96 (96) : 26 Sind L R 150.

12. ('01) 1901 All W N 94 (95).

('26) AIR 1926 Lah 664 (665). (Order under this Section is not appealable.)

('12) 15 Ind Cas 910 (910) (Cal).

(1893) 1893 App Cas 638 (641), *Milson v. Carter*.

('39) AIR 1939 Lah 255 (256). (Suit for accounts — Final decree including only costs between preliminary and final decrees — Decree can be amended so as to include costs prior to preliminary decree.)

('35) AIR 1935 Oudh 369 (371) : 11 Luck 150.

('36) AIR 1936 Pesh 196 (197). (An application for amendment of a decree is maintainable under S. 152, where the question of award of costs is not in dispute but only the method of assessment or any item awarded is in controversy.)

('38) AIR 1938 Oudh 7 (8). (Full pleader's fee awarded against an admitting defendant contrary to rules.)

[See also ('35) AIR 1935 Cal 619 (620) : 63 Cal 181. (If judgment includes costs it means costs allowed by rules — If costs which are not permissible are included in decree, Court should

correct decree so as to make it in conformity with the judgment.)]

13. ('33) AIR 1933 All 102 (103). (Mortgage suit. — Omission to specify property in decree — Court has power to amend decree.)

('33) AIR 1933 All 608 (609). (Decree passed on basis of compromise — Defect not detected by any one — Court has inherent power to correct mistake.)

('38) AIR 1938 Mad 573 (575). (Appellate Court dismissing suit in toto instead of dismissing it only against appealing defendant — Mistake can be corrected under S. 152.)

('37) 169 Ind cas 226 (227) (Oudh). (Ex parte decree — Judge mentioning O. 17 R. 3 instead of O. 17 R. 2 in decree — Accidental slip can be corrected.)

('37) 1937 Mad W N 1013 (1013). (Suit to enforce charge — Judgment and decree not in terms of O. 34 R. 4 read with O. 34 R. 15 — Judgment and decree can be amended.)

14. ('26) AIR 1926 Pat 564 (565).

15. ('28) AIR 1928 Mad 1057 (1059).

16. ('26) AIR 1926 Oudh 223 (224). (The test is whether the order represents the intention of the Court at the time.)

('09) 33 Bom 216 (218).

('15) AIR 1915 All 102 (104).

('31) AIR 1931 All 427 (428). (Provision for sale in final decree under O. 34 R. 8, cannot be annulled by amendment on the ground that the preliminary decree does not contain it.)

('39) AIR 1939 All 96 (96, 97). (Amending decree by reducing decretal amount in light of accounts newly filed is not justified under the Section.)

correcting what is really a mistake of its ministerial officers by whom the decree or order was drawn up. In *In Re Swire, Mellor v. Swire*,³ Lindley, L. J., said:

"There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order, as passed and entered does not express the real order of the Court,"

the Court has ample jurisdiction to set that right. And Bowen, L. J., said:

"Every Court has inherent power over its own records so long as those records are within its power and it can set right any mistake in them. It seems to me that it would be perfectly snacking if the Court could not rectify an error which is really the error of its own minister. An order, as it seems to me, even when passed and entered, may be amended by the Court as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice, or on terms which preclude injustice."

Thus, where *P* sues *Q* and *R* for a certain sum and judgment is given in favour of *P* 'as prayed' but the decree as drawn up makes the amount payable by *Q* alone, the Court can amend the decree so as to bring it in conformity with the judgment.⁴ Similarly, where the judgment gives a mortgage decree in favour of the plaintiff but the decree is wrongly drafted so as to give the decree-holder only a charge on the property, the decree may be amended so as to agree with the judgment.⁵

Where an order which had been dictated but which had been intended to be reconsidered was signed inadvertently, the High Court of Allahabad set aside the order under its inherent powers.⁶

But where the decree as drafted is in accordance with the intention of the judgment and there is no clerical or arithmetical mistake or accidental slip or omission, the Court has no power, either under Section 152 or under its inherent jurisdiction, to amend it⁷ and this is so even if the judgment itself is erroneous in law⁸ and the error is apparent on the face of the judgment.⁹ Thus, where a judgment is passed against *G* and the decree agrees with the judgment, it cannot be amended so as to convert it into a decree against *G* and another person.¹⁰

(13) 19 Ind Cas 916 (917) (Cal). (Following (1852) 7 App Cas 34, *Lawrie v. Lees*, and (1892) App Cas 560, *Hutton v. Harris*.)

(18) AIR 1918 Mad 1287 (1293); 40 Mad 259 (FB.)

3. ('85) 30 Ch D 239 (216), *In re Swire, Mellor v. Swire*.

[See also ('26) AIR 1926 P C 136 (143) (PO). ((1855) 30 Ch D 239 (216), *In re Swire, Mellor v. Swire*; observation of Bowen, L. J. quoted with approval.)]

4. ('92) 15 Mad 403 (401). (And the matter becomes res judicata.)

5. ('16) AIR 1916 Mad 520 (521).

6. ('33) AIR 1933 All 49 (49).

7. ('27) AIR 1927 Pat 405 (405).

(30) AIR 1930 Lah 589 (591).

(27) AIR 1927 Lah 403 (401).

(26) AIR 1926 Cal 1100 (1101).

(27) AIR 1927 Cal 203 (206). (Arithmetical mistake in Commissioner's report crept into judgment and decree—No remedy by way of amendment but by review or appeal.)

(04) 8 Cal W N 473 (474). (Only remedy is by an application for review.)

(10) 6 Ind Cas 979 (931); 13 Oudh Cas 114.

(13) 24 Ind Cas 831 (831); 7 Sind L R 186.

(25) 103 Ind Cas 737 (738) (Lah).

(09) 2 Ind Cas 551 (551) (All).

(25) AIR 1925 Pat 47 (47, 48); 3 Pat 654.

(86) 8 All 377 (380).

(99) 22 Mad 361 (367).

(93) 15 All 121 (123). (Interest not granted by decree or judgment—Decree cannot be amended by award of interest.)

(98) 20 All 337 (339).

(82) 1882 All W N 72 (73).

(39) AIR 1939 Lah 312 (313).

(38) AIR 1938 Cal 187 (187, 188).

(36) AIR 1936 Oudh 81 (83). (Preliminary mortgage decree providing that the plaintiff was entitled to apply for personal decree in case of deficiency of the sale proceeds of the mortgaged property—If the decree is allowed to stand and is not appealed against, it cannot be amended by the omission of the provision for the personal decree because such provision amounts to an adjudication on the rights of the parties.)

(38) AIR 1938 Lah 331 (332, 333).

8. ('17) AIR 1917 Mad 290 (291, 292).

9. ('24) AIR 1924 Mad 225 (226).

(17) AIR 1917 Mad 290 (290, 291).

10. ('17) AIR 1917 All 166 (167).

(16) AIR 1916 Pat 45 (46).

7. "May be corrected." — The amendment of accidental mistakes under this Section cannot be claimed by any party *as of right*. The matter is left to the discretion of the Court to be exercised in view of the peculiar facts of each case.¹ But the Calcutta High Court has, in the undermentioned case,² held that the word "may" in Section 152 does not make it discretionary with the Court to order the correction but merely enlarges the powers of the Court by providing that such correction can be done at any time. It was, however, conceded in that case that the amendment may be refused when it offended against the principles of equity, for instance, where the interest of a *bona fide* purchaser for value without notice may be jeopardised. In a later case of the same High Court,³ Suhrawardy, J., adhered to the view taken in the case and further held that where the decree was not in conformity with the judgment owing to an error of the Court, it was *incumbent* on the Court to order its amendment without regard to any laches on the part of the parties. Graham, J., on the other hand, held that the matter is one of *discretion* to be exercised in view of the particular facts of each case. In a still later case,⁴ the same High Court held that a decree could be brought into conformity with the judgment even after the lapse of years and that the only limitation is that the Court may deem it inexpedient or inequitable to exercise its power where third parties have acquired rights *bona fide*, under the erroneous decree.

8. "At any time." — It is a general principle that rules of limitation are applicable to acts to be performed by *litigants* and not to acts which the Court may or has to perform *suo motu*.¹ An amendment under this Section falls within the latter class of acts and there is consequently no limitation for an application for amendment under this Section.² The amendment can be made *at any time*.³ But where satisfaction of a decree has been entered up the Court is *functus officio* and has no power to amend the decree. An order for amendment in such a case is a mere

Note 7

1. ('23) AIR 1923 Mad 57 (57).
('33) AIR 1933 Oudh 425 (425).
('33) AIR 1933 Oudh 466 (468) : 9 Luck 90.
('33) AIR 1933 Oudh 529 (530) : 9 Luck 162.
('33) 142 Ind Cas 880 (882) (Nag).
('25) AIR 1925 All 187 (188) : 47 All 44.
('25) AIR 1925 All 556 (556).
('35) AIR 1935 Oudh 369 (371) : 11 Luck 150.
('38) AIR 1938 Lah 4 (6).
('37) AIR 1937 Lah 894 (895).
2. ('24) AIR 1924 Cal 895 (897).
3. ('32) AIR 1932 Cal 563 (564, 566, 567).
4. ('33) AIR 1933 Cal 627 (629) : 60 Cal 753.

Note 8

1. ('86) 8 All 519 (533, 534). (The mere fact that one of the parties has made an application under this Section, will not render the act of the Court subject to the rule of limitation.)
('87) 11 Bom 284 (285).
('13) 21 Ind Cas 540 (541) : 7 Sind L R 53.
2. ('29) AIR 1929 Oudh 385 (388) : 4 Luck 562 (FB).
('21) AIR 1921 Pat 491 (494).
('24) AIR 1924 Oudh 408 (409).
('24) AIR 1924 Oudh 144 (144).
('24) AIR 1924 Cal 895 (899).
('82) 4 Mad 172 (173).

- ('97) 1897 Pun Re No. 12.
('87) 10 Mad 51 (52).
('08) 11 Oudh Cas 208 (211).
('87) 9 All 364 (365).
('69) 12 Suth W R 65 (66). (90 days' rule does not apply.)
('94) 21 Cal 259 (261).
('37) AIR 1937 Lah 894 (895).
('37) 41 Cal W N 1330 (1331).
3. ('21) AIR 1921 Oudh 190 (190).
('29) AIR 1929 All 337 (337) : 51 All 672.
(1892) 1892 App Cas 547 (564), *Hatton v. Harris*.
(Decree amended after 39 years.)
('88) 12 Bom 174 (183). (Decree amended after 10 years.)
('91) 14 Mad 150 (152). (Amendment after execution.)
('24) AIR 1924 All 690 (690).
('23) AIR 1923 Bom 414 (415). (Late stage of the proceeding.)
('27) AIR 1927 Rang 57 (57) : 4 Rang 347. (Omission to appeal does not bar application.)
('25) AIR 1925 Oudh 418 (419).
('11) 12 Ind Cas 151 (154) : 39 Cal 265.
('94) 17 Mad 67 (69).
('14) AIR 1914 Sind 40 (41) : 8 Sind L R 28.
('16) AIR 1916 Mad 908 (908). (Pending second appeal.)
('37) AIR 1937 Lah 894 (895).
('39) AIR 1939 Bom 389 (390) : 41 Bom L R 800 (802).

nullity unless steps are taken to set aside the order recording satisfaction.⁴

Similarly, where third parties have acquired rights under the erroneous decree, for valuable consideration and in ignorance of the error in the decree, no amendment should be allowed so as to prejudice their rights.⁵ The reason is that it would be inequitable to allow amendment of the decree in such a case.⁶ Laches may also, in the particular circumstances of a case, disentitle a party to relief by way of amendment of a decree.⁷

See also Note 7 above.

9. Court by which amendment can be made. — Unless and until a decree is superseded in appeal or revision, the Court which passed it is entitled to amend it under this Section.¹ Where an appeal or revision has been preferred from the decree, the power of the Court of first instance to amend the decree depends on the question whether the decree has been superseded by the appellate decree or is left intact. Where the decree of the lower Court is *confirmed, reversed or varied*, it is superseded by the decree of the Appellate Court, and the only Court that can amend the decree thereafter is the Appellate Court.² But where the decree of the lower Court is left

('39) 43 Cal W N 490 (192).

4. ('25) AIR 1925 All 556 (556).

('29) AIR 1929 Mad 830 (832).

('26) AIR 1926 Mad 516 (517).

('02) 12 Mad L Jour 96 (97).

5. ('23) AIR 1923 Mad 57 (57).

('24) AIR 1924 Cal 895 (897).

('25) AIR 1925 Bom 389 (390).

('11) 12 Ind Cas 151 (155) : 39 Cal 265. (But this principle has no application in cases of assignments of decrees.)

('24) AIR 1924 Oudh 408 (410).

('39) AIR 1939 Bom 389 (391) : 41 Bom L R 800 (804, 805).

('37) 41 Cal W N 1330 (1331).

6. ('24) AIR 1924 Cal 895 (897).

[See also ('37) AIR 1937 Oudh 217 (220) : 13 Luck 101 (FB). (Decree subsequently amended cannot be allowed to operate retrospectively so as to affect rights of purchaser for value without notice.)]

7. ('25) AIR 1925 All 187 (188) : 47 All 44.

('28) AIR 1928 Nag 149 (149).

('29) AIR 1929 Cal 676 (679) : 57 Cal 549.

('15) AIR 1915 Lah 213 (214).

('32) 36 Cal W N 97 (103, 104, 105).

('37) AIR 1937 Cal 96 (99). (Applicant not appearing in appeal which resulted in decree and hence having no knowledge of discrepancy between judgment and decree—Delay in making application for amendment—Delay held not fatal to granting of application.)

('37) 41 Cal W N 1330 (1331). (Under the circumstances of the case it was held that the applicant was under no obligation to satisfy the Court that there were no laches on his part.)

('35) 37 Pun L R 623 (623). (Application to correct clerical error as to costs refused on ground of laches.)

Note 9

1. ('85) 1885 All W N 325 (326). (Execution Court cannot add to or alter decree.)

(1864) 1 Suth W R Misc 8 (8).

('70) 13 Suth W R 330 (330).

('91) 13 All 124 (126).

('22) AIR 1922 Mad 186 (186). (Transfer of application for amendment to another Court is not proper.)

2. ('10) 32 All 295 (300) : 37 Ind App 70 (PC).

('93) 6 C P L R 142 (143).

('93-1900) 1893-1900 Low Bur Rul 449.

('10) 5 Ind Cas 304 (304) (Cal).

('10) 5 Ind Cas 261 (262) (Cal).

('89) 11 All 314 (318) (FB).

('14) AIR 1914 Mad 99 (100).

('14) AIR 1914 Oudh 332 (333).

('96) 1896 Pun Re No 32, page 89.

('18) AIR 1918 Cal 133 (134).

('17) AIR 1917 All 417 (418).

('13) 21 Ind Cas 540 (541) : 7 Sind L R 53.

('17) AIR 1917 Mad 589 (589).

('16) AIR 1916 Mad 1202 (1202).

('11) 12 Ind Cas 139 (139) (Mad).

('11) 12 Ind Cas 669 (672) (Cal).

('15) AIR 1915 Mad 1068 (1068).

('25) AIR 1925 Mad 735 (735).

('27) AIR 1927 Rang 57 (58) : 4 Rang 347.

('21) AIR 1921 Upp Bur 5 (6) : 4 Upp Bur Rul 1.

('29) AIR 1929 Rang 153 (159) : 7 Rang 88.

('31) AIR 1931 Rang 153 (154) : 9 Rang 186.

('30) AIR 1930 Nag 138 (138).

('29) AIR 1929 Mad 830 (831).

('21) AIR 1921 All 130 (130, 131).

(1900) 1900 Pun Re No. 59, page 231.

('92) 15 Mad 170 (174).

('95) 18 Mad 214 (216) (FB). (Overruling 9 Mad.

354.)

intact, as for instance, where an appeal or revision is dismissed *in limine*,² or for default,⁴ or where the amendment relates to a portion of the decree which is outside the scope of the appeal⁷ or where the appeal is withdrawn,³ the lower Court is entitled to amend the decree. It was held by the High Court of Allahabad in the undermentioned case⁷ that the words "at any time" have a special significance and provide for amendment by the lower Court even where its decree has merged in the decree of the Appellate Court.

There is a conflict of opinion as to the effect of a dismissal of an appeal under O. 41 R. 11 of the Code and as to whether after such dismissal the decree can be amended by the lower Court or can be amended only by the Appellate Court. For a discussion of the question, see Notes to O. 41 R. 11, *infra*.

Amendment pending appeal against decree.—From what has been said above, it is clear that an amendment can be made by the Court which passed the decree even when an appeal against the decree is pending in a superior Court.⁵ But the Appellate Court can also amend the lower Court's decree under Section 152 read with Section 107 (2) of the Code.⁹

Power of executing Court to amend.—An executing Court has no power, as such, to amend the decree. It cannot go behind the decree but must take the decree as

('94) 18 Bom 542 (545).

('10) 5 Ind Cas 723 (725) (Cal).

('07) 6 Cal L Jour 512 (543).

('18) AIR 1918 All 341 (342).

('89) 11 All 267 (274) (FB).

('38) AIR 1938 Lah 4 (6).

('35) AIR 1935 Cal 619 (620) : 63 Cal 181.

The following cases to the contrary are not good law especially in view of the Privy Council decision in 32 All 295 (PC) cited above :

('88) 10 All 51 (54).

('69) 11 Beng L R 367n.

('69) 11 Beng L R 368n. (But executing Court cannot question validity of decree on the ground that it was amended by lower Court after it had been confirmed in appeal.)

('74) 21 Suth W R 41 (41). (Decree of trial Court affirmed by lower Appellate Court—Application for amendment must be made to the lower Appellate Court and not to the High Court.)

('97) 24 Cal 759 (762). (Decree confirmed on appeal by High Court—High Court can amend.)

('70) 14 Suth W R 26 (26).

('94) 18 Bom 542 (544, 545).

('89) 11 All 267 (274) (FB).

('89) 11 All 314 (318) (FB).

[See ('89) 9 Cal W N 605 (608).]

3. ('12) 16 Ind Cas 933 (933) (Mad). (Appeal dismissed on the ground that no appeal lay.)

('32) AIR 1932 Pat 238 (240) : 11 Pat 409.

('20) AIR 1920 Lah 321 (322) : 1 Lah 342. (Revision dismissed—Application to amend should be made to the Small Cause Court.)

('35) AIR 1935 Pesh 91 (92).

4. ('25) AIR 1925 All 556 (556).

('17) AIR 1917 Nag 24 (24).

5. ('20) AIR 1920 Cal 286 (286).

[See also ('33) AIR 1933 Cal 335 (336); 36 Cal WN 665 (667). (Decree confirmed by Privy Council—Clerical mistake discovered subsequently as to double payment of court-fees—High Court can correct.)]

6. ('28) AIR 1928 All 679 (680) : 50 All 603.

7. ('34) AIR 1934 All 971 (972).

8. ('18) AIR 1918 Mad 295 (296).

('14) AIR 1914 Cal 220 (221).

('11) 12 Ind Cas 669 (672) (Cal). (Lower Court's control over its decree does not come to an end on the filing of an appeal.)

('24) AIR 1924 Pat 528 (528).

('26) AIR 1926 All 304 (304) : 43 All 224.

('24) AIR 1924 All 127 (127).

('31) AIR 1931 All 766 (766).

('94) 21 Cal 476 (479). (The matter was left to the Appellate Court in the peculiar circumstances of the case.)

Note.—The language of the decision in AIR 1916 All 170 : 32 Ind Cas 194 would seem to lay down a contrary view but the real decision in the case is quite different, namely that after a decree is drawn up, it cannot be altered on the ground that it is erroneous in law.

[See also ('32) AIR 1932 Oudh 291 (293) : 8 Luck 93.]

9. ('28) AIR 1928 All 458 (459).

('23) AIR 1923 All 358 (360) : 45 All 53. (Error in calculating amount.)

('75) 1 Bom 1 (3). (Clerical error in decree ordered to be amended at hearing of appeal.)

[See ('34) AIR 1934 Pat 146 (147). (Decree cannot be amended in appeal arising from proceedings for execution of the decree.)]

2 against it.¹ When an amendment is ordered in this manner, the aggrieved party may
4 apply for a review of the order.²

It has been held that where a plaintiff applies for the amendment of a decree on the ground that by an accidental slip he mentioned in his plaint the name of a wrong person as the defendant which name has been repeated in the decree, and asking that the decree should be amended by the insertion of the name of the right person, it is open to the Court to amend the decree as prayed for after giving notice to the person whose name is sought to be inserted as that of the defendant and giving him an opportunity to show that the mistake is not accidental or clerical.³

13. Effect of amendment. — An amended decree must be taken as in force from the date of the original decree. There is a distinction between a case of amendment and one of revision or substitution. When an instrument is amended so as to express the real intention which it was intended to express but which it did not completely express, the transaction is not in *substantia* varied but its inaccurate description is only rectified.⁴ Hence, where a decree is amended the amended decree operates as *res judicata* from the date of the original decree and not from that of the amendment.⁵ But it has been held by the Oudh Chief Court that though the *general* rule is that an amendment of a decree dates back to the date of the decree, yet the amendment should not be allowed to take effect from the date of the decree so as to affect the rights of a purchaser for value without notice who has acquired the property after the decree but before the making of the amendment.⁶

14. Amendment and limitation. — An amendment of the decree under this Section does not give a fresh starting point of limitation for an appeal or application except an application for the execution of the decree.⁷ Where, however, a party is prejudiced by an amendment but finds that at the date of the amendment, an appeal from the decree is barred if the period is calculated from the original decree, the Court will excuse the delay under Section 5 of the Limitation Act.⁸ Again, where a decree is in conformity with the judgment and the Court has no power to amend the decree under this Section, a party affected by the amendment will be entitled to

1. ('30) AIR 1930 Cal 619 (620). (32 Cal 238 (173).
Applied.)

[See also ('30) AIR 1930 All 541 (541, 542).]

2. ('30) AIR 1930 All 381 (386) : 15 All 281.

3. ('30) AIR 1930 All 541 (544, 545).

[See also ('33) AIR 1933 Bom 200 (203). (Mis-
description of person against whom decree is
passed. This can be amended in execution pro-
ceedings.)]

Note 13

1. ('21) 11 Mad 130 (132).

('22) 13 Mad 103 (100).

2. See cases cited in footnote (1).

[See also ('38) AIR 1938 Mad 373 (373). (Correc-
tion of accidental or clerical mistakes though
requiring to be made in review really falls
under S. 132 and there is no new decree sub-
stituted for the original one in such cases and
appeal lies from the original decree.)]

3. ('37) AIR 1937 Oudh 217 (220) : 13 Luck 101 (105).

Note 14

1. ('20) AIR 1920 Pat 622 (630) : 5 Pat Li Jour
472 (473). (Time for appeal runs from date of

original decree.)

('16) AIR 1917 Low Bur 162 (163). (De.)

('22) 22 Mad 361 (367). (De.)

('05) 32 Cal 808 (909). (De.)

('23) AIR 1923 All 22 (23). (Time for application
under Art. 181 of the Limitation Act runs from
date of original decree.)

('21) 11 Mad 130 (132).

('22) 13 Mad 103 (100).

[But see ('15) AIR 1915 Nag 57 (58) : 11 Nag Li R
93. (Time runs from the date of amendment.)]

2. ('19) AIR 1919 Oudh 91 (91, 92).

('32) AIR 1932 Cal 334 (335) : 59 Cal 1032.

(Amendment having no relation to the grounds
upon which the validity of the decree is sought
to be challenged in appeal. Even in such cases
Court has discretion to excuse delay — 3 Cal Li
Jour 188; AIR 1921 All 60, Dissented from—AIR
1928 Pat 255, Distinguished.)

('06) 3 Cal Li Jour 188 (192, 193).

('01) 24 Mad 646 (649, 650).

('35) AIR 1935 Oudh 461 (463) : 11 Luck 415.

calculate the time from the date of amendment.³ In the undermentioned case,⁴ the Punjab Chief Court expressed an opinion that the defendants were not bound to appeal from the decree at a time when the plaintiff had, within the period of ninety days allowed for an appeal, applied for an amendment of the decree. No reasons are given for this proposition and the decision, it is submitted, cannot be accepted as correct.

Limitation for the execution of decree. — Article 182 clause (4) of the Limitation Act (IX of 1908) expressly provides that where the decree has been amended, time for execution of it runs from the date of amendment. The following decisions to the contrary, passed under the Limitation Act of 1877, which did not contain such a provision, are no longer good law.⁵ The undermentioned cases⁶ decided under the same Act, in which it was held that the limitation was extended, by treating the order for amendment as one for review of judgment, are only of academic interest at the present time in view of the express provision in Article 182 clause (4).

See also the Authors' Commentaries on the Limitation Act, Article 182 Note 50.

15. Successive applications for amendment—Res judicata. — An application for amendment of a decree is not a suit. Hence, Section 11 of the Code does not apply to such an application. But the principle of *res judicata* applies to it, Section 11 not being exhaustive. (See Notes under Section 11.) Hence, where an application for amendment has been disposed of on the merits, a subsequent application substantially for the same relief is barred.¹ But where the subsequent application is materially different from the previous application it is not barred.²

16. Consent decree. — A clerical or arithmetical mistake or an error due to an accidental slip or omission in a consent decree, may, as in the case of any other decree, be corrected by the Court under Section 152.¹ Similarly, where a consent decree is not in accordance with the agreement of the parties the Court has power under Section 151 to bring it into conformity with the agreement.² But where there is no such mistake and there is no variance between the decree and the compromise petition, it cannot be amended either under Section 152 or Section 151, on the ground that the compromise itself is bad for mutual mistake or fraud of the parties or on the ground that it does not represent the true intention of the parties.³ In such a case, the remedy of the aggrieved party is to *sue* for setting aside the decree on the ground of mistake

3. ('99) 22 Mad 364 (367).

4. ('19) AIR 1919 Lah 250 (251).

5. ('07) 4 All L Jour 469 (471).

('05) 27 All 575 (577).

('91) 13 All 124 (126).

('98) 20 All 304 (306).

6. ('95) 17 All 39 (41).

('82) 4 All 137 (141).

('98) 25 Cal 258 (260).

('01) 24 Mad 25 (26).

Note 15

1. ('11) 12 Ind Cas 151 (153) : 39 Cal 265.

('15) AIR 1915 Cal 696 (697).

('10) 5 Ind Cas 119 (120) (Mad).

('37) AIR 1937 Oudh 246 (247) : 13 Luck 186.

(But where the application is not decided on merits subsequent application is not barred.)

2. ('27) AIR 1927 Rang 57 (57) : 4 Rang 347.

('28) AIR 1928 Lah 244 (245).

Note 16

1. ('13) 21 Ind Cas 115 (116) (Cal).

('34) AIR 1934 Rang 108 (109).

('29) AIR 1929 Lah 254 (254).

('29) AIR 1929 Lah 400 (401).

('28) AIR 1928 Lah 352 (353) : 9 Lah 172.

('37) AIR 1937 Bom 457 (457, 458) : 12 Bom 1237.

Bom 837.

2. ('34) AIR 1934 Rang 108 (109).

3. ('16) AIR 1916 Cal 446 (446).

('34) AIR 1934 Lah 239 (239).

('29) AIR 1929 Nag 24 (24).

[See ('37) AIR 1937 Bom 457 (457, 458) : 12 Bom 1237. (1937) Bom 837. (mistake in contract cannot be corrected under Section.)]

Where an amendment is sought on the ground of a subsequent change of circumstances, a suit, and not an application, would be the most appropriate remedy.⁶

As to the maintainability of suits to set aside or correct a *consent decree* on the ground of mutual mistake of the parties, see Note 16 above.

19. Appeal. — An order granting or refusing an amendment under this Section is not a decree¹ or an appealable order, and consequently, no appeal lies therefrom.² Where, however, there is no clerical or arithmetical mistake or accidental slip or omission, but the whole method of calculation is altered by the amendment, the order, though purporting to be one under Section 152, must be deemed to be one passed on review under Order 47 and hence will be appealable.³

An order of the High Court rejecting an application to amend a decree passed by it on appeal, is not an order made "on appeal" within the meaning of Clause 39 of the Letters Patent (Calcutta), and is not appealable to the Privy Council under that Clause.⁴ As to whether an order of a single Judge of the High Court on an application for amendment is appealable under Clause 15 of the Letters Patent as a "judgment," see Note 6 to Section 104.

The amended decree is always appealable as a decree.⁵ But, as has been seen in Note 14 above, in the case of an amendment under Section 152, no fresh starting point of limitation for appeal is given by the amendment, though the delay may be excused in appropriate cases under Section 5 of the Limitation Act.

Where the Judge instead of amending the decree passes a fresh decree, there is a right of appeal from the amended decree,⁶ but not from the original decree.⁷

20. Revision. — An order granting or refusing an application for amendment under the Section is, as has been observed already in Note 19 above, neither a decree nor an appealable order. Hence, it is open to revision by the High Court in a fit case.¹

6. ('15) AIR 1915 Cal 696 (698).

Note 19

1. ('88) AIR 1933 Rang 264 (265). (Application to set aside order allowing amendment of decree is governed by Art. 181.)

('36) AIR 1936 Oudh 81 (82).

('39) AIR 1939 Bom 389 (390) : 41 Bom L R 800 (802).

2. ('10) 5 Ind Cas 304 (305) (Cal).

('01) 28 Cal 177 (179).

('88) 1888 Pun Re No. 101.

('26) AIR 1926 Lah 664 (665).

('23) AIR 1923 Lah 147 (148).

('28) AIR 1928 Lah 352 (353) : 9 Lah 176.

('27) AIR 1927 Lah 68 (68).

('11) 10 Ind Cas 850 (850) (Lah).

('19) AIR 1919 All 30 (31).

('18) AIR 1918 Lah 63 (63) : 1918 Pun Re No. 43.

('84) 6 All 125 (129).

('04) 1 All L Jour 701 (702).

('38) AIR 1938 Lah 4 (5). (Order amending decree passed on separate application under Ss. 151/152 but not in execution — Application under Ss. 151/152 does not fall under S. 47—No appeal is competent from order.)

('36) AIR 1936 Oudh 81 (82).

3. ('21) AIR 1921 Lah 250 (251).

4. ('03) 30 Cal 679 (681).

5. ('05) 9 Cal W N 605 (607).

('31) AIR 1931 Cal 578 (579).

('28) AIR 1928 All 194 (196).

('81) 6 Cal 22 (24, 25). (Decree passed on review of judgment. Time for appeal runs from such decree, and not the original decree. See also Note 14 above and the cases cited therein.)

('38) AIR 1938 Lah 331 (332).

6. ('34) AIR 1934 Lah 839 (839).

7. ('36) AIR 1936 Sind 53 (55) : 29 Sind L R 445.

Note 20

1. ('07) 31 Bom 447 (449).

('34) AIR 1934 All 100 (101). (Order to amend is different from amended decree.)

('15) AIR 1915 Mad 1068 (1068).

('12) 16 Ind Cas 933 (933, 934) (Mad).

('25) AIR 1925 All 556 (556).

('93) 15 All 121 (122).

('85) 7 All 875 (876) (FB).

('85) 7 All 876 (878) (FB).

('37) AIR 1937 Lah 894 (894, 895).

('38) AIR 1938 Lah 4 (5).

('39) AIR 1939 Bom 389(390):41 Bom LR 800(802).

('36) AIR 1936 Oudh 81 (82).

Other Topics (miscellaneous)

Amendment of pleadings. See Notes 2 and 3.
 Amending cause title by substituting legal representatives. See Note 3.
 Answer to interrogatories. See Note 3.
 Change of cause of action. See Note 6.
 Execution petition. See Note 3.

For determining the real question or issue raised. See Note 2.

Notice of motion. See Note 3.

Particulars. See Note 3.

Sale certificate. See Note 3.

1. Legislative changes. — This Section is new. It is based on O. 28 R. 12 of the Rules of the Supreme Court (of England).

2. Scope of the Section. — Section 152 deals with amendments of *judgments, decrees and orders*. O. 6 R. 17 deals with amendments of *pleadings*. The present Section confers a general power on the Court to amend any defect or error in *any proceeding* in a suit and to make all necessary amendments for the purpose of determining the real questions between the parties. The object of the rule allowing amendments is to minimise litigation and avoid multiplicity of proceedings,¹ and also to see that the merest technicality may not be allowed to stand in the way of substantial justice.² Hence, the Court has power to allow all necessary amendments for raising the real questions at issue between the parties provided that no injury or injustice is caused to the opposite party and are such as can be sufficiently compensated for by costs or otherwise.³ But the Court will not aid a party by allowing him to amend his pleading where the mistake was fraudulent or intended to get round a previous decision of the Court.⁴

The power to get an amendment of a proceeding under this Section, is subject to the *discretion* of the Court, and is not claimable as of *right*.⁵ As to the general principles guiding the exercise of discretion in granting or refusing an amendment, see Order 6 Rule 17.

3. "At any time." — The power of amendment conferred by this Section can be exercised "at any time" during the proceedings.¹ The power is vested both in the original as well as in the Appellate Court.² But *prima facie* it is limited to

Section 153 — Note 2

1. ('98) 25 Cal 371 (390).

('15) AIR 1915 Cal 203 (207). (Decree for sale under O. 34 R. 4— But property already sold in revenue sale — Decree amended for disposal of sale proceeds.)

('14) AIR 1914 Mad 256 (258). (Amendment of an application in forma pauperis.)

('19) AIR 1919 Oudh 55 (56). (Amendment of pre-emption decree granting set-off.)

('10) 5 Ind Cas 532 (535) : 37 Cal 399. (Omission of pleader's name in vakalatnama—Amendment allowed.)

('23) AIR 1923 Nag 182 (186) : 19 Nag L R 36. (Do).

2. ('33) AIR 1933 All 295 (297) : 55 All 216.

('37) AIR 1937 Nag 173 (174) : 1 L R (1937) Nag 514. (Courts are to be reluctant to non-suit parties on purely technical grounds if a way of escape can be found.)

[See also ('35) AIR 1935 Mad 118 (118). (Decree-holder applying for execution before date mentioned in decree — Judgment-debtor filing counter only subsequent to such date — Court

has discretion to condone such irregularity if no prejudice is caused to opposite side as it amounts to little more than a mere technicality.)

3. (1880) 14 App Cas 818 (820), Australian Marine Navigation Co. v. Smith and Sons.

(1878) 10 Q J 398 (399), *Wildesly v. Harper*.

(1888) 32 W R (Eng) 262 (263), *Charapada v. Commercial Union Association*.

(1884) 26 Ch D 700 (711), *Cropper v. Smith*.

(1887) 19 Q B D 394 (399), *Weldon v. Neal*.

4. ('25) AIR 1925 All 142 (142). (Overruling the suit in order to get round a previous decision is an abuse of the process of the Court.)

5. ('97) 21 Bom 570 (571).

('15) AIR 1915 Mad 449 (451, 452). (Great delay on applicant's part due to his negligence — Amendment refused.)

Note 3

1. ('96) 20 All 476 (480). (Formal error as to date in a pending execution application may be amended even after limitation.)

2. ('16) AIR 1916 Pat 247 (248) : 1 Pat L J 404 (1916).

amendments during the actual pendency of proceedings and not after the decree has been drawn up and sealed.³

4. "Defect or error." — Assuming that Section 153 applies to orders of Courts, an order erroneous on the merits is not "a defect or error" in the proceedings within the meaning of the Section, and cannot be amended or corrected under this Section.¹

5. "Any proceeding in a suit." — The term "proceeding" in this Section must be interpreted as including any application to a Court of justice however made, for aid in the enforcement of rights, for reliefs, for redress of injuries, for damages or for any remedial object.¹ See for instance the following —

(i) *Pleadings*. — See Order 6 Rule 17.

(ii) *Memorandum of appeal*. — A memorandum of appeal may be amended under this Section.² Thus, when, through a *bona fide* error, the name of a deceased person instead of that of his legal representative appears in a memorandum of appeal as the respondent, the error may be amended.³ But, it has been held that no such discretion to amend is available to the Court when it is sought to substitute a person for the potential *appellant* who died before the memorandum of appeal was filed, the reason being that in such a case there is no memorandum of appeal at all in the eye of the law.⁴

(iii) *Application for execution*. — See Notes to Order 21 Rule 17.

(iv) *Application for final decree in a mortgage suit*. — The Section applies to the amendment of an application for a final decree in a mortgage suit.⁵

(v) *Application for personal decree under O. 34 R. 6*. — Under Section 153 an application for a personal decree against the mortgager under O. 34 R. 6 may be amended by allowing a party to sign it, where he has failed to do so in the first instance,⁶ or by allowing the addition of an alternative prayer.⁷

(vi) *Application for restitution*. — Where an application for restitution has not been made in the correct form, it may be amended under this Section.⁸

(vii) *Answers to interrogatories*. — Leave may be given in a fit case to amend answers to interrogatories. Thus, an answer containing an admission made by mistake may be amended.⁹ Similarly, an answer may be amended where subsequent to the filing of the affidavit of answer, it is found that there are other matters which could have been included in it.¹⁰

(22) AIR 1922 All 81 (81). (Amendment may be allowed even in second appeal.)

3. (24) AIR 1924 Bom 166 (166).

(12) 14 Ind Cas 407 (409) : 8 Nag L R 13.

Note 4

1. (22) AIR 1922 Pat 121 (121) : 4 Pat L Jour 287.

Note 5

1. (37) AIR 1937 Mad 342 (343).

2. (30) AIR 1930 All 181 (182).

(23) AIR 1923 Lah 115 (116) : 3 Lah 382. (Grounds of appeal may be amended to make them clear.) [See (26) 56 Ind Cas 11 (11) (Lah). (Amendment of the respondents's names.)]

3. (37) AIR 1937 Bom 401 (407) : 1 L R (1937) Bom 401.

(36) AIR 1936 Pesh 192 (193).

(23) AIR 1923 Mad 1210 (1210) : 49 Mad 18 (FB).

(Overruling AIR 1924 Mad 56.)

(30) AIR 1930 All 181 (182).

(32) AIR 1932 Lah 335 (336).

[See however (13) 21 Ind Cas 336 (336). (Upp Ban.)]

4. (38) AIR 1938 Nag 271 (276) : 31 Nag L R 57.

5. (22) AIR 1922 All 416 (417).

6. (24) AIR 1924 All 801 (805).

7. (15) AIR 1915 Mad 452 (453) : 38 Mad 677.

8. (21) AIR 1921 All 321 (322).

9. (1892) 3 Ch 236 (236), *Holls v. Barton*.

10. (1877) 7 Ch D 435 (442), *Saunders v. Jolly*.

(viii) *Particulars.* — Leave to amend particulars will generally be given on terms, provided the application is made a reasonable time before the trial.¹¹ But leave will be granted at the trial only when it is shown that the new matter has been recently discovered.¹²

(ix) *Notice of motion.* — A notice of motion can be amended under this Section.¹³

(x) *Power of attorney.* — The Court has inherent power to amend a power of attorney filed by the *mukhtiar* of a party by the insertion of the *mukhtiar's* name which was omitted by mistake.¹⁴ It has been held in the undermentioned case¹⁵ that Section 153 would apply to such a case.

(xi) *Sale certificate.* — The present Section *prima facie* applies to *pending proceedings*.¹⁶ Section 152 applies to the amendment of *decrees and orders*. Although a sale certificate is a document issued by a Court, it is doubtful whether it is an order of Court within Section 152. It may also be doubted whether it is a proceeding in a suit within the meaning of the present Section. A Court has, however, inherent power to amend a sale certificate after notice to the judgment-debtor, where the certificate does not correctly describe the property sold,¹⁷ unless the sale price has been affected by such misdescription.¹⁸

See also the undermentioned cases.¹⁹

6. Amendment by Court suo motu. — Under O. 6 R. 17 the Court has no power to amend the pleadings of its own accord. Under the present Section the Court has a power of amendment *suo motu*. But even under this Section the Court has no power to convert, of its own accord, a suit for declaration into one for possession.¹ The reason is that a Court is bound to adjudicate on a claim as brought and cannot direct parties to alter their claims.²

154. [S. 3, para. 3.] Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

Saving of present right of appeal.

11. (1895) 2 Q B 148 (155), *Yorkshire Provident Co. v. Gilbert*.

12. (1886) 33 Ch D 603 (604), *Moss v. Malings*.

13. (1897) 1 Ch 266 (270, 271), *Cook v. Andrews*.

14. ('10) 5 Ind Cas 532 (535) : 37 Cal 399.

15. ('34) AIR 1934 All 810 (811). (Omission of name of vakil from body of vakalatnama.)

16. ('24) AIR 1924 Bom 166 (166).

('12) 14 Ind Cas 407 (409) (Nag).

17. ('13) 20 Ind Cas 588 (589) (Cal). (Wrong towji number can be corrected.)

('32) AIR 1932 All 587 (589) : 54 All 800. (Sale certificate and dhakalnama.)

('22) AIR 1922 Mad 63 (64, 65). (Notice to judgment-debtor is necessary.)

('13) 18 Ind Cas 725 (726) (Cal). (No jurisdiction to amend so as to show purchase of large share than actually sold.)

('14) AIR 1914 Cal 527 (528).

('37) AIR 1937 Oudh 144 (144) : 12 Luck 167.

[See also ('35) AIR 1935 Mad 420 (421). (To order an amendment of the sale certificate without ordering a corresponding amendment of the decree is likely to complicate matters, and would not be quite proper, even otherwise for a Court to do.)]

18. ('34) AIR 1934 Lah 29 (30).

19. ('37) AIR 1937 Mad 342 (343). (Application for challan for depositing amount for setting aside execution sale is "proceeding" within S. 153 and may be amended by inclusion of prayer for setting aside sale.)

('37) AIR 1937 Nag 108 (110) : I L R (1938) Nag 245. (Verification in application to appeal in forma pauperis — Verification not made in prescribed manner must be allowed to be corrected.)

Note 6

1. ('13) 19 Ind Cas 672 (672) (Mad).

2. ('11) 9 Ind Cas 673 (674) : 1911 P

Synopsis

1. "Any present right of appeal."
2. Right of appeal being given by new Code but not by old Code — Effect on pending proceedings.
3. Other rights accrued before the present Code.
4. Power of Appellate Court.

1. "Any present right of appeal."—It has been observed in Note 3 to the Preamble that the general principle is that an Act which takes away a substantive right is not retrospective in effect except by express enactment or by necessary implication. This principle is recognized in Section 6 of the General Clauses Act of 1897. But this principle does not apply to enactments merely affecting practice or procedure. For, there can be no vested right in any course of procedure. But a right of appeal is a substantive right and not a mere matter of procedure. When the law permits an appeal, the right of appeal vests in a party on the commencement of proceedings in the lower Court. Any Act coming into force subsequently cannot affect this right prejudicially, except by express words or by necessary implications.¹ This is the general rule apart from Section 154. Under this Section the question has arisen whether this general right is restricted by the words "*any present right of appeal*" in the Section. The question has arisen in this way. Take, for instance, an order which was appealable under the former Code, but is not appealable under the present Code. The present Code came into force on 1st January 1909. Suppose the proceedings in which the order was passed were commenced before 1st January 1909, and also that the order was passed before 1st January 1909. In such a case, there was undoubtedly a *present* right of appeal accrued to a party at the commencement of the Code (1st January 1909) because the order having already been passed, the right of appeal given by the former Code was capable of being exercised immediately on that date. But suppose, in the above instance, the proceedings were started before 1st January 1909, but the order therein was passed *after* 1st January 1909. In such a case, no doubt a right of appeal had accrued to the party at the commencement of the present Code, because when the law permits an appeal, the right of appeal vests in a party on the initiation of the proceedings in the lower Court. But as the order had not been passed at the commencement of the Code but was passed only subsequently, the right of appeal was not therefore capable of being immediately exercised at that date. Is such a right, a *present* right of appeal within Section 154? On this question there is a conflict of decisions. It has been held by the Calcutta High Court,² the Punjab Chief Court³ and the Sind Judicial Commissioner's Court⁴ that such a right of appeal cannot be called a *present* right of appeal because although it has vested in a party, it is not capable of being immediately exercised. But the Madras High Court

(32) AIR 1932 Bom 391 (396, 397). (Suit on promissory note inadmissible for want of stamp—Amendment into a suit on original cause of action—Wholly distinct suit—Not allowable.)

Section 154 — Note 1

1. (1905) 1905 App Cas 369 (372, 373), Colonial Sugar Refining Co. Ltd. v. Irving.
 (1900) 1900 Pun Ra No. 12 (FB).
 (28) AIR 1928 Lah 627 (630, 631) : 10 Lah 165 (FB).
 (21) AIR 1921 Mad 126 (128, 129).
 (80) 2 All 795 (786).
 (12) 15 Ind Cas 725 (726, 727) (Lah).

(16) AIR 1916 Mad 1035 (1036).

(78) 1 All 668 (670, 671) (FB).

(08) 32 Bom 337 (344, 345).

(01) 24 Mad 39 (42).

2. (12) 15 Ind Cas 679 (681) (Cal).

(13) 14 Ind Cas 53 (54) (Cal).

(10) 8 Ind Cas 3 (4) (Cal).

(13) 17 Cal W N 524 (525).

[See however (12) 16 Ind Cas 690 (691) (Cal).]

3. (12) 16 Ind Cas 834 (834) (Lah).

(12) 15 Ind Cas 725 (726) : 1913 Pun Ra No. 1.

4. (13) 19 Ind Cas 348 (351) : 6 Sind L R 163.

This Section and the Fifth Schedule of the Code have been repealed by Act XVII of 1914, Section 3.

The Section as it stood before the repeal was as follows :—

"The enactments mentioned in the Fifth Schedule are hereby repealed to the extent specified in the fourth column thereof."

157. [S. 3, second sentence.] Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

Synopsis

1. "Rules."
2. "Consistent with the Code."
3. Retrospective effect of the Code. See Note 3 to Preamble.

1. "Rules." — The expression "rules made" means rules properly and validly made, in other words, made with jurisdiction by the proper authority. Rules, which though purporting to be made under the old Code, were beyond the powers given by the old Code, do not become valid by reason of the fact that, if they had been made under the new Code, they would be valid.¹

2. "Consistent with the Code." — The word 'Code' according to the definition in Section 2 clause 1 includes the rules in the First Schedule. Hence, it has been held that the Madras Civil Rules of Practice made by the High Court under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Code of 1908 are invalid if and in so far as they are inconsistent with any of the rules in the First Schedule of the later Code.¹

3. Retrospective effect of the Code. — See Note 3 to Preamble.

Section 157 — Note 1

1. ('16) AIR 1916 Mad 1165 (1166).

Note 2

1. ('35) AIR 1935 Mad 423 (441); ILR (1936) Mad 734 (FB). (37 Mad 17; AIR 1914 Mad 652 (FB),

Overruled.)

[See also ('35) 1935 Mad 893 (895); 59 Mad 342. (Rule 199 of Civil Rules of Practice, to the extent to which it is opposed to, and inconsistent with, the provisions of Sch. 1, C. P. C., cannot take effect.)]

158. [S. 3, para. 2.] In every enactment or notification

Reference to Code of
Civil Procedure and other
repealed enactments.

passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

"As to the retrospective effect of the Code," see Note 3 to Preamble.



A. I. R. COMMENTARIES JUDICIALLY NOTICED

A. I. R. 1933 Peshawar 61 at 62.

"The law on the subject is lucidly summed up in Chitaley's Commentary on Civil Procedure Code, Vol. 1, p. 182, and is stated as follows: 'A party them.'"

A. I. R. 1934 Allahabad 253 at 255.

" the reason being that no one can have vested right in forms of procedure. The subject is discussed in Chitaley's Civil Procedure Code, Vol. 1, pp. 4 and 5."

A. I. R. 1934 Peshawar 40 at 42.

"The argument is based on Chitaley's Commentary, 1933 Edition, p. 1888 under O. 21, R. 15 of the Code, which is supported by *Gopendra Krishna v. Moti Lal*, A. I. R. 1928 Cal. 559."

A. I. R. 1934 Peshawar 57 at 61.

"These conflicting views are noted on pp. 746 and 747 of Chitaley's Civil Procedure Code."

A. I. R. 1934 Peshawar 94 at 95.

"He (D. J.) quotes from Chitaley as follows: 'All co-promisees as parties.'"

"I have no disagreement with this statement of the law, but in the present case the defendant is not a promisee, but a promisor. A further passage from Chitaley is cited by the learned Additional District Judge to the following effect :

'Where several of suits.'

"That statement of law applies to the facts of the present case."

A. I. R. 1936 Allahabad 811 at 813.

"The ruling cases on this point are collected and noted in Chitaley's Civil Procedure Code, Vol. 3, p. 2318, 2nd Edn."

A. I. R. 1936 Nagpur 228 at 230 =

I. L. R. 1937 Nag. 230 at 234.

"The point is well summed up at pages 2469 and 2470 of Chitaley and Rao's Code of Criminal Procedure, Vol. 3, and the learned authors rightly point out that the view of the High Courts, excepting Rangoon, is consistent with the principles underlying sub-section 3 of the section."

A. I. R. 1936 Peshawar 37 at 37.

"Counsel for the appellants quotes from Chitaley's Commentary to the effect that where the question of costs has been referred to the arbitrator, or where the whole matter in dispute has been referred to the arbitrator, the arbitrator has authority to award costs in the award."

A. I. R. 1936 Peshawar 209 at 210.

"We have been referred to Note (7) under S. 48 in Chitaley's Commentary on the Civil Procedure Code where the distinction between a fresh application and an application in continuation of a previous application is illustrated."

A. I. R. 1937 Allahabad 82 at 87.

"The balance of authority seems to be that an Appellate Court has no power under it to interfere to the prejudice of a person who was a party to a suit, but who was not impleaded in the appeal: vide "Code of Civil Procedure," Chitaley & Annaji Rao, Vol. 3, pp. 3003-3004 (1st Edn). I am, therefore, of opinion that defendants 2-7 ought not to have been impleaded."

A. I. R. 1937 Calcutta 222 at 224.

"On this point there is a considerable mass of case law which will be found set out in Chitaley's Commentary on the Civil Procedure Code."

A. I. R. 1937 Lahore 41 at 49 =

I. L. R. 1937 Lah. 11 at 33.

"I find it stated in Chitaley and Annaji Rao's Code of Civil Procedure that this section (i. e., S. 80) like S. 79 enacts only a rule of procedure. With this view I agree."

A. I. R. 1937 Nagpur 50 at 53 =

I. L. R. 1937 Nag. 277 at 284.

"This question has been well discussed in Note 10 under S. 162, p. 804, of Chitaley and Annaji Rao's recent Commentary on the Criminal Procedure Code. The learned authors favour the view of the Madras and Calcutta High Courts which is with the opinion expressed

A. I. R. 1937 Nagpur 216 at 217 =

I. L. R. 1938 Nag. 280 at 282.

"In Chitaley and Rao's Civil Procedure Code, Edn. 2, p. 2094 under O. 22, R. 1, it is remarked :

'If, in the first Court, the
..... either party.'

"I agree with these remarks which would apply to a dismissal of the suit in appeal. It is further remarked on the authority of 34 *Mad loc. cit.* that the appeal cannot be continued even in respect of costs or other relief which are merely incidental to the main reliefs. I accordingly uphold the contention of the respondent."

A. I. R. 1937 Nagpur 268 at 269 =

I. L. R. 1937 Nag. 519 at 520.

"It appears that the weight of authority is in favour of the view that the Appellate Court has such powers. The dissentients from that view are limited to the High Courts of Allahabad and Rangoon and the Chief Court of Oudh : See also Chitaley and Rao's Code of Civil Procedure, Vol. I, page 712."

A. I. R. 1937 Oudh 481 at 483 =

I. L. R. 13 Luck. 560 at 565 & 566.

"Messrs. Chitaley and Annaji Rao in their Commentary on the Code express the opinion that the present cl. (d) of R. 5 of O. 33 gives effect to the view taken in the Full Bench decision of the Allahabad High Court reported in 7 All 661, and other cases."

A. I. R. 1937 Peshawar 13 at 15.

"In this connexion we may quote the following Note No. 4 from Mr. Chitaley's Commentary under R. 53 which is as follows: 'Other decrees. — A decree this rule.'"

A. I. R. 1937 Peshawar 41 at 41.

"On p. 1480 of Mr. Chitaley's Commentary on the Civil Procedure Code (Edn. 1) it is noted that 'where a plaint is presented on the re-opening date after court-holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4,

Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of the holidays.' This note is supported by reference to rulings in Nagpur, Lahore, Madras and Calcutta Courts, though a Calcutta ruling to contrary is also noted. The proposition as stated appears to me to be correct."

A. I. R. 1937 Peshawar 81 at 81.

"Learned counsel has been unable to show me any decided case in which action of that nature amounts to a public nuisance, and the commentary in Chitaley's Civil Procedure Code certainly indicates the contrary."

A. I. R. 1937 Rangoon 391 at 392.

"The learned authors of the Code of Criminal Procedure by Chitaley and Annaji-rao, Edn. 1, Vol. 1, at p. 200 say : 'Thus an ... Proviso.'

"I agree with this view."

A. I. R. 1938 Calcutta 287 at 289 & 290 =

I. L. R. (1938) 1 Cal. 53 at 58 and 60.

"In the Note to Messrs. Chitaley and Annaji Rao's Code of Civil Procedure, at p. 1388, I find the following comment : 'The first parties.'

"The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions."

A. I. R. 1938 Calcutta 730 at 733 =

I. L. R. (1939) 1 Cal. 112 at 120.

"The expression 'other cause of a like nature' has been the subject of various decisions, most of which will be found mentioned in Chitaley's Limitation Act (1938), pp. 567 to 572."

A. I. R. 1938 Lahore 220 at 222.

"(The amended Rule will be found printed at pp. 252-3 of Chitaley's Code of Civil Procedure, Edn. 2.)"

A. I. R. 1938 Lahore 345 at 346.

"The learned counsel for the present respondents also quoted A. I. R. 1932 All. 446, A. I. R. 1933 All. 264 (a judgment by a Full Bench, one member of which was the present Hon'ble Chief Justice of the Lahore High Court) and the remarks in the Commentary of Mr. Chitaley's Criminal Procedure Code, Vol. 1, p. 676."

A. I. R. 1938 Nagpur 122 at 123.

"It was assumed by the Taxing Judge (Bose J.) in his order of reference that the present case was similar because he assumed that there was no difference for these purposes between a plaint and a memorandum of appeal. This we think is wrong although there are a larger number of rulings collected at p. 44 of Vol. 1 of Chitaley's Civil Procedure Code which take that view."

**A. I. R. 1938 Oudh 45 at 47 and 48 =
I. L. R. 13 Luck. 689 at 693 and 695.**

"The learned counsel (for appellant) maintained that that case stands alone, and he has pointed out to us that in the Commentary on the Civil Procedure Code by Chitaley and Annaji Rao this case is submitted to have been wrongly decided: vide the Commentary, Vol. 1, (Edn. 2) p. 478, (Note 9, F. N. 4).

"In my opinion, the contention of the learned counsel for the appellant must be accepted."

**A. I. R. 1938 Oudh 146 at 147 =
I. L. R. 14 Luck. 116 at 118.**

"As has been pointed out in Chitaley's discussion of this matter in his Notes to S. 115 at pages 924 and 925 of Vol. 1, Edn. 2 of the Civil P. C., the Allahabad view originally depended on a distinction between cases in which the application had been rejected and cases where it had been accepted."

A. I. R. 1938 Peshawar 4 at 5.

"The general result of this conflict has been clearly set out in Note No. 9 of the commentary on that Rule in Chitaley's Code

of Civil Procedure and virtually all the cases which have been referred to in the course of that Note have been cited before us as well as some other rulings in addition."

A. I. R. 1939 Lahore 356 at 357.

"As pointed out in A I R 1921 Lah 369 and A I R 1928 All 236 the absence of a shifting balance is not decisive: see also cases collected in Chitaley's Limitation Act, Vol. 2, p. 1362 *et seq.*"

A. I. R. 1939 Oudh 86 at 89.

"According to Chitaley, (Civil Procedure Code) Vol. 1, p. 517, Note 7:

'A debt debt.'"

A. I. R. 1939 Oudh 116 at 117 =**I. L. R. 14 Luck. 538 at 541.**

"A reference to the Notes to O. 40, R. 1 on the subject of the appointment of a receiver in execution proceedings both in Chitaley's Code of Civil Procedure and the latest edition of Katju and Das's Code of Civil Procedure makes it quite clear that there is no such principle as the one suggested by learned counsel."

A. I. R. 1939 Oudh 284 at 285 =**I. L. R. 15 Luck. 19 at 23.**

"I take the following passage based on various rulings from p. 701 of Chitaley's Commentary on the Code of Criminal Procedure: 'On the making of an Section 517.'"

A. I. R. 1940 Allahabad 263 at 266.

"In Chitaley's Criminal Procedure Code, Vol. 1, p. 797, the learned commentators say: 'It is Evidence Act.' I agree with their conclusion."

A. I. R. 1940 Peshawar 24 at 25.

"At Note 10 to O. 21, R. 15 of Chitaley's Civil Procedure Code the following comments are made as regards the right of appeal against an order made under O. 21, R. 15:

'The question whether of the non-applicant decree-holder.'"

erroneously thinks that it has, or that it has no jurisdiction to act in a particular manner or to pass a particular order, there is either an illegal assumption of jurisdiction or a failure to exercise the jurisdiction which it has. But suppose the order of the trial Court as to its own jurisdiction is appealed against and the Appellate Court either confirms such order or reverses it, can the lower Appellate Court itself be said to have exercised a jurisdiction not vested in it or to have failed to exercise a jurisdiction which it has or to have exercised its jurisdiction illegally or with material irregularity? According to the High Courts of Allahabad,¹ Bombay,² Calcutta,³ Madras⁴ and Patna⁵ and the Judicial Commissioner's Court of Nagpur,⁶ the decision of the Appellate Court is reversible under Section 115. There is a difference of opinion in the Lahore High Court⁷ and the Oudh Judicial Commissioner's Court.⁸ The High Courts of Allahabad and Lahore and the Judicial Commissioner's Court of Nagpur have also held that the order of the Court of the first instance can itself be revised notwithstanding that it was appealed against.⁹

16. "May make such order in the case as it thinks fit." — When once the jurisdiction to revise is established, there is no limitation imposed on the power of the Court as to the mode of disposal.¹ The High Court may finally dispose of the case itself² or pass any other order which may satisfy the justice of the case.³ What the

Note 15

1. ('30) AIR 1980 All 713 (717) : 53 All 75 (F.B.).
 - ('38) AIR 1938 All 17 (18) : 1 L R (1938) All 40.
 - ('86) 8 All 111 (113) (F.B.).
 - ('30) AIR 1930 All 158 (160).
 - ('26) AIR 1926 All 58 (61) : 48 All 168.
- The following cases are, in view of the Full Bench Ruling, no longer good law :*

- ('98) 1898 All W N 74 (75).
- ('18) AIR 1918 All 415 (415).
- ('21) AIR 1921 All 226 (227) : 43 All 334.
- ('21) AIR 1921 All 236 (237).

2. ('91) 15 Bom 148 (151, 152).
- ('92) 16 Bom 608 (617, 618).
- ('96) 20 Bom 50 (53).

3. ('05) 32 Cal 146 (153). (1 Cal W N 626, dis-sented from.)
- ('20) AIR 1920 Cal 977 (977).
- ('15) AIR 1915 Mad 1223 (1229) : 18 Ind Cas 555 (560, 565) : 39 Mad 195.

- ('16) AIR 1916 Mad 739 (739).
- ('29) AIR 1929 Mad 396 (398).
- ('30) AIR 1930 Mad 216 (216, 217).
5. [See ('22) AIR 1922 Pat 525 (526) : 1 Pat 232.]
6. ('32) AIR 1932 Nag 70 (71).
- ('34) AIR 1934 Nag 257 (258).
7. ('22) AIR 1922 Lab 100 (101). (Revision Hes.)

- ('23) AIR 1923 Lab 412 (413). (Do.)
- ('25) AIR 1925 Lab 605 (606). (Do.)
- ('29) AIR 1929 Lab 605 (606). (Do.)
- ('30) AIR 1930 Lab 611 (612). (Do.)
- ('34) AIR 1934 Lab 536 (537). (No revision Hes.)
- ('24) AIR 1924 Lab 349 (350). (Should only be exercised in exceptional cases to remedy an injustice.)
- ('86) 1886 Pun Re No. 46, p. 87. (No revision Hes.)
- ('11) 9 Ind Cas 674 (675) : 1911 Pun Re No. 4. (Do.)
- ('13) 19 Ind Cas 237 (238) (Lab.). (Do.)
- ('24) AIR 1924 Lab 278 (279). (Do.)

Note 16

- ('26) AIR 1926 Lab 47 (47). (Do.)
 - ('29) AIR 1929 Lab 83 (84). (Do.)
 - ('30) 128 Ind Cas 51 (51) (Lab.).
 8. ('05) 8 Oudh Cas 257 (257). (Revision Hes.)
 - ('29) AIR 1929 Oudh 91 (92) : 4 Luck 347. (Do.)
 - ('26) AIR 1926 Oudh 31 (32). (Does not lie.)
 - ('30) AIR 1930 Oudh 2 (3) : 4 Luck 667 (Do.)
 9. ('26) AIR 1926 All 58 (61) : 48 All 168.
 - ('34) AIR 1934 Lab 108 (108).
 - ('32) AIR 1932 Nag 70 (71) : 28 Nag L R 54.
 - ('74) 11 Bom H O R 194 (195).
 - ('33) AIR 1933 Lab 210 (211).
- [See also ('71) 6 Mad H O R 360 (363).]
- ('25) AIR 1925 Oudh 163 (163).

1. ('98) 1898 Pun Re No. 41, p. 141.
2. ('98) 1898 Pun Re No. 41, p. 141.
- ('32) AIR 1932 Mad 714 (716). (Appeal entertained against a non-appealable order — High Court in addition to setting aside the appellate order can also revise the order of the first Court if necessary and justified.)
- ('22) AIR 1922 Pat 359 (360) : 4 Pat L Jour 195.
- ('35) AIR 1935 Pesh 21 (22). (Under S. 115, C. P. Code, in cases where a Court below has failed to exercise jurisdiction vested in it, the High Court may pass such order as it thinks fit, and it is not incumbent upon the High Court to re-mand the case for exercise of that jurisdiction by the Court below.)

- ('38) AIR 1938 Oudh 107 (108) : 14 Luck 13. (The Chief Court has power under its revisional jurisdiction to amend decree so as to make it conform with the judgment.)
- ('81) 3 All 203 (205, 206) (F.B.).
- ('31) AIR 1931 Lab 748 (749).

3. ('81) 3 All 417 (420).
- ('33) AIR 1933 Cal 559 (560).
- ('19) AIR 1919 All 76 (78) : 42 All 18.

order should be in any particular case will depend on the circumstances of that case.⁴ As a general rule, when justice has been done between the parties, the High Court will very rarely interfere with the findings of fact or the orders of the lower Court.⁵ Similarly,

- ('17) AIR 1917 Mad 223 (224). (May expunge seditious, blasphemous, or irrelevantly scandalous or indecent remarks in the judgment.)
 ('02) 6 Cal W N 346 (348).
 ('15) AIR 1915 Oudh 171 (172). (When pre-emption money deposited on last day was not sent to bank in time due to mistake of Court, order refusing to deliver property was set aside.)
 ('96) AIR 1936 Lah 909 (910). (Time fixed by lower Appellate Court already expired and appeal dismissed for want of payment of court-fees—High Court, even then, can extend time in revision.)
 ('36) AIR 1936 Nag 140 (143) : I L R 1936 Nag 188. (When High Court as a Court of revision, under its inherent powers to remand, remands a case for further evidence on an issue and findings, retaining seisin of the case, it has no power to scrutinize or review the evidence. The powers of that Court are limited by S. 115 and all it can do is to determine whether the lower Court exercised its jurisdiction with material irregularity in arriving at the finding it did on the issue remanded to it for trial.)
4. ('03) 27 Bom 563 (574). (Where the Court, instead of remitting the case for a new trial, reversed the decree dismissing the suit and passed a decree for the plaintiff.)
5. ('15) AIR 1915 All 241 (242).
 ('32) AIR 1932 Oudh 156 (158) : 7 Luck 642.
 ('94) 18 Bom 449 (452).
 ('04) 28 Bom 458 (460).
 ('11) 12 Ind Cas 709 (710) : 36 Bom 123. (When fresh documentary evidence cannot be taken by a collector revising a Mamlatdar's order.)
 ('04) 8 Cal W N 621 (624). (Revision of restoration order on ex parte decree.)
 ('09) 1 Ind Cas 741 (742) : 36 Cal 189. (Order under old Section 108.)
 ('09) 1 Ind Cas 151 (152) (Cal).
 ('22) 66 Ind Cas 127 (128) (Cal).
 ('25) AIR 1925 Cal 1223 (1225).
 ('26) AIR 1926 Cal 245 (246). (Amendment of a patently wrong decree.)
 ('29) AIR 1929 Cal 78 (80) : 55 Cal 1084. (Where the evidence was not taken down in a manner provided by Order 18 but was dictated to the stenographer, who typed it and was later verified and signed by the Judge.)
 ('36) AIR 1936 Pesh 213 (214).
 ('34) AIR 1934 Pesh 103 (105). (Concurrent findings of Courts below cannot be interfered with in revision.)
 ('32) AIR 1932 Cal 441 (442) : 59 Cal 311. (Notice not taken in the prescribed way — No prejudice — Will not be interfered with.)
 ('01) 1901 Pun Re No. 19, p. 63.
 ('02) 1902 Pun Re No. 36, p. 135. (A Divisional Judge hearing an appeal which he cannot hear.)
 ('03) 1903 Pun L R No. 14, p. 44.
 ('04) 1904 Pun L R No. 73.
 ('07) 1907 Pun Re No. 125, p. 611. (Lower Court hearing on appeal triable by a superior Court.)
 ('10) 8 Ind Cas 733 (735) : 1911 Pun Re No. 1.
 ('11) 11 Ind Cas 445 (446) : 1911 Pun Re No. 93. (An oral acknowledgment of a debt.)
 ('11) 9 Ind Cas 744 (745) (Lah).
 ('12) 13 Ind Cas 720 (720) (Lah). (Error on a technical point.)
 ('32) AIR 1932 Mad 223 (224). (Do.)
 ('13) 18 Ind Cas 251 (251) (Lah). (Objection to jurisdiction not raised — No failure of justice — Will not be revised.)
 ('19) AIR 1919 Lah 297 (297). (Where a certain inadmissible evidence was admitted.)
 ('23) 73 Ind Cas 873 (873, 874) (Lah).
 ('26) 96 Ind Cas 822 (823) (Lah).
 ('27) AIR 1927 Lah 55 (55, 56). (No revision, as petitioner had acquiesced in the order setting aside the ex parte decree.)
 ('29) AIR 1929 Lah 777 (777). (Surety claiming discharge in revision on ground of dismissal of suit against principal—Revision not competent.)
 ('32) AIR 1932 Lah 305 (306).
 ('98) 8 Mad L Jour 149 (151). (When small cause was tried in ordinary way and also in appeal without objection.)
 ('14) AIR 1914 Mad 298 (298). (Refusing to amend a plaint at a late stage.)
 ('15) AIR 1915 Mad 335 (335). (New defendants added—Plaint not amended — Defendants not prejudiced.)
 ('16) AIR 1916 Mad 882 (882) : 39 Mad 882. (Extending time for payment of mortgage money.)
 ('18) AIR 1918 Mad 1060 (1062). (Land acquisition Judge reviewing an order passed by him under the Land Acquisition Act though without power.)
 ('22) AIR 1922 Mad 63 (65).
 ('24) AIR 1924 Mad 586 (586). (Where Section 151 was applied for Section 47 but the order was just.)
 ('26) AIR 1926 Mad 1059 (1060). (Where lower Court granted extension of time allowed by the decree from 2 to 6 months, applying Sections 148 and 151 though none of the provisions applied.)
 ('27) AIR 1927 Mad 1009 (1009). (Order as to costs acquiesced in cannot be challenged in revision.)
 ('29) AIR 1929 Mad 790 (791). (Plaint with defective or no signature, filed with plaintiff's knowledge.)
 ('24) AIR 1924 Nag 293 (294). (Where execution sale was held only 29 days after the proclamation.)
 ('22) AIR 1922 Pat 315 (316) : 1 Pat 68. (Though the order passed by the Court below was passed on an invalid reference to the Civil Court by the Land Registration Deputy Collector under Section 55 of the Land Registration Act (VII B. C. of 1876).)
 ('25) AIR 1925 Pat 36 (37) : 3 Pat 778. (Lower Court's order under Section 151, C. P. C., passed without jurisdiction setting aside its own

where the interference is likely to work not in the interest of justice but rather against it, the High Court will not interfere.⁶ Where, however, a particular order creates an anomalous position or leaves the matter in a muddle,⁸ the High Court will set it aside in revision. Thus, while a Small Cause Judge returned a plaint which had been returned by the Munsif to be presented before the former and the Munsif adhered to his previous order, the High Court is entitled to make such an order as would enable the plaintiff to have his action tried.⁹ But a party who, by his conduct creates a particular position, cannot, in revision, seek to set it aside.¹⁰

16a. Nature of order made in revision against a decree.—An order passed in revision from a decree is a decree as much as an appellate decree.¹ But, an order *dismissing* a petition for revision does not substitute a decree of the revisional Court for that of the Court below. When a revising Court refuses to exercise its power of revision, it does not confirm any decree but merely declines to interfere, leaving the decree of the Court below intact as the decree of that Court.²

17. Laches in making the application.—Applications in revision are not governed by any law of limitation.³ Revision is a purely discretionary remedy. It is a

decree is not revivable where the decree would

have been successfully avoided in review.)

(26) AIR 1926 Pat 218 (222) : 5 Pat 36 (PB).

(Restoration though O. 9 R. 1 did not apply.)

(29) AIR 1929 Kang 198 (200). (Appellate Court

though without power deciding rightly a case

under S. 73, C. P. Code.)

(13) 21 Ind Cal 831 (831) : 7 Sind L R 186. (Where

a Court allowed interest to a party when the

merits of the case did not entitle him to interest,

and the Court, on an application under Sec-

tion 152, C. P. Code, modified its judgment by

allowing such interest.)

(14) AIR 1911 Sind 61 (62) : 8 Sind L R 927. (Where

S. 151 was applied to rectify a mistake of the

Court and to restore an execution petition, it

will not be interfered with.)

(See (32) AIR 1932 Mad 157 (158). (Revision

against order disallowing objections to award

—More illegality is not enough, but there must

be some harm resulting from such illegality.)

(20) AIR 1920 All 112 (116) : 42 All 626. (Order

setting aside an order rejecting an appeal for

failure of the appellant to give security for

costs.)

(25) AIR 1925 All 51 (52). (When a suit was

disposed of as a small cause without objection.)

6. (30) AIR 1930 Lab 417 (418). (Order extend-

ing time under S. 5, Limitation Act for a peti-

tion under S. 9, Provincial Insolvency Act.)

(33) AIR 1933 All 154 (155). (Application under

O. 1 R. 8 held to be mala fide and hence dis-

missed—Held order should not be interfered

with.)

(25) AIR 1925 All 264 (266).

(98) 28 Bom 458 (460).

(11) 12 Ind Cas 908 (908) (Low Bur).

(31) AIR 1931 Cal 425 (427).

(05) 1905 Pun L R No. 109. (Ex parte decree set

aside in 30 days after date of order.)

(08) 81 Mad 414 (415).

(14) AIR 1914 Mad 159 (160). (Where a petition

under S. 195, Criminal Procedure Code was

wrongly dismissed for default and subsequently

restored.)

(29) AIR 1928 Mad 559 (560). (Amendment of

plaint to bring case within the Court's pecuniary

jurisdiction at late stage allowed though irre-

gular.)

(25) AIR 1925 Pat 153 (154). (Where S. 148 was

applied to extend time to a conditional order for

payment of costs though it did not apply.)

(30) AIR 1930 Pat 279 (280).

(21) AIR 1921 Oudh 168 (169).

(36) AIR 1938 Pat 447 (449). (The High Court

under S. 115, C. P. Code, ought not obviously to

interfere in revision so as to restore an order

which itself is without jurisdiction, or founded

on irregularity in the exercise of jurisdiction,

although the order under revision is one with-

out jurisdiction.)

(27) AIR 1927 Lah 485 (489) : 8 Lah 617.

(33) AIR 1933 Bom 245 (250). (Two appeals and

one revision in cases disposed of by one judge-

ment—Decision of lower Court held to be wrong

in appeals—Revision should also be allowed.)

8. (25) AIR 1925 All 202 (202).

(92) AIR 1932 Bom 210 (213).

9. (23) AIR 1922 Pat 368 (369).

(34) AIR 1934 Nag 257 (258).

10. (86) 9 Mad 451 (452).

(04) 28 Bom 264 (274, 275).

Note 16a

1. (34) AIR 1934 All 134 (135) : 56 All 608. (In

the Allahabad High Court a decree is invariably

prepared in such cases.)

2. (35) AIR 1935 Pesh 91 (92).

Note 17

1. (33) AIR 1933 Pesh 51 (52).

[See (36) AIR 1936 Sind 172 (173) : 30 Sind

L R 271. (The period of ninety days provided

by the Rules of the Sind Court in case of a

revision application is subject to the High

Court's discretion.)]

privilege and not a right and corresponds to the remedies in England known as *certiorari* and *mandamus*. The invariable rule in all these cases is that the party aggrieved must come to the Court at the *earliest possible moment*. When, therefore, there has been a great and unexplained delay or *laches* in making the application, the Court will refuse to interfere.² Where, however, the petitioner is not to be blamed for the delay³ or where there are exceptional circumstances⁴ the High Court will not refuse to exercise its powers under the Section. Thus, when the petitioner failed in his attempt to set aside an *ex parte* decree and then filed a suit to vacate the same for want of jurisdiction but the Court held that the relief could not be granted, and then a revision was preferred to the High Court, the circumstances were held sufficient to explain the delay in applying for revision.⁵ The practice of the High Court of Patna is to entertain applications in revision only if they are filed within three months of the date of the order sought to be revised.⁶

18. Application in revision treated as appeal. — Where an application for revision is filed in a case in which an appeal lies, the Court may treat the petition as an appeal, provided the same was filed within the time prescribed for filing the appeal¹

2. ('17) AIR 1917 All 215 (215). (Where the order complained of was passed very early and the applicant took part in the proceedings and lost and then came in revision to set aside the same.)

('38) AIR 1938 All 98 (100) : I L R (1938) All 148. (Nine months.)

('36) AIR 1936 Oudh 185 (187) : 12 Luck 52. (Interference in revision being discretionary the practice of the Chief Court is to refuse to entertain applications for revision if they are made too late and to demand an explanation from the applicant for the delay in case the application is made more than ninety days after the passing of the order.)

('35) AIR 1935 Lah 120 (121). (Considerable delay in filing a petition is not in itself a sufficient ground for rejecting the petition where once it has been admitted to hearing.)

('33) AIR 1933 Lah 175 (176). (Delay of one year.)

('69) 1 N W P H O R 271 (272).

('82) 4 All 154 (154). (Application made after 17 months against order setting aside an execution sale.)

('10) 8 Ind Cas 529 (529) (All). (Delay of five and half months.)

('26) AIR 1926 All 228 (228, 229). (7 months.)

('83) 7 Bom 341 (372).

('74) 22 Suth W R 522 (523).

('78) 2 Cal L Rep 545 (547).

('76) 1876 Pun Re No. 50, p. 92. (Eight and half months.)

('90) 1890 Pun Re No. 34, p. 92.

('11) 10 Ind Cas 129 (130) (Lah). (Two months.)

('11) 10 Ind Cas 183 (186) (Lah). (Preliminary order unchallenged till after the enquiry had been made and final order passed.)

('13) 18 Ind Cas 795 (795) (Lah). (17 months' delay.)

('14) AIR 1914 Lah 249 (250) : 1914 Pun Re No. 25. (One year.)

('11) 12 Ind Cas 169 (170) (Mad).

('14) AIR 1914 Mad 299 (299). (8 Months from

date of order and after an inexcusable delay of 5 months.)

('18) AIR 1918 Oudh 116 (117). (Where a plaint was returned by the Court of first instance for presentation to the proper Court and the plaintiff delayed long after the order of return and also after the lower Appellate Court's order.)

('21) AIR 1921 Oudh 141 (142) : 24 Oudh Cas 282.

('23) AIR 1923 Oudh 272 (272). (One year.)

('25) AIR 1925 Oudh 608 (608). (Three years of unexplained delay.)

('30) AIR 1930 Oudh 496 (496).

[See also (1900) 1900 Pun L R No. 7. (Extreme remissness of petitioner.)]

3. ('84) 6 All 125 (126).

('36) AIR 1936 Oudh 185 (187) : 12 Luck 52. (If the applicant was not a party to any of the orders which he seeks to revise and they were all passed behind his back and without notice to him, the delay on the part of the applicant should be condoned.)

('28) AIR 1928 Mad 528 (530) : 51 Mad 672.

4. ('15) AIR 1915 Cal 290 (291).

('22) AIR 1922 Mad 63 (64).

('69) 11 Suth W R 56 (57).

[See also ('30) AIR 1930 Oudh 496 (496).]

5. ('29) AIR 1929 Oudh 383 (383).

6. ('33) AIR 1933 Pat 582 (582).

Note 18

1. ('98) 25 Cal 757 (773) (F B). (Suit to file an award which was rejected on objection by opposite party on the ground that there was no reference at all to arbitration.)

('32) AIR 1932 Bom 77 (78).

('34) AIR 1934 Pat 281 (282).

('11) 10 Ind Cas 51 (53) (Cal). (Order setting aside a sale under O. 21 R. 89.)

('11) 10 Ind Cas 542 (543) (Cal). (Where the lower Court wrongly refused to entertain an appeal as being barred by limitation.)

('15) AIR 1915 Cal 268 (271).

('84) 7 Mad 555 (556). (Application presented as an appeal — But amended and received as an

and provided the proper court-fee is paid.² In cases where the time for filing the appeal had expired on the date when the revision was converted into an appeal, the Court has ample jurisdiction to excuse the delay under Section 5 of the Limitation Act.³ If a revision is treated as a second appeal *ex parte*, the respondents are not precluded from showing that no second appeal lay.⁴

19. Appeal treated as an application in revision.—In cases where no appeal lies but an appeal is wrongly preferred, the Court has a very wide discretion to allow the appeal to be treated as a petition for revision, where the conditions of Section 115 are satisfied.¹

application under this Section — But ultimately held that an appeal lay and therefore treated as an appeal.)

(19) AIR 1919 Mad 358 (358).
(25) AIR 1925 Pat 16 (17) : 3 Pat 344.
(15) 29 Ind Cas 678 (678). (U P B R).

(17) AIR 1917 U P B R 9 (10) : 2 U P B R 106. (Second appeal.)
(27) AIR 1927 All 120 (120) : 49 All 178. (Appeal admitted as revision.)

2. (1900) 23 Mad 101 (104).
[See also (27) AIR 1927 Cal 581 (584).]

3. (18) AIR 1918 Lah 67 (68) : 1917 Pun Re No. 95. (On the facts of this case, extension of time under S. 5, Limitation Act was not granted.)

(20) AIR 1920 Lah 450 (451). (The facts were so peculiar and the order of the Court below was so manifestly unjust, that the Chief Court extended the time under Sec. 5 of the Limitation Act.)

(22) AIR 1922 Lah 233 (234) : 2 Lah 1. (Period cannot be extended where no sufficient cause has been shown.)

4. (94) 1894 Pun Re No. 80, page 274.
Note 19

1. (92) 5 C P L R 81 (82).
(34) AIR 1934 Bom 252 (253) : 58 Bom 485.
R. 6 (2) treated as revision. (Order of remand against order refusing stay under O. 41

(33) AIR 1933 Cal 496 (497). (Order of remand under O. 41 R. 25 is not appealable—Appeal can be treated as revision.)

(32) AIR 1932 Lah 538 (539). (Appeal filed against a non-appealable order of remand.)
(33) AIR 1933 Lah 73 (74).

(33) AIR 1933 Lah 185 (136). (Conditions of Section not satisfied — Appeal not treated as revision.)
(33) AIR 1933 Lah 421 (421).

(34) AIR 1934 Lah 198 (198). (Second appeal against an appellate order under the Provincial Insolvency Act treated as revision.)
(33) AIR 1933 Mad 152 (153) : 56 Mad 453.

(32) AIR 1932 Oudh 61 (62). (Appellate order by District Court under Sec. 75 of the Provincial Insolvency Act—Second Appeal to High Court treated as revision.)

(33) AIR 1933 Pesh 46 (46). (Appeal not maintainable — Question of jurisdiction raised — Appeal can be converted into revision.)

(04) 26 All 358 (361).
(05) 27 All 380 (381).
(06) 1906 All W N 58 (59).
(06) 1906 All W N 62 (63).

(27) AIR 1927 All 563 (563) : 49 All 812.
(04) 28 Bom 458 (460). (Second appeal against an order raising an attachment.)
(09) 4 Ind Cas 830 (831) : 34 Bom 171. (Second appeal against a decree of a small cause nature.)
(11) 12 Ind Cas 687 (687) : 36 Bom 105.
(80) 6 Cal L Rep 234 (236). (Appeal against order allowing an appeal in a case in which no appeal lay.)
(02) 29 Cal W N 614 (615).
(05) 32 Cal 518 (525).
(11) 38 Cal 421 (424).
(21) AIR 1921 Cal 380 (381). (Appeal against appellate order dismissing an appeal on the ground that no appeal lay.)
(20) AIR 1920 Cal 797 (797).
(23) AIR 1923 Cal 612 (614).
(24) AIR 1924 Cal 487 (490). (Appeal heard and disposed of without jurisdiction.)
(27) AIR 1927 Cal 850 (853) : 59 Cal 219.
(15) AIR 1915 Lah 100 (101). (Second appeal treated as revision when a ruling has been misapplied.)
(85) 8 Mad 192 (195). (Appeal against an appellate decree by a party to a suit who did not appeal against the original decree.)
(07) 17 Mad L Jour 199 (200).
(14) AIR 1914 Mad 675 (676) : 21 Ind Cas 308 (310) : 38 Mad 256.
(16) AIR 1916 Mad 376 (378) : 39 Mad 598. (Even if presented out of time.)
(12) 15 Ind Cas 367 (368) (Mad). (Appeal against an order of remand not passed under O. 41 R. 23.)
(18) AIR 1918 Mad 409 (410).
(18) AIR 1918 Mad 191 (193) : 41 Mad 554. (When the issue is one of jurisdiction.)
(19) AIR 1919 Mad 949 (950).
(21) AIR 1921 Mad 612 (614).
(26) AIR 1926 Mad 559 (565) : 49 Mad 580.
(29) AIR 1929 Mad 205 (207, 208).
(07) 3 Nag L R 85 (87).
(16) 34 Ind Cas 689 (689) (Oudh).
(17) AIR 1917 Oudh 49 (50).
(25) AIR 1925 Nag 183 (185).
(26) AIR 1926 Nag 65 (65). (Appeal cannot be converted into revision long after the expiry of limitation for a revision.)
(14) 25 Ind Cas 933 (934) : 7 Low Bur Rul 133.
(24) AIR 1924 Rang 177 (178) : 1 Rang 656. (An order of remand directing further evidence to be taken not under O. 41 R. 23.)

(95) 19 Bom 286 (288). (Special Judge under Dekkhan Agriculturists' Relief Act setting aside Sub-judge's decree on facts.)
(96) 19 Bom 675 (678).
(95) 19 Bom 790 (795, 796). (Order granting a succession certificate on applicant's furnishing security.)
(98) 22 Bom 520 (524).
(92) AIR 1932 Bom 228 (230).
(09) 1 Ind Cas 116 (118) (Cal.). (Where the witnesses to a claim are same, allowing them to proceed with two suits together.)
(12) 17 Ind Cas 361 (362) (Cal.). (When plaintiff filed a suit in ejectment and applied for a temporary injunction and the Court ordered defendant to furnish security.)
(16) AIR 1916 Pat 268 (269) : 1 Pat L Jour 92. (Where a Court extended time in a pre-emption suit for depositing money under S. 148, Civil Procedure Code.)
(19) AIR 1919 Cal 979 (980). (Restoration of a dismissed suit for default in the ends of justice.)
(19) AIR 1919 Cal 923 (924, 925). (Order allowing substitution of parties under O. 22 R. 10.)
(19) AIR 1919 Cal 234 (234). (Fixing rent under S. 105, Bengal Tenancy Act.)
(23) AIR 1923 Lah 506 (508). (Decision that no grounds existed for exercise of inherent power.)
(22) 64 Ind Cas 563 (564) (Cal.). (Rejection of an application under O. 1 R. 10.)
(22) 67 Ind Cas 252 (253) (Cal.). (Refusal to admit additional evidence in appeal.)
(28) AIR 1928 Cal 421 (423) : 55 Cal 748. (Issue of a commission under Order 26.)
(02) 5 Oudh Cas 151 (152).
(30) AIR 1930 Cal 426 (428). (Admitting appeal out of time under S. 5, Limitation Act.)
(14) AIR 1914 Lah 9 (11) : 20 Ind Cas 208 (205) : 1914 Pun Re No. 10. (Dismissal of an application for restitution and failing to act under Section 151.)
(16) AIR 1916 Mad 1220 (1221) : 39 Mad 235 (F.R.).
(8) 6 Mad 227 (228). (Junior widow implored in an execution petition by senior widow.)
(84) 7 Mad 584 (586). (Admitting appeal out of time.)
(87) 10 Mad 98 (100). (Refusing leave under S. 18 of the Act, 20 of 1868, Religious Endowments Act.)
(06) 16 Mad L Jour 526 (528). (Restoration of suit dismissed for default.)
(07) 30 Mad 274 (276). (Settling arbitrage of a wrong order.)
(10) 5 Ind Cas 291 (291) : 33 Mad 412. (Order refusing to excuse delay in presentation of an appeal.)
(14) AIR 1914 Mad 149 (149). (When delay is excused under S. 5, Limitation Act, in admitting an appeal.)
(26) AIR 1926 Mad 591 (592). (Where the Court amended an issue at a late stage but

before passing of a decree.)
(29) AIR 1929 Mad 192 (193). (Allowing examination of witness on commission.) (Order as to costs.)
(30) AIR 1930 Mad 72 (74). (Order as to costs.)
(31) AIR 1931 Mad 10 (11). (Granting extension of time for discharge under S. 43, Provincial Insolvency Act.)
(14) AIR 1914 Nag 60 (62) : 10 Nag L R 139. (Refusing to extend time spent in obtaining copies.)
(20) AIR 1920 Nag 149 (149). (Grant of adjournment on payment of costs.)
(26) AIR 1926 Nag 156 (157). (Court's discretion for extending time for payment of deficient court-fee.)
(27) AIR 1927 Nag 258 (255). (Application for appointment of curator.)
(29) AIR 1929 Nag 288 (288). (Allowing secondary evidence of a lost document.)
(28) 111 Ind Cas 141 (142) (Nag). (An order passed under O. 1 R. 10, O. P. Code.)
(24) AIR 1924 Oudh 348 (349). (Fixing of high fee of commissioner.)
(25) AIR 1925 Oudh 148 (148). (Appellate Court excusing delay in filing appeal.)
(31) AIR 1931 Oudh 408 (409). (Discretion in the appointment of a person as mutually.)
(18) AIR 1918 Pat 520 (521). (Appointment of a pleader as a guardian for the suit.)
(26) AIR 1926 Oudh 160 (160). (Question of sufficiency of security.)
(28) 108 Ind Cas 804 (804) (Pat). (Exercise of inherent jurisdiction.)
(17) AIR 1917 Low Bur 81 (81). (Compensation in breach of contracts of service.)
(14) AIR 1914 Sind 105 (107) : 8 Sind L R 275. (Grant of adjournments.)
(81) 3 All 508 (509). (Order granting or withholding sanction to prosecute by Civil Court.)
(36) AIR 1936 Lah 904 (905). (Refusal to stay suit under S. 19, Arbitration Act, in exercise of discretion—No interference.)
(36) AIR 1936 Lah 140 (140).
(34) 35 Pun L R 374 (374). (Discretion under S. 5, Limitation Act.)
(35) 168 Ind Cas 259 (259) (Lah). (Rejection of application for extension of time under S. 5, Limitation Act.)
(35) AIR 1935 Cal 102 (107).
(34) AIR 1934 Cal 780 (781). (Exercise of inherent power.)
(35) AIR 1935 All 49 (49). (Court considering matter judicially and refusing to exercise discretion under S. 151 — S. 115 does not apply—No question of jurisdiction arises.)
(36) AIR 1936 Pesh 97 (99). (Lower Court exercising discretion vested in it by S. 5, Limitation Act—High Court will not interfere.)
(35) AIR 1935 Pesh 182 (185). (One Court notifying to another a complicated situation and suggesting that proceedings in the other Court may be stayed — Other Court should give weight to such suggestion and give reasons for refusing to comply with such request—That is matter of Court's discretion and High Court is reluctant to interfere with such discretion.)

ground for interference.² But when the discretion is exercised *perversely* so as to cause serious prejudice to a particular party, the High Court will be justified in interfering with it.³ It was held in the undermentioned case⁴ that the Judge's order as to whether a ballot paper is valid or not, is *final* under Rule 12 of the rules for the decision of disputes relating to election to local bodies, and cannot be interfered with in revision. But where the revisional power is not distinctly barred by any specific provision, it remains.⁵

- (1938) AIR 1938 Mad 979 (980); ILR (1938) Mad 317.
 ('35) AIR 1935 Nag 68 (68). (Parties to mortgage — Person claiming paramount title may be joined as a party to a mortgage suit if just and convenient — High Court should not interfere under Section 115.)
 ('38) AIR 1938 Mad 347 (348); I L R (1938) Mad 667 (FB). (Court thinking that guardian acted properly throughout — It has full discretion to discharge him and his order cannot be challenged in revision.)
 ('37) AIR 1937 Pat 38 (39). (Judge in exercise of his discretion rejecting application to be added as intervenor of person depositing landlord's fee under Sec. 26 (O), Bihar Tenancy Act — High Court in revision will not interfere.)
 ('37) AIR 1937 Pat 528 (530). (Even when such exercise is founded on a mistaken view of the law.)
 ('39) AIR 1939 Lah 170 (171). (Court accepting security in exercise of its discretion — No material irregularity — No revision lies against order accepting security.)
 [See ('37) AIR 1937 Lah 206 (207). (*Obiter* — Order refusing to stay under S. 19, Arbitration Act — No appeal lies but revision is entertainable.)]
 ('33) AIR 1933 All 343 (344). (Order restraining returning officer from holding election.)
 [See also ('91) 15 Bom 180 (182). (Special Judge under Bombay Act 17 of 1879 exercising his discretion in setting aside the decree of a subordinate Judge.)]
 2. ('23) AIR 1923 Mad 690 (692). (Refusal to add parties.)
 ('28) 113 Ind Cas 313 (313) (Mad). (Amendment of issue at a late stage.)
 ('16) AIR 1916 Mad 384 (385). (Bare failure to exercise discretion as regards costs.)
 ('26) AIR 1926 Cal 1112 (1113). (Amendment of pleading.)
 ('31) AIR 1931 Lah 672 (672). (Order under S. 41, Provincial Insolvency Act.)
 ('67) 7 Suth W R 519 (520). (Sending a witness to a Magistrate for refusing to attend Court in obedience to a summons.)
 ('18) AIR 1918 All 418 (419) : 40 All 612.
 ('11) 12 Ind Cas 173 (174) (Mad). (Amending pleading.)
 ('23) 111 Ind Cas 141 (142) (Nag).
 ('93) 16 Mad 424 (428).
 ('27) AIR 1927 Rang 311 (313) : 5 Rang 615. (Order extending time for performance is not revisable unless discretion is wrongly exercised.)
 ('38) AIR 1938 Lah 548 (550); I L R (1938) Lah 289.
 3. ('16) AIR 1916 Pat 75 (76); 1 Pat L Jour 465.
 ('33) AIR 1933 All 957 (958). (Order refusing amendment of plaint — *Held* exercise of discretion was arbitrary — Hence revisable.)
 ('25) AIR 1925 Cal 293 (294). (Order setting aside sale under S. 173 of Bengal Tenancy Act — Not revisable unless prejudice caused.)
 ('31) AIR 1931 Cal 268 (269).
 ('14) AIR 1914 Mad 203 (203). (A refusal by a subordinate Court to issue a commission to examine certain witnesses is not an abuse of process warranting an interference by the High Court.)
 ('23) AIR 1923 Lah 506 (508). (Exercise of discretion under S. 151 not shown to be perverse — No interference.)
 ('37) AIR 1937 Oudh 282 (283); 13 Luck 171. (Court disallowing plaintiff costs of suit — Discretion as to costs based on erroneous view of law — Order as to costs can be interfered with under S. 115.)
 ('35) AIR 1935 Mad 230 (232).
 ('36) AIR 1936 Pat 250 (252). (Court summarily rejecting prayer for trying preliminary issue on point of law — No opinion expressed as to whether point of law would be sufficient to dispose of case — High Court would interfere in revision.)
 ('35) AIR 1935 All 705 (706). (Discretion exercised capriciously.)
 ('37) AIR 1937 Pat 21 (22). (Refusal to issue commission to a pardanashin lady at her place of residence which is different from the place of suit.)
 ('35) AIR 1935 Cal 336 (337). (By acting under S. 151, Court having no jurisdiction to do so, depriving a party of a valuable right which he had acquired by virtue of the law of limitation — High Court can interfere in revision.)
 [See ('37) AIR 1937 Mad 338 (339). (Order under O. 1 R. 10 can be revised when the Court fails to exercise a discretion vested in it due to error.)]
 ('38) AIR 1938 Pat 413 (417) : 17 Pat 507.
 ('34) AIR 1934 Mad 84 (85); 57 Mad 542. (Excess fee paid by mistake of party — Certificate should be granted even in revision.)
 4. ('29) AIR 1929 Mad 793 (793).
 5. ('29) AIR 1929 All 581 (584) : 51 All 957.
 [See ('32) AIR 1932 Oudh 39 (40). (Decree under S. 9, Specific Relief Act, may be revised.)]
 ('32) AIR 1932 Oudh 210 (213); 7 Luck 601 (FB). (Revision lies against order of Court under Mussalman Waqf Act of 1923 if conditions of Section are satisfied.)
 [See also ('33) AIR 1933 Rang 2 (3); 10 Rang 517 (SB). (Order of District Judge as to validity of election — Rule providing that the order shall be final — Revisional powers will not be exercised unless the order is made without jurisdiction.)]

As to whether the High Court will interfere in revision against an order which has been declared to be final by a particular Act, see the undermentioned cases.⁶

21. Orders under Sections 152 and 153.—The High Courts of Allahabad, Bombay⁷ and Calcutta⁸ and the Chief Court of the Punjab⁹ have held that an order passed under Section 206 of the old Code constitutes an adjudication separate from that concluded by the decree and amounts to a decision of a 'case' capable of being revised. The same view has been taken under the present Code also.⁵ Accordingly, it has been held that if a Court refuses to amend a decree in conformity with the judgment it amounts to a refusal to exercise jurisdiction.⁶ In an old Allahabad case⁷ when the decree was amended from "I dismiss the appeal" to "I accept the appeal" it was considered to be a grave irregularity in the exercise of jurisdiction. Similarly, a Court has no power to vary or amend a decree when it is in conformity with the judgment and, if done, it will be open to revision.⁸

The High Court of Madras⁹ has, on the other hand, held that no revision lies.

186. (Order refusing to amend decree—High Court, even if precluded from interfering in revision, can interfere under S. 151.)

(186) AIR 1936 Oudh 81 (82). (Decision under S. 152, C. P. C., allowing amendment of preliminary decree is an order and not a decree and is open to revision.)

(198) AIR 1938 Lah 4 (5). (Amended decree though appealable, revision from order amending decree is entertainable, if order is passed without jurisdiction.)

[See however (197) AIR 1927 Cal 114 (116). (Order amending decree not open to revision as appeal lies on amended decree.)]

6. (184) 6 All 125 (129).

(186) 8 All 519 (532).

(191) 1691 All W N 114 (114). (Delay in applying when not caused by petitioner is no ground to refuse.)

(110) 6 Ind Cas 707 (707) (All).

(18) AIR 1918 All 208 (209).

(124) AIR 1924 Lah 621 (622). (When judgment is given against a person sued in a representative capacity, the decree giving a personal liability was refused to be amended.)

(129) AIR 1929 Lah 664 (664).

(131) AIR 1931 Oudh 423 (424).

(15) AIR 1915 All 1 (1). (But not when the refusal arose from a mistake of law or fact.)

7. (185) 7 All 875 (876) (FB).

8. (198) 15 All 121 (122). (Decree was amended by adding interest from date of suit, till date of payment when judgment awarded only a specified sum.)

(134) AIR 1934 All 100 (101).

(14) AIR 1914 Cal 387 (387). (Where the Court acts under S. 151 in a case where it should not have done.)

(128) 108 Ind Cas 787 (788) (Lah).

[See (130) AIR 1930 Lah 589 (591).

(13) 18 Ind Cas 725 (726) (Cal). (An amendment to a sale certificate to show the purchase of a larger share of the property than what was stated in the sale proclamation under S. 152 is beyond jurisdiction.)]

9. (191) 24 Mad 646 (650).

6. (192) AIR 1932 Cal 727 (729). (Order of District Judge under S. 88 of the Bengal Act, 5 of 1919 is final—High Court will discourage application in revision.)

(193) AIR 1938 All 47 (47) : 1 L R (1938) All 110. (Final in S. 45 (5), U. P. Encumbered Estates Act means finally for purposes of appeal—High Court can interfere in revision under Section 115.)

(193) AIR 1938 All 456 (459) : 1 L R (1938) All 702 (711). (The provision about the finality of the decision of the Appellate Court contained in S. 5 (2) of the U. P. Agriculturists' Relief Act, cannot warrant the inference that the Legislature meant in any way to control or limit the revisional jurisdiction conferred on the High Court by S. 115, C. P. Code.)

(193) AIR 1938 Cal 465 (466). (Order of District Judge arising out of proceedings under S. 86 to 10 of the Bengal Municipal Act is final and High Court has no power to revise it.)

(193) AIR 1938 Cal 959 (960). (Order of District Magistrate on petition under R. 1 (a) of Election Rules under Bengal Local Self Government Act is final and no revision lies to High Court.)

(193) AIR 1938 Oudh 162 (165). (Application under S. 4, U. P. Encumbered Estates Act—Applicant making default in paying charges for issue of notice under S. 11—Special Judge dismissing application and further refusing to restore it—Appeal lies to District Judge under S. 45 (2)—Revision under S. 115 does not lie.)

1. (185) 7 All 875 (876) (FB).

2. (197) 31 Bom 447 (449).

3. (191) 28 Cal 177 (179).

4. (188) 1888 Pun Re No. 101.

5. (194) AIR 1934 All 100 (101).

[See (11) 10 Ind Cas 850 (850) : 1911 Pun Re No. 24.

(127) AIR 1927 Lah 68 (68). (Order of amendment of a decree in regard to the amount of the plaintiff's fee allowed as costs.)]

[See also (37) AIR 1937 Oudh 246 (247) : 18 Luck

1. (185) 7 All 875 (876) (FB).

2. (197) 31 Bom 447 (449).

3. (191) 28 Cal 177 (179).

4. (188) 1888 Pun Re No. 101.

5. (194) AIR 1934 All 100 (101).

[See (11) 10 Ind Cas 850 (850) : 1911 Pun Re No. 24.

(127) AIR 1927 Lah 68 (68). (Order of amendment of a decree in regard to the amount of the plaintiff's fee allowed as costs.)]

[See also (37) AIR 1937 Oudh 246 (247) : 18 Luck

way of a suit is available to the aggrieved party under clause (2) of Section 73.¹ This, however, does not mean that the aggrieved party should be confined to that remedy "if the circumstances of the case warrant an interference." Accordingly when Courts have acted in defiance of the terms of Section 73 and thereby assumed a jurisdiction which they did not possess or declined jurisdiction in a proper case, the High Court will interfere to set matters right.²

See Notes to Section 73 also.

23. Orders in claim cases.

As has been seen in Note 8 *ante*, no application will ordinarily be entertained to revise an order passed under O. 21 Rr. 60, 61 or 62 inasmuch as the party against whom the order is made has a special remedy by way of a suit. But this does not bar the High Court's power of interference in exceptional cases.¹ Thus, if the lower Court fails to determine the only real question that has to be decided, namely, that of possession² and disposes of the petition on a determination of the question of title³ which it was not competent to investigate, or allows a claim in express violation of the Code, as for example, after the execution sale⁴ or against mortgaged property which was brought for sale,⁵ the High Court will interfere.

(17) AIR 1917 Mad 589 (589).
[See (32) AIR 1932 All 337 (339) : 54 All 490.
(Revision treated as application for amendment to prevent multiplicity of proceedings.)]

Note 22

1. See Note 8 *ante* and also point 1, Note 25 to Section 73.

2. (25) AIR 1925 Oudh 287 (287).
(32) AIR 1932 All 411 (413) : 54 All 516. (Interfered to avoid long and expensive litigation.)
(33) AIR 1933 Lah 48 (49) : 14 Lah 243.
(34) AIR 1934 Lah 119 (119).

(34) AIR 1934 Oudh 110 (111). (Disallowing rateable distribution in defiance of predecessor's order.)
(33) AIR 1933 Pesh 52 (53).

(09) 4 Ind Cas 52 (53) (Cal).
(11) 10 Ind Cas 527 (529, 530) (Cal). (Rateable distribution was refused because lower Court thought that execution petition was not put in before sale.)

(16) AIR 1916 Cal 371 (372). (Giving rateable distribution to a person who has simply obtained an attachment before judgment.)
(22) AIR 1922 Cal 19 (21).

(81) 4 Mad 383 (384). (Giving a share to decree-holder whose execution has been dismissed.)
(92) 15 Mad 372 (376). (Wrongly refusing to entertain an application.)

(09) 4 Ind Cas 509 (510) : 32 Mad 334. (Refused because there was other property of the judgment-debtor available.)
(21) AIR 1921 Mad 481 (482).

(26) AIR 1926 Mad 179 (181). (Where the lower Court thought that petitioner was not entitled to rateable distribution, because his execution did not end successfully.)
(31) 1931 Mad W N 1012 (1014).

(26) AIR 1926 Nag 380 (381).
(07) 10 Oudh Cas 129 (131).
(21) AIR 1921 Pat 401 (402) : 5 Pat L Jour 415. (Application refused because it was put in only when sale was going on.)

(24) AIR 1924 Pat 434 (435).
(31) AIR 1931 Pat 405 (408) : 11 Pat 250.
(38) 177 Ind Cas 269 (270) (Pat). (Court declining to exercise jurisdiction vested in it under S. 73.)
[See also (33) AIR 1933 Pat 277 (278). (Sum distributed not forming part of assets liable to be rateably distributed—Revision lies.)]

Note 23

1. (26) AIR 1926 Nag 257 (259). (But the mere fact that if he files a suit the onus will be on him is no ground for interference in revision.)
(33) AIR 1933 Pat 158 (159). (Where order is passed without consideration of evidence, High Court will interfere.)
(23) AIR 1923 Mad 663 (664).

(36) AIR 1936 Rang 306 (306) : 14 Rang 516. (High Court will interfere where Court passing the order has failed to exercise jurisdiction vested in it.)

2. (29) AIR 1929 Cal 225 (226).
(09) 4 Ind Cas 125 (125) (Mad).
(16) AIR 1916 Mad 19 (19).

(28) AIR 1928 Mad 124 (125).
(27) AIR 1927 Nag 286 (288).
(21) 60 Ind Cas 616 (618) (Pat).

(23) AIR 1923 Rang 195 (196) : 1 Rang 276.
(28) AIR 1923 Rang 195 (196) : 1 Rang 276. (Really went behind and saw whether his possession was lawful or not.)
(15) AIR 1915 Cal 116 (117).

(33) AIR 1933 Rang 259 (260).
(25) AIR 1925 Mad 588 (588).
(31) AIR 1931 Lah 666 (666).

(37) 1937 Mad W N 320 (320).
(39) AIR 1939 All 117 (120).
(06) 33 Cal 487 (496).

(12) 15 Ind Cas 53 (54) (Cal).
(11) 9 Ind Cas 194 (195) (Cal).
(29) AIR 1929 Pat 746 (747). (Order based on erroneous view of fact and law.)

5. (05) 27 All 700 (701).
(18) 18 Ind Cas 215 (216) (Cal).
(18) AIR 1918 Lah 368 (368) : 1918 Pun Re No. 58
[See also (21) AIR 1921 Cal 479 (480).]

enough; it will be violating the principle of the rule if the sale is set aside without such an application.¹² though an oral application has been considered sufficient.¹³ No order could be made setting aside a sale under O. 21 R. 89, without notice as provided under R. 92, but there is no jurisdiction to confirm the sale for failure to pay process fees when the auction-purchaser appears in the proceeding by a pleader.¹⁴ When the deposit falls short, due to a mistake of the Court, and is subsequently made good, the Courts act with material irregularity in refusing to set aside a sale.¹⁵ No application for revision will lie from an order dismissing an application under R. 89 on the ground that an application under Rule 90 was previously dismissed.¹⁶ See also the undermentioned cases.¹⁷

As in the case of applications under O. 21 R. 89 so in applications under R. 90, only a first appeal is provided by Section 104 and O. 43 R. 1 clause (i).¹⁸ But if the application raises a question concerning the execution, discharge or satisfaction of the decree within the meaning of Section 47 and when no petition is put in under R. 89, the executing Court is bound to decide it and the decision so given being a decree, a second appeal will lie.¹⁹ An instance of the kind is to be found where a sale is held without issuing a proper notice provided by O. 21 R. 22.²⁰ When a Court rejects an application to set aside a sale summarily,²¹ or without allowing the petitioner an opportunity to substantiate his allegations²² or without considering the evidence let in by him²³ or by misapplying the law of limitation,²⁴ it was held to be a sufficient ground for interference. When the auction-purchaser²⁵ or the decree-holder²⁶ is not impleaded

(129) AIR 1929 Nag 10 (11). (Refusal to confirm a sale where the amount is not deposited in time as without jurisdiction.)
(187) 14 Cal 821 (1928). (Under S. 174, B. T. Act, where T. T. Notes were deposited, it was held not a proper deposit.)
12. (19) AIR 1919 Bom 180 (131) : 43 Bom 735. (See (39) 18 Pat 210 (213). (Court refusing to set aside execution sale in absence of application though necessary deposit was made—High Court cannot interfere.)]
13. (21) 63 Ind Cas 140 (141) (All). (17) AIR 1917 Mad 225 (226). (An unstamped memo will not be allowed to be amended in revision to include a prayer for setting aside.)
14. (22) 67 Ind Cas 286 (287) (Cal).
15. (30) AIR 1930 Cal 249 (250).
[But see (20) AIR 1920 Cal 392 (392).]
16. (98) 1898 All W N 148 (149).
17. (37) AIR 1937 Pat 113 (116) : 16 Pat 202 (R.B.). (Parties agreeing that on default in payment of the decretal amount by a certain date the sale should be confirmed — Sale confirmed — Order one under O. 21 R. 89 — Appeal lay and even if appeal did not lie, revision lay.)
(37) AIR 1937 Pat 537 (540). (Sale in execution of rent decree—Transferee from judgment-debtor depositing in Court 5 per cent. for payment to stranger auction-purchaser on last day of limitation — In lieu of depositing in Court under Section 174 (1), Bengal Tenancy Act, transferee filing petition that payment had been made out of Court — Landlord decree holder assenting to same — Court held was bound to affirm sale unless money actually deposited in Court within limitation — Sale set aside — Case held fit for

interference in revision.)
(36) AIR 1936 Oudh 55 (56) : 11 Luck 418. (Execution sale — Decree-holder consenting to accept decretal amount from judgment-debtor and have sale set aside though beyond time — Court setting aside sale — Equities held were in favour of judgment-debtor and High Court should not interfere in revision.)
(38) AIR 1938 Mad 307 (312). (An order rejecting an auction-purchaser's application for confirmation of the sale is not an appealable matter nor can it be revised.)
18. (95) 22 Cal 802 (805). (Sale set aside without knowledge of third party interested will not be interfered with.)
(27) AIR 1927 Cal 657 (658). (Order of remand for clearer findings was held not without jurisdiction.)
19. (24) AIR 1924 All 698 (699).
20. (24) AIR 1924 Mad 431 (436) : 47 Mad 288 (R.B.).
21. (25) AIR 1925 Nag 289 (291).
22. (29) AIR 1929 All 798 (793) : 51 All 1023.
23. (25) AIR 1925 Cal 515 (516). (When a sale was set aside after seven years and the judgment did not discuss all points.)
(21) AIR 1921 Cal 251 (252) : 48 Cal 119.
24. (26) AIR 1926 All 305 (306) : 48 All 286. (Because fuller particulars of fraud were given only after 30 days.)
(28) AIR 1928 All 354 (354). (S. 18, Limitation Act.)
(24) Cal T. Jour 555 (558).
(13) 18 Ind Cas 391 (392) (Cal). (A failure to consider S. 7, Limitation Act is not, when raised for first time.)
25. (29) AIR 1929 All 593 (595) : 51 All 910.
26. (93) 15 All 407 (409).

circumstances of the case, or on a ground not covered by the Section⁵ or where there is no material on which the discretion could be exercised.⁶ Similarly, an order granting leave to withdraw but without giving the necessary permission to bring a fresh suit⁷ or after the case has been disposed of on the merits,⁸ is open to revision. Where, however, the Court acts judicially in a proper manner, the order is not open to revision even if there is an error of judgment.⁹

Though Order 23 does not apply to execution proceedings, an order rejecting the application of a decree-holder to withdraw the execution proceedings and proceedings

(16) AIR 1916 Mad 674 (674). (Appellate Court permitting withdrawal for non-joinder.)
(18) AIR 1918 Nag 93 (91).
(17) AIR 1917 Nag 121 (122).
(21) AIR 1921 Oudh 107 (108).
4. (25) AIR 1925 Oudh 110 (111).
(31) AIR 1931 AH 137 (139). (Withdrawal allowed without considering procedure under O. 23 and for inadequate grounds—Order can be set aside in revision.)
(15) AIR 1918 Pat 452 (451) : 3 Pat L Jour 460.
(17) AIR 1917 Cal 36 (37).
(17) AIR 1917 Cal 172 (172).
(17) AIR 1917 Cal 741 (741).
(12) 14 Ind Cas 97 (98) (AH).
(11) AIR 1914 AH 457 (458).
(15) 31 Ind Cas 617 (618) (AH). (Omission to consider question of costs causing prejudice to defendant.)
(25) AIR 1925 AH 466 (466) : 47 AH 319.
(26) 95 Ind Cas 556 (556) (AH).
(26) 92 Ind Cas 1030 (1031) (AH).
(15) AIR 1916 Mad 480 (481). (Permission given in spite of defendant's opposition to condone plaintiff's defects in the case.)
(25) AIR 1925 Oudh 291 (292) : 27 Oudh Cas 291. (Order made in disregard of procedure prescribed by the rule.)
(25) AIR 1925 Oudh 596 (597). (After close of evidence and before arguments.)
(11) 10 Ind Cas 819 (819) : 35 Bom 261.
(27) AIR 1927 AH 701 (705).
(10) 5 Ind Cas 187 (189) (Cal). (When plaintiff adduced all his evidence and failed to establish his allegations—Improper.)
(10) 6 Ind Cas 629 (630) (Cal).
(04) 27 Mad 377 (380). (In order that plaintiff may wait, and see if the law is not altered in his favour.)
(09) 1 Ind Cas 252 (253) : 33 Bom 722. (Do.)
(12) 14 Ind Cas 33 (34) (Cal). (When it was granted after plaintiff failed in his attempt to prove his case.)
(35) AIR 1935 AH 284 (284). (When Court has applied its mind to the question no revision lies.)
(See also) (98) 15 AH 169 (170).
5. (16) AIR 1916 Cal 255 (256) : 44 Cal 367.
(17) AIR 1917 Cal 830 (830).
(31) AIR 1931 Cal 268 (269).
(18) AIR 1918 Loh 329 (330).
(25) AIR 1925 Loh 497 (498).
(18) AIR 1918 Pat 261 (262) : 3 Pat L Jour 651.
(28) AIR 1928 Oudh 483 (484, 485) : 3 Luck 408.
(15) AIR 1915 Mad 480 (481).
(25) AIR 1925 Mad 617 (618).

(26) AIR 1926 Mad 868 (864).
(18) AIR 1918 Mad 699 (699). (Insufficiency of evidence.)
(22) AIR 1922 Nag 84 (85) : 18 Nag L R 80.
(25) AIR 1925 Oudh 61 (61).
(25) AIR 1925 Oudh 291 (298) : 27 Oudh Cas 281.
(35) AIR 1935 AH 740 (742) : 58 AH 245.
(21) AIR 1921 Pat 42 (43) : 6 Pat L Jour 112. (Inability to produce important evidence is no ground.)
(13) 21 Ind Cas 23 (24) : 37 Bom 682.
(21) AIR 1921 Cal 84 (86, 87) : 48 Cal 138 (P B). (Overruling 44 Cal 867 : AIR 1916 Cal 255).
6. (23) AIR 1923 Loh 97 (98).
7. (11) 10 Ind Cas 346 (346) (Cal).
(17) AIR 1917 Cal 197 (198).
(21) AIR 1921 Pat 360 (360).
8. (29) AIR 1929 Cal 88 (89) : 55 Cal 1067.
9. (18) AIR 1918 AH 418 (419) : 40 AH 612.
(34) AIR 1934 AH 214 (215). (Order cannot be interfered with even if discretion has been wrongly exercised.)
(32) AIR 1932 Loh 860 (861) : 18 Loh 537.
(33) AIR 1933 Oudh 255 (256).
(32) 137 Ind Cas 804 (804) (Loh).
(12) 14 Ind Cas 414 (415) (AH).
(15) AIR 1915 AH 123 (124) : 37 AH 326.
(21) AIR 1921 AH 65 (66). (That Appellate Court would have come to a different conclusion on same materials is no ground.)
(20) AIR 1920 AH 235 (235).
(21) AIR 1921 AH 65 (66). (When Appellate Court applied its mind judicially, no interference because it might come to a different conclusion.)
(24) AIR 1924 AH 121 (122).
(26) AIR 1926 AH 548 (548).
(27) AIR 1927 AH 750 (750) : 50 AH 148. (Wrong exercise of discretion is no ground to interfere.)
(29) AIR 1929 AH 683 (685).
(30) 125 Ind Cas 580 (581) (AH).
(18) AIR 1918 Cal 534 (534).
(32) AIR 1932 Loh 360 (361) : 13 Loh 537.
(12) 17 Ind Cas 400 (400) (Mad).
(30) AIR 1930 Cal 424 (426).
(26) AIR 1926 AH 294 (295). (Error of judgment in permitting withdrawal because a certain power was not filed.)
(35) AIR 1935 AH 384 (284).
(See also) (36) AIR 1936 Mad 697 (698). (Suit by partners, not registered as firm, withdrawn—Subsequent suit by them on same cause of action on getting themselves registered is not

refusing an application for leave to sue in *forma pauperis* is a case decided.¹¹ The Nagpur and Sind Judicial Commissioners' Courts have maintained the distinction pointed out by the Allahabad Court though interference would be made only in cases where there is some material illegality or irregularity in the procedure adopted by the lower Court in rejecting the application.¹² In Oudh¹³ the application in *forma pauperis* was itself held to be a "case decided" and therefore if the lower Court committed an irregularity in deciding it, it could be revised whether the application was allowed or rejected. This view, it is submitted, is the correct view, and has been upheld by all the other High Courts. The Madras, Patna and Rangoon High Courts¹⁴ have also rejected the distinction referred to above between the rejection and the allowing of the application. Accordingly when the lower Court, after considering the whole question of pauperism and in the exercise of discretion comes to a proper decision it will not be interfered with when there is no error of jurisdiction.¹⁵ If, on the other hand, the lower Court commits an irregularity in the exercise of jurisdiction as where it declines to give notice to the Government Pleader or to the defendant before disposing of the application,¹⁶ or where it does not properly consider the

11. ('26) AIR 1926 Lah 642 (643).
('84) AIR 1934 Lah 281 (281).
('29) AIR 1929 Lah 498 (498).
('82) 1882 Pun Re No. 99.
('19) AIR 1919 Lah 4 (5) : 1919 Pun Re No. 134.
[See also ('36) AIR 1936 Pesh 69 (71). (Order refusing application to sue in forma pauperis is reversible.)]
12. ('11) 10 Ind Cas 471 (471) : 7 Nag L R 49. (Order granting leave to sue in forma pauperis is not reversible.)
('24) AIR 1924 Nag 44 (45) : 19 Nag L R 165. (Order refusing permission—Revision lies.)
('33) AIR 1933 Sind 82 (83) : 26 Sind L R 491.
('25) AIR 1925 Nag 843 (844). (Where there is not any material irregularity, the High Court will not interfere in revision.)
('27) AIR 1927 Nag 340 (341). (Wrong conclusion on facts and evidence is no ground for interference.)
('28) AIR 1928 Nag 24 (27). (Application rejected and court-fee demanded—Revision filed, but later on suits dismissed for non-production of stay order—Still revision is maintainable.)
('30) AIR 1930 Nag 53 (54). (Absence to record reasons does not vitiate the order.)
('35) AIR 1935 Nag 209 (211) : 31 Nag L R 413 (Lower Court rejecting application to sue in forma pauperis on erroneous assumption, its decision thus amounting to a conscious violation of the rules of the Civil Procedure Code—Decision is open to revision.)
[See also ('36) AIR 1936 Nag 280 (280) : 1 L R (1987) Nag 428. (Application for leave to sue in forma pauperis rejected—Second application — Objection that it was barred — Trial Court has jurisdiction to decide if application is barred.)]
[But see ('38) AIR 1938 Nag 210 (211). (Order allowing person to sue as pauper is reversible when the conditions of S. 115 are satisfied.)]
13. ('09) 4 Ind Cas 777 (778) : 12 Oudh Cas 381. ('15) AIR 1915 Oudh 3 (3). ('23) AIR 1923 Oudh 118 (119).
allowing a party to appeal as a pauper without

115. right of appeal but it was held that the Collector could in such cases move the High Court under this Section.²⁵

27. Orders under Order 47.—An order rejecting an application for review on the merits is not open to revision¹ unless the Court has erroneously thought that it has no jurisdiction to deal with the application² or has declined to hold a proper inquiry³ or has rejected it under the erroneous view that the court-fee paid is not sufficient.⁴ The High Court will also set aside an appellate order setting aside an order granting review if the Appellate Court had entertained the appeal on the grounds other than those mentioned in O. 47 R. 7.⁵ An order *granting* review is revisable under this Section when the order is one without jurisdiction⁶ or has been made in the exercise of jurisdiction illegally or with material irregularity.⁷ But the High Court should not interfere in revision against an order granting a review simply because the Judge did not say that the additional evidence is important.⁸ Where the order granting review was substantially just and passed in the exercise of discretion, it is not a case for interference.⁹ See also the undermentioned case.¹⁰

27a. Orders under Order 45.—This Section is applicable to an order passed granting or refusing a certificate under Order 45.¹

27b. Decision as to court-fee, whether revisable.—It has been held that an order demanding additional court-fee is revisable under this Section as in such cases.

25. ('98) 21 All 138 (187).

('91) 15 Bom 77 (78).

('98) 18 Bom 454 (456).

('98) 21 Mad 118 (114).

[But see (1900) 23 Mad 78 (82). (But where no question of jurisdiction is involved, no revision lies.)]

Note 27

1. ('04) 26 All 572 (573).

('24) AIR 1924 Bom 344 (345). (On the ground that the additional evidence could have been adduced earlier.)

('16) AIR 1916 Cal 227 (228). (Rejection of an application for review of an order rejecting appeal.)

('18) AIR 1918 Cal 701 (701).

('26) AIR 1926 Cal 773 (775) : 53 Cal 679.

('23) AIR 1923 Oudh 153 (158).

('25) AIR 1925 Oudh 594 (594).

[But see ('34) AIR 1934 All 971 (971).]

2. ('21) AIR 1921 All 197 (198) : 43 All 288. (Because an appeal was filed after review.)

('20) AIR 1920 All 160 (161) : 42 All 317. (Do.)

('29) AIR 1929 Cal 513 (513). (Because the application is based on fraud.)

[See also ('24) AIR 1924 Lah 400 (400).]

3. ('28) AIR 1928 Nag 279 (279).

('29) AIR 1929 Nag 305 (311). (Error of law amounting to usurpation of authority in rejecting petition for review of order confirming auction sale.)

('14) AIR 1914 Cal 854 (854). (Where applicant was not heard.)

('25) AIR 1925 Pat 323 (325). (Where letters of administration were granted to a minor.)

4. ('07) 29 All 468 (470).
[See also ('13) 21 Ind Gas 943 (944) (Cal).]

1. ('37) AIR 1937 Mad 930 (936).

Note 27a

within Section 115.)
to grant review of same constitute "case"

10. ('36) AIR 1936 Lah 618 (619). (Proceedings abated—Order of restoration and order refusing to grant review of same constitute "case" extend time.)

('25) AIR 1925 Pat 452 (453). (Application to extend time.)

('28) AIR 1928 All 392 (394) : 50 All 801.

('12) 16 Ind Gas 995 (996) (Lah).

('15) AIR 1915 Mad 1068 (1069).

passed under Order 47.)

9. ('24) AIR 1924 Mad 586 (586). (Though order passed was under S. 151 which might have been

8. ('27) AIR 1927 Mad 641 (642) : 50 Mad 891.

[See ('85) 7 All 345 (352).]

7. ('26) AIR 1926 All 50 (52) : 48 All 160.

[See also ('13) 20 Ind Gas 670 (671) (Cal).]

time without just and sufficient cause.)

(Order admitting review of judgment out of time without just and sufficient cause.)

[See ('74) 14 Beng L R 373 (382) : 2 Ind App 58 (PC).

authority.)

granted on the basis of a ruling of an equal

authority.)

irregular and has led to a miscarriage of justice.)

(11) 12 Ind Gas 246 (247) (Lah). (If the order is

(127) AIR 1927 Oudh 181 (181).

of a decree from which an appeal is pending.)

(04) 27 Mad 602 (608). (An order granting review

(34) AIR 1934 All 250 (252).

of his claim.)

defendant had made an admission of the truth

that after the dismissal of plaintiff's appeal the

6. (10) 5 Ind Gas 182 (184) (Cal). (On the ground

(99) 21 All 152 (154).

(26) AIR 1926 Mad 1083 (1084).

(16) AIR 1916 Mad 544 (544).

5. ('13) 18 Ind Gas 549 (551) (Mad).

there is a refusal to exercise jurisdiction in the matter and try the case on the merits unless the additional court-fee demanded is paid.¹ But a decision holding that the court-fee paid is sufficient is, it has been held, not subject to the revisional jurisdiction of the High Court as there is no refusal to exercise jurisdiction in such cases.² See also the undermentioned decision.³ For fuller discussion see Section 149 Note 14 and Order 7 Rule 11 Note 12.

28. High Court's power of superintendence. — See Note 5 *ante*, and Section 224, Government of India Act, 1935, in the Appendices.

29. High Court's revisional powers under other Acts. — 1. *Guardians and Wards Act, 1890.* — Section 47 of the Guardians and Wards Act enacts that in certain cases specifically mentioned therein an appeal shall lie to the High Court from the orders passed by the subordinate Courts and Section 48 of the same Act while enacting that all other orders are final has expressly saved the extraordinary powers of the High Court to interfere in cases where the lower Courts have not properly exercised their powers.¹ But the application for revision will be considered under Section 48 only where the Court exercised jurisdiction not vested by law, or declined to exercise jurisdiction vested by law or exercised the same in an illegal or irregular manner. As to the circumstances in which the High Courts² have interfered under this Section with the order of the lower Court, see the undermentioned cases.³

Note 27b

1. ('38) AIR 1938 Pat 22 (25) : 16 Pat 766 (FB). ('38) AIR 1938 Nag 122 (127) : I L R (1938) Nag 106 (FB).
- ('35) AIR 1935 Cal 279 (280) : 62 Cal 417. (Order for payment of additional court-fee not supportable under the law.)
- ('39) AIR 1939 Pat 274 (275) : 18 Pat 267. (The High Court has jurisdiction to interfere in revision with the decision of the lower Court on the question of the classification of the suit for purposes of court-fee, where such decision has been adverse to the plaintiff.)
- [See also ('36) AIR 1936 Pesh 140 (141). (The Appellate Court undoubtedly has jurisdiction to decide the correct amount of court-fee, but if its decision on the point results in its refusal to exercise jurisdiction in respect of the merits of the appeal before it, and if that decision is wrong it results in a refusal to exercise jurisdiction vested in it.)]
- [But see ('39) AIR 1939 Mad 380 (382). (An order of a trial Court determining the proper court-fee payable on a plaint and holding that it is insufficiently stamped, is not revisable by the High Court ; and such an order, which by itself does not fall under S. 115, C. P. Code, cannot be revised by the High Court merely because it is bound to be followed by some other order which may be without jurisdiction.)]
2. ('38) AIR 1938 Pat 22 (25) : 16 Pat 766 (FB). ('36) AIR 1936 Pat 85 (86) : 15 Pat 340. ('38) AIR 1938 Nag 122 (126) : I L R (1938) Nag 106 (FB).
3. ('36) AIR 1936 Mad 411 (411). (Where the decision on a question of court-fee also bears upon the valuation of the suit for purposes of jurisdiction, and the suit may have to be filed in a higher Court if the court-fee question should be decided in a different way, the High Court is justified

in interfering in revision, although the point has been decided in plaintiff's favour.)

Note 29

1. ('07) 31 Bom 590 (594). ('25) AIR 1925 Oudh 260 (261). ('15) AIR 1915 Cal 49 (51, 52). ('01) 1901 Pun Re No. 48, p. 157.
2. ('28) AIR 1928 Nag 291 (291).
3. ('14) AIR 1914 Oudh 425 (426) : 18 Oudh Cas 66. (Where no notice was served upon a person interested in the result of an application for guardianship.)
- ('31) AIR 1931 Cal 59 (60). (Party against whom order passed desirous of putting fresh facts for consideration of Court throwing different light on case—Court not hearing same.)
- ('07) 17 Mad L Jour 199 (200). (Order allowing the guardian after termination of guardianship to spend the minor's property for the marriage of his sister.)
- ('23) AIR 1923 Lah 89 (89). (Orders under S. 34 of the Guardians and Wards Act.)
- ('09) 2 Ind Cas 237 (238) : 12 Oudh Cas 78. (Where the order granting permission for sale did not recite the necessity for it.)
- ('30) AIR 1930 Lah 1017 (1018). (Where the Court wrongfully cancelled a lease granted by a guardian which was perfectly within his competence.)
- ('15) AIR 1915 Cal 1 (4) : 42 Cal 351. (Selecting suitable bridegroom without leaving the choice in the first instance to the guardian.)
- ('32) AIR 1932 Bom 156 (158) : 56 Bom 71. (Selection of bridegroom without consulting proper guardian, without taking evidence and consulting minor.)
- ('18) AIR 1918 Cal 242 (243). (Improper orders of the District Court refusing payment of money to the guardian of the person of a minor.)
- ('15) AIR 1915 All 199 (200) : 37 All 515. (Refusal to order custody of minor to the guardian.)

2. *Bombay Regulation II of 1827*.—See Note 2 above.
 3. *Punjab Courts Act, Section 70-I (B)*.—As to the powers of the Chief Court of the Punjab under Section 70-I (B) of the Punjab Courts Act, see the undermentioned cases.

4. *Provincial Small Cause Courts Act, Section 25*.—The powers of the High Court under Section 25 of the Small Cause Courts Act are much wider than those given by this Section and the provisions of Section 115 of the Code are therefore not a safe guide for the exercise of the powers under Section 25 of the Small Cause Courts Act. As to the circumstances in which the High Courts will interfere under the Section, see the undermentioned cases.

- In the following cases it was held that the High Court cannot interfere :
 (726) AIR 1926 All 301 (301) : 48 All 300. (Order fixing amount spent for marriage of minor.)
 (725) AIR 1925 Oudh 260 (261). (Order fixing remuneration of outgoing guardian.)
 (735) AIR 1938 Nag 435 (437). (Order appointing guardian and fixing amount of maintenance of ward—Order is neither appealable nor revisable.)
 4. (10) 6 Ind Cas 735 (736) : 1910 Pun Re No. 2.
 (09) 2 Ind Cas 76 (77) : 1909 Pun Re No. 45.
 (01) 1904 Pun Re No. 70, p. 200.
 (14) AIR 1914 Lab 418 (418).
 (59) 1869 Pun Re No. 86, p. 316.
 (96) 1896 Pun Re No. 36, p. 279.
 (11) 11 Ind Cas 33 (34) (Lab). (Suit for declaration—Compromise decree for possession is beyond plaintiff.)
 (11) 11 Ind Cas 518 (518) (Lab). (Where the only question is one of law.)
 (14) 25 Ind Cas 881 (882) : 1914 Pun Re No. 4. (Do.)
 (14) 25 Ind Cas 867 (868) : 1914 Pun Re No. 1. (Do.)
 (07) 1907 Pun Re No. 65, p. 367.
 5. (24) AIR 1924 Rang 54 (54) : 1 Rang 372.
 (Sancution to prosecute given—Set aside.)
 (34) AIR 1934 All 107 (108).
 (04) 27 All 192 (193).
 (05) 27 All 681 (687).
 (22) 3 L R All 17 (20).
 (11) 11 Ind Cas 15 (16) (Lab).
 (28) AIR 1928 Lab 274 (275).
 (07) 17 Mad L Jour 62 (63). (To transfer the liability from one defendant to another.)
 (32) AIR 1932 Oudh 106 (107).
 (4) Rang 221.
 (26) AIR 1926 Rang 205 (206) : 4 Rang 221.
 (14) AIR 1914 Sind 98 (100) : 8 Sind L R 164.
 (34) AIR 1934 Lab 165 (166). (Even under a decree or order made in any case has been under S. 25 call for a case to satisfy itself that decided by a Court according to law.)
 (39) AIR 1939 All 590 (591).
 [See (34) AIR 1934 Lab 165 (166). (Even under that Act a case must have been decided and no revision lies against interlocutory orders.)]
 6. (95) 21 Bom 250 (255).
 (04) 1904 Pun Re No. 66.
 [See however (93) 15 All 139 (140).]
 (94) 16 All 476 (477).
 (99) 21 All 89 (90).
 7. (91) 13 All 277 (278). (Revisional powers only exercisable where it appears that some substantial injustice has been done to a party on misapprehension of law or from a material error in procedure.)

- (04) 1904 Pun Re No. 66, p. 186. (Do.)
 (97) 1897 All W N 138 (138). (Where no cause of action was disclosed in the plaint a decision was reversed.)
 (24) AIR 1924 All 691 (691). (Gross errors of law.)
 (07) 5 Cal L Jour 413 (415). (Error of law occurring failure of justice.)
 (95) 1895 Pun Re No. 66, p. 330. (Errors of law or procedure.)
 (16) AIR 1916 Lab 304 (304). (Error of law when there is no injustice will not be interfered with.)
 (12) 13 Ind Cas 803 (807) : 14 Oudh Cas 843. (Defiance of well-known principles of law.)
 (05) 27 All 531 (537). (Misappreciation of evidence.)
 (14) AIR 1914 All 158 (158). (Unreliable or no evidence.)
 (10) 7 Ind Cas 530 (530) (Lab). (Unreliable or no evidence at all.)
 (15) AIR 1915 Lab 237 (237).
 (14) AIR 1914 Sind 98 (100) : 8 Sind L R 164. (Decree was opposed to evidence.)
 (12) 15 Ind Cas 186 (186) (Mad).
 (12) 13 All 533 (537). (Judgment not in accordance with O. 20 R. 4.)
 (99) 23 Bom 334 (337, 338). (Do.)
 (96) 6 Mad L Jour 50 (51). (Do.)
 (95) 1895 Pun Re No. 78, p. 373. (Do.)
 (01) 1901 Pun Re No. 57, p. 180. (Do.)
 (12) 15 Ind Cas 202 (202) (Mad). (Disallowing costs without reasons.)
 (15) AIR 1915 Nag 65 (66) : 11 Nag L R 189. (Do.)
 (09) 2 Ind Cas 488 (488) (Mad).
 (11) 11 Ind Cas 15 (16) (Lab).
 (07) 29 All 468 (470). (Rejection of review on ground of supposed deficiency of stamp.)
 (13) 19 Ind Cas 782 (782) (All). (Error on point of limitation.)
 (13) 20 Ind Cas 175 (176) (All). (Do.)
 (15) AIR 1915 All 161 (162). (Do.)
 (93) 17 Bom 510 (511). (Do.)
 (93) 15 All 139 (140). (Do.)
 (95) 17 All 422 (423). (Do.)

- '12) 17 Ind Cas 470 (471) : 15 Oudh Cas 319. (Do.)
- '11) 11 Ind Cas 259 (260) (All). (Substantial injustice should have been done.)
- '95) 21 Bom 250 (255). (Do.)
- '96) 23 Bom 334 (340). (Do.)
- '02) 6 Cal W N 480 (483). (Do.)
- '16) AIR 1916 Cal 230 (230). (Do.)
- '16) AIR 1916 Cal 422 (423). (Do.)
- '88) 1888 Pun Re No. 79, p. 206. (Do.)
- '01) 1901 Pun Re No. 19, p. 63. (Do.)
- '17) AIR 1917 Pat 332 (333) : 2 Pat L Jour 627 (Do.)
- '91) 14 Mad 406 (407). (Do.)
- '12) 17 Ind Cas 743 (750) (Mad). (Do.)
- '15) AIR 1915 Mad 338 (339). (Do.)
- '16) AIR 1916 Mad 433 (434). (Do.)
- '17) AIR 1917 Mad 349 (350). (Do.)
- '98) 11 C P L R 91 (92). (Do.)
- '12) 14 Ind Cas 2 (4) (Oudh). (Do.)
- '11) 9 Ind Cas 470 (471) (Low Bur).
- '25) AIR 1925 Rang 310 (311) : 3 Rang 471. (Conclusions of Small Cause Court not shown to be perverse—No interference by High Court.)
- '26) AIR 1926 Pat 575 (576). (Refusal to summon witnesses—Serious prejudice to party—Revision allowed.)
- '17) AIR 1917 All 159 (160) : 39 All 101. (Small cause suit tried by a Munsif on the original side and his decision reversed on appeal.)
- '01) 25 Bom 417 (417, 418). (Do.)
- '09) 1 Ind Cas 543 (544) : 33 Mad 323. (Do.)
- '03) 26 Mad 176 (178, 179). (Do.)
- '22) AIR 1922 Mad 352 (353). (Do.)
- '16) AIR 1916 Pat 31 (32). (Do.)
- '14) AIR 1914 All 119 (119). (Original suit tried as small cause is an exercise of jurisdiction not vested by law.)
- '92) 14 All 413 (416). (Unless facts ousting jurisdiction are patent on record, High Court will not interfere.)
- '15) AIR 1915 Cal 378 (379). (Do.)
- '10) 5 Ind Cas 742 (742) (Mad). (Application not necessary.)
- '12) 14 Ind Cas 793 (793) (Lah). (Satisfaction of decree out of Court is no bar to revision.)
- '98) 1898 Pun Re No. 23, p. 66.
- '07) 17 Mad L Jour 62 (63).
- '35) AIR 1935 Mad 554 (555). (Where the decree is passed without jurisdiction by the lower Court, the High Court ought to interfere in revision.)
- '36) AIR 1936 Mad 132 (133) : 59 Mad 428. (Decision of Small Cause Court fundamentally wrong—Revision petition held justified.)
- '34) AIR 1934 Nag 257 (258). (Order returning plaint for presentation to proper Court—High Court could revise.)
- '37) AIR 1937 Nag 68 (69). (Where the Small Cause Court returns a plaint for presentation to the proper Court on the ground that it has no jurisdiction to try the suit, there is so far as the Small Cause Court is concerned a case finally decided by that Court and the order is open to revision by the High Court.)
- '37) AIR 1937 Nag 136 (137) : I L R (1937) Nag 266. (Interlocutory orders can be revised under S. 25.)
- '39) AIR 1939 Nag 19 (19). (Revision application from Small Cause Court decision—Findings of fact are to be accepted, unless they are perverse or unreasonable.)
- '36) AIR 1936 Sind 160 (163) : 30 Sind L R 226. (Held, that even if the order was an interlocutory order, the High Court could interfere under Sec. 25, Provincial Small Cause Courts Act, as the order in question amounted to a case decided.)
- '35) AIR 1935 All 372 (373). (S. 25 limits the High Court in revision to grounds of law that might be raised in a second appeal and does not cover a revision on a question of fact.)
- '35) 62 Cal L Jour 530 (532). (Suit of small cause nature tried as ordinary suit by Judge having powers of Small Cause Court Judge—No appeal lies from decree—Remedy of aggrieved party is not by way of appeal but by way of revision.)
- '36) 161 Ind Cas 423 (424) (Oudh). (High Court will not ordinarily exercise its discretionary powers in revision under S. 25 of the Small Cause Courts Act, if no injustice appears to have been done by the decision of the trial Court, even though the question raised is one of limitation.)
- '36) AIR 1936 Oudh 223 (224) : 12 Luck 124. (Plea raising question of fact cannot be raised for first time in revision.)
- '36) AIR 1936 Oudh 247 (248). (No injustice done to any party—High Court should not ordinarily exercise its discretionary power.)
- '36) AIR 1936 Oudh 297 (298). (No miscarriage of justice—High Court will not interfere.)
- '37) AIR 1937 Oudh 364 (385) : 13 Luck 263. (Suit dismissed for non-payment of court-fees—Application for restoration under S. 151, C.P. Code—Suit restored and decree passed—Judgment-debtor making application under S. 25 attacking not decree itself but order of restoration—Restoration of suit under S. 151, C.P. Code, held was wrong — But order of restoration being interlocutory order and application being after passing of decree, High Court could not interfere—Proper remedy of applicant was to attack decree itself.)
- '36) AIR 1936 Pesh 1 (2). (The revisional Court would not upset the judgment of a Small Cause Court on a bare technicality if substantial justice has been done.)
- '34) AIR 1934 All 107 (108). (Lower Court setting aside decree which was not an ex parte decree by summary order in which it has not given consideration to the points that it would be necessary to determine in setting aside an ex parte decree—High Court interfered.)
- '35) AIR 1935 All 379 (381). (Revisional power can be exercised only where substantial injustice has directly resulted from material misapplication or misapprehension of law.)
- '35) AIR 1935 All 437 (438). (Lower Court refusing restoration—High Court should not interfere in revision.)
- '35) AIR 1935 All 690 (691). (Finding of fact cannot be considered in revision.)
- '35) AIR 1935 All 716 (717). (Substantial injustice done to party by decreasing wages barred by time—High Court can interfere in revision.)

5. *Curator's Act (XIX of 1841).*—See the undermentioned cases.⁸
 6. *Provincial Insolvency Act (V of 1920), Section 75.*—Under that Section appeal by the District Court is according to law, call for the case and pass such order with respect thereto as it thinks fit. See also the undermentioned cases.⁹
 7. *Other Acts.*—See the undermentioned decision.¹⁰

30. Sanction to prosecute.—Prior to 1902, the Allahabad¹ and Madras High Courts (1935) AIR 1935 All 842 (843). (Question of jurisdiction involved—High Court should interfere though equity is in favour of opposite party.) (1936) AIR 1936 Cal 497 (503): 1 L R (1937) 1 Cal 1 (F.B.). (Finding on pure question of fact supported by documentary evidence cannot be assailed in revision under S. 25.) (1933) AIR 1933 Lab 452 (453). (Where issue is framed and then changed, onus being shifted to other side, evidence should be allowed to be adduced—High Court interfered.) (1935) AIR 1935 Lab 137 (138). (High Court will not interfere with an erroneous decision on a point of limitation, where the judgment of the lower Court does substantial justice between the parties.) (1935) AIR 1935 Lab 206 (208). (It is open to the High Court in revision under S. 25 to hold that the facts found by the trial Court do not in law constitute misconduct.) (1936) AIR 1936 Pat 84 (84). (Cases cannot be argued like second appeals—High Court cannot interfere wherever question of law is wrongly decided—It will interfere only when substantial injustice is caused.) (1936) AIR 1936 Pat 562 (568). (Patna High Court when exercising revisional powers under S. 25 will not interfere with lower Appellate Courts' decision if it is sound on merits.) (1939) AIR 1939 Nag 64 (65). (Incorrect view of law—High Court will interfere only when law is well-known.) (1936) AIR 1936 Pesh 148 (148). (Where the decision of a suit involves the decision of legal inferences to be drawn from the established facts and the question is an important question of law, revision is competent even if the suit is of a small cause nature.) (See also (1935) AIR 1935 Cal 556 (557). (Small Cause suit—Suit filed as Small Cause suit—Munsif transferred and successor not having Small Cause powers appointed—Suit transferred to his Court—Before commencement of hearing, Munsif invested with powers of Small Cause Court Judge to try such suits—Decision of Munsif is final and not appealable—Only revision is competent.) (See however (1925) AIR 1925 All 51 (52). [But see (1912) 15 Ind Cas 547 (548) (Cal). (An error on a point of limitation by the Small Cause Court cannot be revised.) (1917) AIR 1917 Mad 76 (76): 32 Ind Cas 3 (3) (Do.).] 8. (1907) 34 Cal 929 (934). (Order without conforming to the provisions of S. 3 of the Act.) (1901) 24 Mad 364 (369). (Do.) (1907) 10 Mad 68 (69). (Do.) (1935) AIR 1935 All 842 (843). (Question of jurisdiction involved—High Court should interfere though equity is in favour of opposite party.) (1936) AIR 1936 Cal 497 (503): 1 L R (1937) 1 Cal 1 (F.B.). (Finding on pure question of fact supported by documentary evidence cannot be assailed in revision under S. 25.) (1933) AIR 1933 Lab 452 (453). (Where issue is framed and then changed, onus being shifted to other side, evidence should be allowed to be adduced—High Court interfered.) (1935) AIR 1935 Lab 137 (138). (High Court will not interfere with an erroneous decision on a point of limitation, where the judgment of the lower Court does substantial justice between the parties.) (1935) AIR 1935 Lab 206 (208). (It is open to the High Court in revision under the C. P. Code taken by the High Court under the C. P. Code will not be subject to the provisions of the Insolvency Act but in contravention of such provisions. The High Court cannot interfere under any provision of the C. P. Code when a distinct procedure is prescribed by the Provincial Insolvency Act.) (1937) AIR 1937 Nag 31 (32): 1 L R (1937) Nag 512. (High Court in revision is entitled to act *motu* on facts being brought to its notice at the instance of creditor.) (1936) AIR 1936 All 489 (489). (Scope of revision under S. 75 is much wider than that under S. 115, C. P. Code.) (1937) AIR 1937 All 4 (5). (High Court has very wide powers of revision under Insolvency Act—Whether second appeal from order by Insolvency Court is treated as appeal or revision is immaterial.) (1938) AIR 1938 All 59 (61): 1 L R (1938) All 84. (In exercising revisional jurisdiction under the Insolvency Act the High Court has got wider powers than the powers vested in that Court by Section 115.) (1937) AIR 1937 Rang 189 (190). (Petition under S. 9 (1), Provincial Insolvency Act—Act of insolvency not set out with precision—Ground not raised in lower Court even in revision—Debtors not themselves raising it—Exercise of discretionary powers in revision held not proper.) (1937) AIR 1937 Mad 930 (932). (Powers of High Court under S. 75 are wider but High Court will not interfere on questions of fact unless there has been a patent miscarriage of justice.) 10. (1938) AIR 1938 Oudh 262 (262). (Order under S. 3, Charitable and Religious Trusts Act, is reversible.)
- [See also (1905) 1905 All W N 85 (86).] 1. (1931) 3 All 508 (509).

particulars of charges as in a case for perjury, and forgery⁵ or to consider a case on its merits⁶ constituted a material irregularity. Similarly, where sanction is given on facts which do not establish any offence⁷ or on evidence legally inadmissible,⁸ the order is reversible.

But though the applications in all such cases lie on the *civil revisional* side of the High Court and not on the *criminal revisional* side, the Chief Justice could, under Section 108 of the Government of India Act of 1915, direct a Bench exercising criminal jurisdiction to deal with the case.⁹ The procedure prescribed would however be one under the Civil Procedure Code.¹⁰

When action under Section 476, Criminal Procedure Code, is taken by a subordinate *Criminal* Court, the High Court may revise the proceedings under Section 439, Criminal Procedure Code.¹¹

Having regard to the view that revision against an order granting sanction to prosecute is under Section 115, it is competent to the Court to award costs of the petition.¹² Some recent cases of the Calcutta High Court have taken the view that Section 195, Criminal Procedure Code, creates a special jurisdiction and provides in clause 6 the machinery for the correction of possible errors committed by the primary Court and consequently the party who seeks relief must have recourse only to such machinery and cannot invoke the aid of this Section.¹³ In a recent Full Bench decision¹⁴ the Bombay High Court has held, agreeing with the undermentioned decision of the Lahore High Court,¹⁵ that an application in revision from an order under Section 476B of the Criminal Procedure Code by a Civil Court to the High Court should be heard and decided by the High Court in accordance with the provisions of Section 439 of the Criminal Procedure Code.

31. Orders under the Provincial Small Cause Courts Act. — See Note 29.

32. Appeal and review. — By Clause 15 of the present Letters Patent no.

appeal lies from an order made in the exercise of revisional jurisdiction or of the powers of superintendence under Section 107 of the Government of India Act by a High Court.¹ The words to that effect restricting a right of appeal were introduced

(95) AIR 1935 All 696 (696) : 58 All 85. (Munsif making complaint after deciding case—S. 439, Cr. P. C., does not apply but S. 115, C. P. C., applies.)
[See (31) AIR 1931 Pat 411 (412).]
[See also (24) AIR 1924 All 684 (686) : 46 All 611.]
[But see (17) AIR 1917 Mad 158 (158).]
(26) AIR 1926 Sind 215 (216) : 20 Sind LR 90. (Where it was not held to be a case.)
5. (17) AIR 1917 All 425 (426) : 38 All 695.
(05) 15 Mad LJ 221 (222).
6. (11) 9 Ind Cas 706 (706) (Cal).
7. (11) 11 Ind Cas 616 (616) (All).
(12) 13 Ind Cas 283 (284) (All).
[See (37) 170 Ind Cas 125 (125) (All). (District Judge considering evidence and directing complaint to be made for prosecution under S. 193, Penal Code—*Held*, no case made out for revision under Section 115.)]
[See also (36) AIR 1936 Pat 382 (383). (Trial Court directing prosecution under S. 476, Cr. P. C. — Appellate Court not satisfied with case of prosecution can direct withdrawal of complaint — High Court will not interfere under S. 115 with its order.)]

Note 32

1. (21) AIR 1921 Cal 217 (219).
(31) AIR 1931 Pat 292 (293) : 10 Pat 428.
(28) AIR 1928 Mad 169 (170) : 51 Mad 165.
(35) AIR 1935 All 889 (891).
- (FB).
15. (31) AIR 1931 Lah 761 (762) : 13 Lah 342
Bom 331 (FB).
14. (38) AIR 1938 Bom 225 (227) : 1 L R (1938)
application in criminal matters.)
only. It is found in C. P. C., and can have no
obviously refers to civil matters and civil matters
(28) AIR 1923 Cal 45 (48). (S. 115, C. P. C.,
(18) AIR 1918 Cal 850 (856) : 44 Cal 816.
13. (16) AIR 1916 Cal 103 (104) : 43 Cal 597.
12. (23) AIR 1923 Oudh 119 (121).
(35) AIR 1935 Oudh 59 (61) : 10 Luck 335.
(09) 3 Ind Cas 934 (936) : 33 Mad 48 (FB).
11. (13) 19 Ind Cas 197 (204) : 40 Cal 477.
10. (27) AIR 1927 Cal 98 (100) : 53 Cal 827.
9. (13) 19 Ind Cas 197 (204) : 40 Cal 477 (FB).
not examined.)
on report of handwriting expert not proved and
8. (23) AIR 1928 All 601 (602). (Sanction based

only in the year 1919. Before that, the decisions were not uniform as the original Clause allowed an appeal to the High Court from the judgment of a single Judge or of one Judge of a Division Bench in pursuance of Section 13 of the Charter Act. By Section 13 the High Courts are empowered to exercise original and appellate jurisdiction. The question then arose whether revisional jurisdiction was a part of the appellate jurisdiction vested by Section 13 of the High Courts Act. If it did include it, then an appeal was held to lie from an order of a single Judge made under this Section, provided it amounted to a "judgment." The Allahabad² and Bombay³ High Courts took the view that an order refusing to send for the records of a case did not amount to a judgment, as Clause 15 of the Letters Patent referred only to judgments passed in civil *original* suits and to orders passed by a single Judge disposing of *original* and appellate work. Obviously it was thought that "appellate" powers did not include revisional jurisdiction. The Madras High Court⁴ interpreted the words "appellate jurisdiction" referred to in Section 13 of the Charter Act as exhaustive and so inclusive of revisional powers. Consequently an appeal was held to lie from a *judgment* of a single Judge under this Section. The *rejection* of a petition⁵ under this Section was held not to amount to a "judgment" as the Court does not enter into the controversy between the parties, but only declines to interfere.⁶ But later cases of the High Court of Madras took the view that even if the single Judge declined to interfere in revision his order amounted to a "judgment" and was hence held to be appealable.⁷ As has been noticed before, under the present Letters Patent no such appeal lies. There can be no review or re-hearing of an application for revision dismissed for default.⁸ The proper course is to prefer a second application for revision.⁹ An application for review may also be treated as one for revision.¹⁰

2. ('92) 14 All 226 (232) (FB).
('92) 1892 All W N 31 (31).
- ('93) 15 All 373 (374). (Under S. 25, Provincial Small Cause Courts Act, 1887.)
('05) 28 All 133 (134).
3. ('97) 22 Bom 891 (892). (Application under S. 25, Provincial Small Cause Courts Act.)
4. ('99) 22 Mad 68 (82, 84) (FB).
('12) 35 Mad 1 (9, 21).
5. ('16) AIR 1916 Cal 838 (840).
('16) AIR 1916 Cal 642 (644).
('15) AIR 1915 Cal 695 (695).
('99) 22 Mad 109 (110).
(1900) 23 Mad 169 (170).

- ('04) 27 Mad 340 (340).
('04) 27 Mad 432 (434).
6. ('94) 17 Mad 100 (102).
('14) AIR 1914 Cal 388 (389, 390) : 41 Cal 323.
7. ('07) 30 Mad 311 (312).
('15) AIR 1915 Mad 480 (481).
('16) AIR 1916 Mad 1220 (1221) : 39 Mad 235 (FB).
8. (01) 1901 Pun Re No. 54, page 172.
('81) 1881 Pun Re No. 75, page 169.
9. ('28) AIR 1928 Lah 550 (551).
('01) 1901 Pun Re No. 54, page 172.
('37) AIR 1937 Lah 685 (686).
10. ('01) 1901 Pun Re No. 54, page 172.

PART IX.

SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS

116. [S. 631.] This Part applies only to High Courts which are, or may hereafter be, constituted by His Majesty by Letters Patent.
- Part to apply only to certain High Courts.
3. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915."
1. Amendment after 1908. — See foot-note (a) to the text of the Section.

117. [S. 632.] Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

[1877, S. 632. See Ss. 120, 129 and O. 49 R. 3.]

Synopsis

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|--|---|
| 1. Scope of the Section. | 4. Review in Letters Patent Appeals. |
| 2. Rules include forms. | 5. Letters Patent appeals—See Section 104, Note 6 and Notes on Clause 15 of the Letters Patent (Madras, Bombay and Calcutta). |
| 3. Security for costs in Letters Patent Appeals. | |

1. Scope of the Section. — This Section declares that the provisions of the Code shall apply to Chartered High Courts also save as otherwise provided in Parts IX and X of the Code or in rules.¹ Thus, Sections 16, 17, and 20 of the Code are declared by Section 120 in this Part (IX) to be inapplicable to the High Court in the exercise of its original civil jurisdiction. Again, under Section 129 of the Code, the High Court can make rules as to its own procedure in the exercise of its original civil jurisdiction and such rules will prevail over the provisions of the Code.² For rules not applicable to Chartered High Courts, see O. 49 R. 3. See also Notes to Section 114.

2. Rules include forms. — "Rules" means rules and forms contained in the First Schedule or made under Section 122 or Section 125. See Section 2 (18), *ante*.

3. Security for costs in Letters Patent Appeals. — It follows from what has been said in Note 1 above that O. 41 R. 10 will apply to Letters Patent appeals

Section 117 — Note 1

1. ('28) AIR 1928 Mad 385 (386).
2. See Notes to Section 129.

also unless the High Court has, under Section 129, made a rule inconsistent with it.¹ The Bombay High Court has framed such a rule (being Rule 725 of the Bombay High Court Rules) and therefore O. 41 R. 10 has been held not to apply to Letters Patent appeals in the Bombay High Court.²

4. Review in Letters Patent Appeals. — It has been seen in Note 1 to Section 114 that there is a difference of opinion among the several High Courts in India on the maintainability of an application for review of decrees in appeals under the Letters Patent. In cases where such review lies, appeals from orders passed on such applications for review are governed by the provisions of Order 47 Rule 7.¹

5. Letters Patent Appeals. — See Section 104, Note 6 and Notes on Clause 15 of the Letters Patent (Madras, Bombay and Calcutta).

118. [S. 634.] Where any such High Court considers it

Execution of decree
before ascertainment of
costs.

necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs ;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

1. Taxation of costs and limitation.—Where a decree provides for payment of costs “when taxed and noted”, limitation for the execution of the decree as to costs runs from the date of such taxation.¹

119. [S. 635.] Nothing in this Code shall be deemed to

Unauthorized persons
not to address Court.

authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

[1877, S. 635. See Letters Patent.]

Note 3

1. ('21) AIR 1921 P O 80 (84) : 48 Cal 481 : 48 Ind App 76 (P O).
- ('17) AIR 1917 Cal 626 (626) : 43 Cal 243 (246).
- ('25) AIR 1925 Mad 1132 (1139).
2. ('12) 17 Ind Cas 739 (740) : 37 Bom 572.

Note 4

1. ('89) 16 Cal 788 (793). (Not maintainable.)
- ('88) 12 Bom 171 (173).
- ('86) 9 Mad 253 (255, 256).

Section 118 — Note 1

1. See ('32) AIR 1932 Bom 378 (385).

Synopsis

1. Scope of the Section.
2. Right of Advocates to appear and plead on any side.
3. Right of Vakils to appear or plead or act on the original side.
4. Vakils' right to practise in the Presidency Small Cause Courts.
5. Attorney's right to address Court.
6. Recognised agent.

1. Scope of the Section.—It has been held that the words "the power of the High Court" to make rules concerning "advocates, vakils and attorneys" in this Section are not limited to the power of the High Court under Clauses 9 and 10 of the Letters Patent to make rules for the admission of advocates, vakils and attorneys and to their professional conduct, and that they also include the power of the High Court under the Government of India Act, 1915, to make rules regulating the practice of the Court.

2. Right of Advocates to appear and plead on any side. — See Letters Patent, Clauses 9 and 10.

3. Right of Vakils to appear or plead or act on the original side. — See Letters Patent, Clauses 9 and 10.

4. Vakils' right to practise in the Presidency Small Cause Courts. — See Letters Patent, Clauses 9 and 10.

5. Attorney's right to address Court.—See Letters Patent, Clauses 9 and 10.

6. Recognised agent. — See Note 5 to Clause 10, Letters Patent (Calcutta).

120. [S. 638.] (1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

[1877, S. 638. As to rules, see O. 49 R. 3.]

Synopsis

1. Amendments made after 1908.
2. Scope of the Section.
3. Original civil jurisdiction.

1. Amendments made after 1908. — Originally this Section had another sub-section which corresponded to Section 639 of the old Code. It ran as follows:—

"(2) Nothing in this Code shall extend or apply to any Judge of the High Court in the exercise of jurisdiction as an Insolvent Court."
That sub-section was repealed by the Presidency Towns Insolvency Act, III of 1909, Section 127 and Schedule III thereof.

2. Scope of the Section. — This Section declares that Sections 16, 17 and 20 of the Code shall not apply to the Chartered High Courts in the exercise of their

PART X. RULES

121. [New.] The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

Effect of rules in First Schedule.

1. Rules. — The re-arrangement of the Code into the "body of the Code" and "Rules," is for the purpose of giving a much needed elasticity to judicial procedure, and to enable minor defects to be remedied, as they arise, without resort to the Legislature.¹ But, except for the fact that the rules in the First Schedule can be amended, annulled or added to by the High Courts, such rules have the same force as if enacted in the body of the Code and it is incorrect to say that they are not so imperative as the Sections in the body of the Code.²

The whole of this Part is new except Sections 129, 130 and 131 which correspond to Section 652 of the old Code. The rules passed in accordance with the procedure in this Part, are not on the same footing as the circulars in the Manual of Civil Circulars issued by the High Court. Unless the latter is passed under some enactment which gives it the force of law, it would not have the force of law.³

See Section 124 for annulment and alteration of rules.

122. High Courts constituted by His Majesty by Letters Patent and the Chief Court of Oudh may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule. [1882, cf. S. 652, first para.]

Power of certain High Courts to make rules.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915."

b. Inserted by the Oudh Courts (Supplementary) Act, XXXII of 1925, Section 2 and Schedule.

Synopsis

1. Amendments after 1908.
2. Scope and object of the Section.
3. Extent of High Court's power to make rules.
4. High Courts to which the Section applies.

Section 121 — Note 1
1. See Report of the Select Committee.
2. ('37) AIR 1937 Pat 807 (310). (Non-recording in Appellate Court is illegal.)
3. ('26) AIR 1926 Bom 548 (549) : 50 Bom 793.

provisions of the Letters Patent.¹ Similarly, they cannot vary the period of limitation fixed by the Limitation Act for any proceeding.² Thus, a rule requiring a copy of the *trial* Court's judgment to be filed along with the memorandum of second appeal will not entitle the appellant to exclude the time requisite for obtaining such judgment.³ Nor will a rule dispensing with the necessity of filing a copy of *judgment appealed from* along with the memorandum of appeal disentitle the appellant from excluding the period requisite for obtaining a copy of the judgment.⁴ But a rule extending the provisions of Section 5 of the Limitation Act to applications under Order 9 Rule 9⁵ or Rule 13⁶ of the Code is not *ultra vires*. The reason is that Section 5 of the Limitation Act expressly applies to any application to which it may be made applicable by any enactment or *rule* for the time being in force.

The rule-making power of the High Courts is confined to the regulation of *procedure*.⁷ It was held by a Full Bench of the Rangoon High Court that proviso (b) to O. 21 R. 90 introduced by the Rangoon High Court, as such proviso stood before 27th January 1937, took away an existing right and as such was *ultra vires*.⁸

4. High Courts to which the Section applies. — The Section as it stood prior to its amendment by the Government of India (Adaptation of Indian Laws) Order of 1937, applied to High Courts established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the Chief Court of Oudh.⁹ A High Court within the meaning of the Government of India Act, 1915, is a High Court established in British India by Letters Patent. (See Government of India Act, 1915, Section 10.) The Patna High Court being such a Court, Section 122 applies to it.² In an earlier decision of the Patna High Court it was however held that the Section does not apply to the Patna High Court.³ The reason given was that the Patna High Court was not a High Court established under the Indian High Courts Act, 1861. Apparently their Lordships' judgment is based on the Section as it stood prior to the amendment by Act XIII of 1916. At that time, the Section did not contain the expression "or the Government of India Act, 1915." It was inserted in the Section by the Amending Act XIII of 1916. Their Lordships' attention does not seem to have been drawn to this amendment. Since the amendment of the Section by the Adaptation of Indian Laws Order of 1937, the Section clearly applies to all High Courts constituted by His Majesty by Letters Patent.

123. [New.] (1) A Committee, to be called the Rule Committee, shall be constituted at the town which is the usual place of sitting of each of the High Courts and of the Chief Court referred to in section 122.

Constitution of Rule Committees in certain Provinces.

- Note 3
1. ('26) AIR 1926 Rang 1 (2) : 3 Rang 546 (FB).
 2. ('30) AIR 1930 All 558 (559).
 3. ('18) AIR 1918 All 889 (390) : 40 All 1 (FB).
 4. ('28) AIR 1928 Lah 96 (96).
 5. ('29) AIR 1929 Bom 262 (263, 264) : 53 Bom 458.
 6. ('25) AIR 1925 Mad 14 (17) : 47 Mad 824.
 7. ('37) AIR 1937 Rang 419 (420) : 1937 Rang LR 268 (FB).
 8. ('37) AIR 1937 Rang 419 (420) : 1937 Rang LR 268 (FB).
 9. ('21) AIR 1921 Pat 509 (510).
 10. ('21) AIR 1921 Pat 83 (84, 85) : 5 Pat L Jour 719.
- Note 4
1. See Note 1.
 2. ('21) AIR 1921 Pat 509 (510).
 3. ('21) AIR 1921 Pat 83 (84, 85) : 5 Pat L Jour 719.

- (b) By the Repealing and Amending Act XVIII of 1919, the words "of the Chief Court" were substituted for the words "Chief Courts." The said words, namely, "of the Chief Court" were, however, repealed by Act XI of 1923. By Act XX of 1925, the words "and of the Chief Court" were again inserted in the Section after the words "High Courts." By Act XXXIV of 1926, the words "Chief Courts" have again been substituted for the words "of the Chief Court."
- (c) In sub-section (2) (a) after the words "District Judge or" the words "in the Punjab or Burma" originally occurred. They were substituted by Act XVIII of 1919 by the words "in Burma." These latter words were also repealed by Act XI of 1923.

124. [New.] Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

Committee to report
to High Court.

1. Report of the Rule Committee.—The Rule Committee referred to in the Section is the Rule Committee constituted under Section 123. This Section shows that a rule can be passed under Section 123 only after the opinion of the Rule Committee is taken into consideration. It has been held by the Patna High Court that Section 123 as it originally stood did not apply to the Patna High Court and that a rule framed by it without reference to a Rule Committee, at a time when there was no Rule Committee in existence, is not *ultra vires*.³ A contrary view has, however, been taken in a later case of the same High Court.⁴ See Note 4 to Section 122.

125. [New.] High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the Provincial Government may determine:

Power of other High
Courts to make rules.

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the words "in the case of the Court of the Judicial Commissioner of Coorg, the Governor-General in Council, and in other cases the Local Government."

Section 124 — Note 1

1. (21) AIR 1921 Pat 83 (84); 2 Pat L-Jour 719. 3. (21) AIR 1921 Pat 83 (84, 85); 6 Pat L-Jour 719.
2. See Note 1 to Section 123.
4. (21) AIR 1921 Pat 509 (510).

same approval is made necessary for rules under the provisions in this part of the Code. Neither this Section nor Section 107 of the Government of India Act applies to rules framed by the High Court for the conduct of its own business. Such rule, therefore, need not be sanctioned as required by the Section.¹

127. [New.] Rules so made and approved shall be published in the *Official Gazette* . . . , and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1987, Para. 4 (1) for "Gazette of India or in the Local Official Gazette, as the case may be." As under Para. 4 (1) the words "Official Gazette" have to be substituted for "Gazette of India" and also for "Local Official Gazette," the substitution will strictly read "Official Gazette or in the Official Gazette, as the case may be." But the last words are omitted as being redundant.

1. Amendments after 1908.—By Act XXIV of 1917, the word "approved" was substituted for the word "sanctioned" which occurred in the Section as it originally stood.

128. [New.] (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1) such rules may provide for all or any of the following matters, namely:—

(a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service; (b) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and the proceeds of such sale;

(c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction;

1. Scope of the Section.—This Section enacts that the rules framed under the provisions of this Part may provide for any matter relating to the procedure of Civil Courts and it indicates the sort of rules that may be framed. A rule extending the provisions of Section 5 of the Limitation Act to applications under O. 9 R. 13 of the Code is a matter of procedure and is not *ultra vires*.¹ But a new rule in lieu of O. 34 R. 2, limiting the right of the mortgagee to recover interest at the mortgage rate for the whole period allowed for redemption is one dealing with substantive rights and is not a rule of procedure. Such a rule will be *ultra vires*.²

A rule framed under the provisions of this part must not be inconsistent with the provisions in the body of the Code.³ The words "consistent with the body of the Code" mean "consistent with the Sections of the Code" and not with the Rules in the First Schedule which can be altered by the High Court.⁴

This Section relates only to rules to be made under the Code by the High Courts with the advice of the Rule Committee constituted under Section 123. It does not affect the validity of rules framed under the previous Code.⁵

2. Defendant claiming indemnity against third party — Clause (e). — Under this clause rules may be framed relating to procedure when the defendant claims to be entitled to contribution or indemnity against any person whether a party to the suit or not. In England, rules have been framed restricting third party procedure to the cases referred to in Section 128 (2) (e), namely to cases of contribution and indemnity.¹

3. Suit for debts — Summary procedure — Clause (f). — A suit on a negotiable instrument provided for under Order 37 of the Code also falls under the category of suits of the nature referred to in this clause.¹ The period of limitation for a suit under the summary procedure under this clause is six months from the date when the debt or liquidated demand becomes payable or the property becomes recoverable.² Similarly, the period of limitation for an application for leave to defend such a suit is 10 days from the date when the summons is served.³

See also the undermentioned case.⁴

4. Originating summons — Clause (i). — An originating summons means every summons other than a summons in a pending cause or matter.¹ Where the disputed facts are complex and involve a considerable amount of oral evidence, an originating summons is not the proper procedure to be taken.²

Section 128 — Note 1

1. (25) AIR 1925 Mad 14 (17): 47 Mad 824 (FB).
(17) AIR 1917 Mad 957 (957): 40 Mad 105.

2. (11) 12 Ind Cas 18 (20) (Low Bur).
3. (21) AIR 1921 PC 80 (83): 48 Cal 481: 48 Ind

App 76 (PC).
(25) AIR 1925 Oudh 492 (492): 28 Oudh Cas 169.

(09) 4 Ind Cas 1154 (1155): 3 Sind L R 171.

(30) AIR 1930 All 558 (560).
(34) AIR 1934 Mad 692 (694): 58 Mad 285. (Rule

178 of Madras Civil Rules of Practice which prohibits the sale of a decree in execution of another decree is not *ultra vires* because under S. 51 of the Code the power to order the sale of any property is subject to any limitations that may be prescribed by rules.)

4. (14) AIR 1914 Mad 652 (654): 37 Mad 17 (21).
(27) AIR 1927 Bom 599 (600).

1. See R. S. C., O. 71 R. 1A.
2. (19) AIR 1919 Bom 29 (30).

Note 4

1852, are still maintainable in British India.)

4. (10) 34 Bom 192 (198). (Under S. 128 such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act,

3. See Article 159 of the Limitation Act.

2. See Article 5 of the Limitation Act.

1. (27) AIR 1927 Sind 90 (92): 21 Sind L R 257.

Note 3

1. (19) AIR 1919 Cal 189 (189): 46 Cal 48.

Note 2

Mad 17 (21) (FB).]
[See also (14) AIR 1914 Mad 652 (653, 654): 37

5. (29) AIR 1929 Mad 641 (650): 52 Mad 563 (FB).
(21) AIR 1921 Lah 73 (73): 2 Lah 227.

5. Delegation of judicial duties — Clause (i). — Under Section 637 of the old Code any *non-judicial* or *quasi-judicial* act required to be done by a Judge may be done by the Registrar of the Court or by such other officer of the Court as the Court may direct to do such act.¹ Under the present Section rules may be framed for the delegation of any judicial and non-judicial duties. It is doubtful whether a rule under the old Code delegating *judicial* duties to the Registrar and which was, therefore, *ultra vires* under the old Code is validated by this Section.²

6. Counter claims. — See Order 8 Rule 6, Note 15.

129. [S. 652, para. 3.] Notwithstanding anything in this Code, any High Court *constituted by His Majesty by Letters Patent* may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

Power of Chartered High Courts to make rules as to their original civil procedure.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915."

Synopsis

1. Amendments after 1908.
2. Scope of the Section.
3. Letters Patent.

1. Amendments after 1908.—By the Amending Act XIII of 1916, the words and figures "or the Government of India Act, 1915," were inserted, after the words "established under the Indian High Courts Act, 1861" which originally occurred in the Section. The words "constituted by His Majesty by Letters Patent" have been substituted by the Government of India (Adaptation of Indian Laws) Order of 1937 for the words "established under the Indian High Courts Act, 1861 or the Government of India Act, 1915."

2. Scope of the Section. — Under this Section, a Chartered High Court may make rules to regulate its own procedure in the exercise of its *original civil jurisdiction*. Such rules need *not be consistent* with the provisions in the body of the Code but *must be consistent* with the Letters Patent, establishing the High Court.¹

Note 5

1. ('16) AIR 1916 Cal 488 (492) : 43 Cal 903 (928, 931) (F B).
- ('07) 5 Cal L Jour 405 (412) : 34 Cal 619. (Granting of leave under Cl. 12 of the Charter is a judicial act which cannot be delegated to a ministerial officer.)
- ('91) 15 Bom 93 (98). (Grant of leave to sue is a judicial act and cannot be delegated.)
- [See also ('95) 18 Mad 236 (246, 248) (F B). (Which was a case under the Presidency Small Cause Courts Act, Ss. 18, 33.)]

2. ('18) AIR 1918 Cal 681 (682).

Section 129 — Note 2

1. ('07) 5 Cal L Jour 405 (410) : 34 Cal 619.
- ('32) AIR 1932 Cal 1 (1, 2) : 59 Cal 370. (Order 3, Rule 4 (5) being contrary to rules under Cl. 37, Letters Patent, latter prevail though the former was enacted by the Legislature.)
- ('36) AIR 1936 Lah 369 (370). (S. 129, C. P. Code, expressly authorizes the Bombay High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction. A pay-

Where a rule passed under this Section is inconsistent with the provisions of the Code (*e. g.*, O. 41 R. 10) the former rule prevails over the latter.² A resolution of the High Court in regard to the mode of calculation of Counsel's fee, is not binding as a rule.³ The Section enacts that it shall not affect the validity of rules in force at the commencement of the Code.⁴

3. Letters Patent.—The Letters Patent referred to in the Section may be legitimately read as referring to the Letters Patent of 1865 which was in force at the time of the passing of the Code.¹

130. A High Court not constituted by His Majesty by Letters Patent may, with the previous approval of the Provincial Government, make with respect to any matter other than procedure which a High Court so constituted might under section 224 of the Government of India Act, 1935, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.

n. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original Section.

1. Amendments after 1908.—

By the Amending Act XIII of 1916 the following changes were introduced in the Section:—

(a) The words and figures "or the Government of India Act, 1915" were added after the words "established by the Indian High Courts Act, 1861," which originally occurred in the Section.

(b) The Section as it stood originally, spoke of only the rules that might be made under Section 15 of the Indian High Courts Act of 1861. After the amendment of 1916, it mentioned rules that might be made by High Courts under Section 15 of the Indian High Courts Act of 1861 or under Section 107 of the Government of India Act, 1915.

By the Repealing and Amending Act XXIV of 1917 the word "approval" was substituted for the word "sanction."

The whole Section was replaced by the present Section by the Government of India (Adaptation of Indian Laws) Order, 1937.

ment order under R. 874 in favour of a solicitor when validly made can be executed as a decree.)
Side Rules are framed by High Court under this Section in this matter.)
3. (05) 1905 All W N 83 (84).
4. (10) 37 Cal 853 (855).
Note 3
1. (24) AIR 1924 Cal 1025 (1027) : 51 Cal 905.
(Order 21 Rule 86, not applicable where, Original
(30) AIR 1930 Cal 324 (324, 325) : 57 Cal 106.
(25) AIR 1925 Mad 1132 (1133).
2. (13) 37 Bom 572 (574).
(25) AIR 1925 Mad 1132 (1133).

131. [S. 652, para. 4.] Rules made in accordance with section 129 or section 130 shall be published in the *Official Gazette* and shall from the date of publication or from such other date as may be specified have the force of law.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India or in the local official Gazette, as the case may be." See also foot-notes to Section 127 *ante*.

1. Scope of the Section.— Rules made by the High Court under Sections 129 and 130 and published in the Official Gazette have the force of law¹ from the date of publication or from such other date as may be specified.²

Section 131 — Note 1

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|---|---|
| <p>1. ('09) 6 All L Jour 45 (48).
 ('01) 4 Oudh Cas 303 (305).
 ('03) 5 Bom L R 394 (395).
 ('04) 27 Mad 121 (123). (High Court may require</p> | <p>security for costs of appeal, if the rules framed by it under Sec. 652 old (now Ss. 122, 129, 131) authorise it.)
 2. ('28) AIR 1928 All 708 (708) : 50 All 865.</p> |
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PART XI.

MISCELLANEOUS

132. [S. 640.] (1) Women who, according to the customs

and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

[1877, S. 640; 1859, S. 21. See O. 26 R. 1.]

Synopsis

1. Customs and manners of the country.
2. "Shall be exempt from personal appearance in Court."
3. Sub-section (2) — Exemption of women from arrest in execution.

1. Customs and manners of the country. — This Section applies to women, who according to the customs and manners of the country, ought not to be compelled to appear in public, *e. g.*, *pardashin* ladies.¹ The custom set up must not be one of a varying or uncertain character.² The right conferred by the Section does not depend on the rank or station in life of a lady,³ and cannot be refused on the ground that the lady has appeared in public before⁴ or a charge of immorality is made against her.⁵ Even though a lady may have given up the use of the *pardah* she is entitled to the benefit of the Section, if, having regard to her social position and the feelings of her class, the Court is satisfied that she should not be compelled to appear in the witness-box.⁶ But a lady may completely alter her mode of life and cease to be included in the statutory description of a woman "who, according to the customs and manners of the country, ought not to be compelled to appear in public." When this transformation has taken place, she can no longer claim, as of right, the statutory exemption formulated in Section 132.⁷

Section 132 — Note 1

1. (10) 8 Ind Cas 418 (421) (Oudh). (127) AIR 1927 Mad 524 (524). (Hindu widow — *Held* no custom provided that she should remain in seclusion for more than one year from her husband's death.) (99) 1899 Pun Re No. 19, page 114. (A *Khatri* woman is entitled to the benefit of this Section.) 2 Hyde 88. (Though a lady may not belong to the *pardashin* class Court may extend the privilege to her if she is not accustomed to appear in public.) 2. (90) 14 Bom 584 (586). (Parsi woman — Sec-
3. (75) 24 Suth W R 375 (375). (A lady of humble rank may be entitled to exemption.) (67) 8 Suth W R 282 (283). (All women of high rank not necessarily entitled to exemption.) 4. (99) 26 Cal 650 (652).
5. (99) 26 Cal 651n (652n).
6. (99) 3 Cal W N 753 (753).
7. (88) 15 Cal 775 (779). (Case decided with reference to Sec. 503, Cr. P. Code.) 5. (01) 5 Cal W N (four) 232 (232).
6. (18) AIR 1918 Cal 111 (112) : 45 Cal 492.
7. (18) AIR 1918 Cal 743 (744) : 45 Cal 697.

2. "Shall be exempt from personal appearance in Court." — The exemption from personal appearance under this Section is a right which no Court has power to refuse,¹ and applies to *parties* as well as witnesses.² According to the Calcutta High Court the exemption is only in respect of *appearance* and not *attendance* in Court. Women can be compelled to come to Court, so long as they do not become visible to the public gaze.³ The High Court of Allahabad has, however, held that the words "personal appearance" used in the Section mean "personal attendance" and that an exempted person cannot be compelled to *attend* Court.⁴ The Sind Judicial Commissioner's Court has also taken the same view.⁵ If a commission is issued for the examination of a woman entitled to the benefit of this Section, she cannot decline to be examined at any place other than of her own choice.⁶

As to exemption from personal appearance in Court in criminal cases, see Criminal Procedure Code, Section 503 and the undermentioned cases.⁷ See Sections 20 and 32 (ii) of the C. P. Land Revenue Act (II of 1917) and Section 53 (2) of the Bombay Salt Act (II of 1890) for the application of this Section and Section 133 to proceedings under the said Acts.

3. Sub-section (2). — Exemption of women from arrest in execution. — The Code exempts women from arrest in execution of money decrees (see Section 56) and decrees for restitution of conjugal rights (see O. 21 R. 32).

133. [S. 641.] (1) The ^a*Provincial Government* may, by notification in the ^b*Official Gazette*, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the ^a*Provincial Government* and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

Note 2

1. ('28) AIR 1928 Cal 814 (815).
- ('38) AIR 1933 All 551 (553, 554) : 55 All 666. (Pardanashin lady examined on commission — Allegation of tutoring by somebody from behind — If true, proper course is exclusion of such evidence and not order personal attendance.)
- ('01) 24 All 172 (173). (Pauper appeal may be presented by duly authorised agent.)
- ('25) AIR 1925 Mad 905 (906). (Even though the pleader undertakes to produce her in Court.)
- ('71) 15 Suth W R 129 (130). (Residing in the town where Court sits and willing to admit the Court to an interview at her residence.)

('35) AIR 1935 Sind 205 (206) : 25 Sind L R 298.

2. ('11) 11 Ind Cas 668 (668) (Mad).

('38) AIR 1933 All 551 (553) : 55 All 666.

3. ('29) AIR 1929 Cal 528 (528) : 56 Cal 865.

('72) 18 Suth W R 230 (230).

4. ('33) AIR 1933 All 551 (553) : 55 All 666.

5. ('35) AIR 1935 Sind 205(206) : 25 Sind L R 298.

6. ('21) AIR 1921 Cal 229 (231) : 48 Cal 448.

7. ('79) 4 Cal 20 (22).

('90) 12 All 69 (72). (Although there is no provision in Cr. P. Code to protect pardanashin ladies, reasonable safeguards to decency is adopted by Criminal Courts.)

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

[1877, Ss. 641, 93; 1859, Ss. 22 and 23. See O. 26, R. 1.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."
b. Substituted by *ibid* for "local official Gazette."

Synopsis

1. Legislative changes. 2. Scope of the Section.

1. **Legislative changes.**—The words "and may, by like notification, withdraw such privilege" which occurred in the corresponding Section 641 of the former Code have been omitted in the present Section.

2. **Scope of the Section.**—No person, of whatever position and respectability he may be, is entitled to exemption from personal appearance under this Section in the absence of a notification by the Government, even though it may be derogatory to his dignity to attend personally in Court as a witness.¹ But where a notification under this Section exists, the exemption is absolute and not even the Court *suo motu* can compel personal attendance.² See also Notes under Order 26 Rule 1.

134. [New.] The provisions of sections 55, 57 and 59 Arrest other than in shall apply, so far as may be, to all persons execution of decree.
arrested under this Code.

1. **Scope of the Section.**—Sections 55, 57 and 59 refer in terms to the arrest of a *judgment-debtor*, i. e., to arrest in execution of a decree. The present Section makes the provisions of those Sections applicable to all arrests under the Code.

135. [S. 642 and compare Ss. 572 and 573.] (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal³ having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties⁴ thereto, their pleaders, mukhtars, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process⁵

Section 133—Note 2

1. (15) AIR 1915 Mad 915 (919). (Pandara (17) AIR 1917 Bom 155 (157) : 42 Bom 136. Sannadhis as such, not exempt.)
2. Marsh 627.

other than process issued by such tribunal for contempt of Court³ while going to or attending⁵ such tribunal for the purpose of such matter, and while returning from such tribunal.⁴

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

[1877, S. 642.]

Synopsis

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|--|---|
| 1. Legislative changes. | 6. "Tribunal," meaning of. |
| 2. Scope and object of Section. | 7. Parties. |
| 3. No exemption in case of process for contempt of Court. | 8. Civil process. |
| 4. "While going to or attending such tribunal and while returning from such tribunal." | 9. Remedies of exempted person on being illegally arrested. |
| 5. Arrest of person while in custody or while returning home on release from custody. | 10. Appeal. |

Other Topics (miscellaneous)

Ground of exemption from arrest. See Note 2.

Duration of privilege of exemption from arrest. See Note 4.

1. Legislative changes. — The following changes should be noted :

- (a) The words "and except as provided in section 337 A, sub-section (5) and sections 256 and 643" which occurred in the beginning of sub-section (2) of the corresponding Section 642 of the Code of 1882 have been omitted.
- (b) The words "other than process issued by such tribunal for contempt of Court" in sub-section (2) are new. See Note 3.
- (c) Sub-section (3) is new.

2. Scope and object of Section. — The exemption conferred by this Section is not for the personal benefit of the individual, but for the furthering of public interest and the better administration of justice.¹

The privilege is really that of the Court and the principle on which it is founded is that freedom from the fear of arrest encourages willing attendance and thus tends to the advancement of justice.²

In cases in which this Section does not, in terms apply, the English law should be followed. The English law in this respect is approximately the same as the law under the Section.³

3. No exemption in case of process for contempt of Court. — It was held by the Calcutta High Court that the exemption created does not apply in the case of process issued for contempt of Court.¹ The Section has been amended in the present Code so as to give effect to that ruling.

Section 135 — Note 2

1. ('29) AIR 1929 Oudh 426 (426) : 5 Luck 302 (F B).
 ('90) 13 Mad 150 (158).
 ('75) 14 Beng L R App 13 (14).
 ('76) 1 Cal 78 (91).

2. ('09) 3 Ind Cas 46 (47) : 32 All 3.

('31) AIR 1931 Bom 175 (175) : 55 Bom 612.

3. ('80) 5 Cal 106 (108). (Arrest under a writ from a Small Cause Court—English law followed.)

Note 3

1. ('70) 4 Beng L R O C 90 (91).

- 9. Remedies of exempted person on being illegally arrested.**—A person who is arrested in contravention of this Section has various remedies:
- (1) He can apply for his release to the Court which ordered his arrest¹ or to the High Court under S. 491 (1) (b) of the Criminal Procedure Code.²
 - (2) On being released from such illegal arrest, he is entitled to a refund of the sum paid by him to obtain his release.³
 - (3) He cannot, however, maintain a suit for damages for illegal arrest in the absence of proof of malice and want of reasonable cause.⁴
 - (4) He can prosecute the person causing the arrest for an offence under Section 342 of the Indian Penal Code.⁵
- 10. Appeal.**—An order disallowing a claim to exemption from arrest under this Section is one falling under Section 47 and as such is appealable.¹

135A.

(1) No person shall be liable to arrest or detention in prison under civil arrest and detention under Exemption of members of legislative bodies from civil process.

(a) if he is a member of a unicameral Legislature or of either Chamber of a bicameral Legislature constituted under the Government of India Act, 1935, during the continuance of any meeting of such Legislature or Chamber;

(b) if he is a member of any committee of such Legislature or Chamber, during the continuance of any meeting of such committee;

(c) if he is a member of either Chamber of such a bicameral Legislature, during the continuance of a joint sitting, meeting, conference or joint committee of the Chambers of that Legislature;

and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have

Note 9

1. [See (10) 20 Mad L Jour 136 (137).]

2. (179) 5 Cal L Rep 170 (171). (In view of the express enactment of S. 491, Cr. P. Code the decisions in 1 Cal 78 and 5 Cal L Rep 170 pronounced before the Cr. P. Code was enacted are not of much importance.)

(176) 1 Cal 78 (91).

3. (129) AIR 1929 Oudh 426 (426); 5 Luck 302 (FB).

1. (24) AIR 1924 Mad 900 (900).
(10) 5 Ind Cas 909 (910) (Mad).
(10) 32 All 3 (C).

Note 10

4. (30) AIR 1930 Rang 131 (132) : 7 Rang 593.
5. (16) AIR 1916 Lah 318 (319, 320).
[But see (35) AIR 1935 Cal 551 (551). (Held in this case that the person who arrests does not commit any offence).]

been liable if he had not been released under the provisions of sub-section (1).

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original clause.

b. Substituted by *ibid* for "Chamber or Council."

c. Substituted by *ibid* for the original clause.

1. Scope. — This Section is new. It was inserted into the Code by Act XXIII of 1925. Its object is to confer on members of the Imperial and Provincial Legislatures immunity from arrest and imprisonment under civil process to the extent necessary to enable them to discharge their duties as members of such Legislatures.

136. [S. 648.] (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

Procedure where person to be arrested or property to be attached is outside district.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court, if u i.

at Fort William in Bengal or at Madras or at Bombay, * * * the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras or Bombay, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

[1877, S. 648.]

a. The words "or of the Chief Court of Lower Burma" repealed by the Government of India. (Adaptation of Indian Laws) Order, 1937.
b. Substituted by *ibid* for "Bombay or Rangoon."

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 5. The person to be arrested or property to be attached must be outside the Courts' jurisdiction. 6. Jurisdiction of District Court to which the warrant or order is sent. 7. Power of Court to order attachment before judgment of property situated outside its jurisdiction. | <ol style="list-style-type: none"> 1. Legislative changes. 2. The arrest or attachment must be under any provision of the Code. 3. Such arrest or attachment to be otherwise than in execution of a decree. 4. Order of arrest for contempt of Court. |
|---|---|

1. Legislative changes.—

This Section corresponds to Section 648 of the former Code. The chief alteration made is that the words "where an application is made" have been substituted in the place of the words "where any Court desires." As to the effect of this alteration, see Note 7.

Alterations prior to Code of 1908 :

The words in the Code of 1877, "outside the district within which the Court issuing the warrant of arrest or making the order of attachment is situated" were converted in the Code of 1882 into the words "outside the local limits of its jurisdiction." As to the effect of this alteration, see Note 5. It may be noted that there is no material change in this respect in the present Code.

2. The arrest or attachment must be under any provision of the Code.

— This Section in terms applies only to cases in which the arrest or attachment has been ordered under any provision of the Code. Hence it applies to an order for arrest under O. 39 R. 2 for disobedience of a temporary injunction.¹ As to order for arrest for contempt of Court, see Note 4.

3. Such arrest or attachment to be otherwise than in execution of a decree.

The Section expressly provides that the procedure laid down by it does not apply to arrest or attachment in execution of a decree. The procedure to be followed in such cases is laid down in Section 39, *ante*.

4. Order of arrest for contempt of Court.— An order for arrest for contempt of Court passed by a Judge on the original side of the High Court is not one

Section 136 — Note 2

1. (26) AIR 1926 Mad 574 (575).
(28) AIR 1928 Cal 462 (463) : 55 Cal 777.
(31) AIR 1931 Cal 279 (280) : 57 Cal 1280. (*Semble*)
(37) AIR 1937 Cal 172 (174).
(34) AIR 1934 Cal 818 (819) : 61 Cal 971.
of temporary injunction against party, resident outside jurisdiction.
— Enforcement under this Section of an order

7. Power of Court to order attachment before judgment of property situated outside its jurisdiction. — Under the former Code there was a conflict of decisions as to whether a Court had the power to order the attachment before judgment of property outside its jurisdiction. On the one hand it was held that under Sections 483 and 484 (corresponding to the present O. 38 R. 5) a Court could not attach before judgment property outside its jurisdiction. It was further held that the old Section 648 (corresponding to Section 136) did not enlarge the Court's power in this respect and that that Section applied only where the Court had power to order such attachment under any other provision of the Code.¹ On the other hand, it was held that under Section 648 a Court did have the power to order the attachment before judgment of property situated outside its local jurisdiction.² Under the present Code, the words in the old Sections 483 and 484 which imposed the restrictions as to the property being within the Court's jurisdiction have been omitted in O. 38 R. 5 and the words "where any Court desires" in Section 648 have been replaced in the present Section by the words "where an application is made." Hence, there is no room for doubt under the present Code that Section 136 read with O. 38 R. 5 (1) (a) empowers a Court to order the attachment before judgment of property situated outside its jurisdiction.³

137. [S. 645 and compare Ss. 49, 200, 201.] (1) The language of sub-ordinate Courts. Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the *Provincial Government* otherwise directs.

(2) The *Provincial Government* may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1987, for "Local Government."

1. Sub-section (3). — This Section corresponds to Section 645 of the former Code. Sub-section (3) is new. It deals with writings other than the *record of evidence*. Hence pleadings and applications may be in English subject to a translation being supplied to the other side where necessary. Compare Section 138 and O. 18 R. 9.

Note 7

1. (03) 5 Bom L R 570 (574).
- (07) 1907 Upp Bur Rul 13.
- (85) 8 Mad 20 (21).
- (02) 1 Low Bur Rul 310 (311).
2. (08) 31 Mad 502 (504, 505).
- (08) 7 Cal W N 216 (218).
3. (11) 10 Ind Gas 794 (796) (Low Bur).
- (31) AIR 1931 Rang 279(280):9 Rang 561. (Court ordering attachment under this Section has power to remove it.)

138. [S. 185A.] (1) The High Court may, by notification in the "*Official Gazette*", direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "local official Gazette."

1. Amendment after 1908. — The words "High Court" were substituted for the words "Local Government" by Section 2 and Schedule, Part I, of the Decentralisation Act (IV of 1914).

139. [S. 197.] In the case of any affidavit under this Code —

- (a) any Court or Magistrate, or
- (b) any officer or other person whom a High Court may appoint in this behalf, or
- (c) any officer appointed by any other Court which the "*Provincial Government*" has generally or specially empowered in this behalf, may administer the oath to the deponent.

[1877, S. 197. See O. 19.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

Synopsis

1. Legislative changes.
2. Scope of the Section.
3. "Any Court or Magistrate." — Clause (a).
4. Any officer or other person appointed by the High Court — Clause (b).

1. Legislative changes. — The words "or other persons" in clause (b) are new. See Note 4, *infra*.

2. Scope of the Section. — An affidavit is a declaration as to facts, made in writing and sworn before a person having authority to administer an oath.¹ Order 19

Section 139 — Note 2

1. ('10) 8 Ind Cas 897 (897) : 4 Sind L R 88.

[See also ('32) AIR 1932 Cal 160 (160) : 58 Cal 1389. (Affidavit differentiated from solemn affirmation.)]

lays down the circumstances under which affidavits may be used as a mode of proof. The present Section declares the persons who are competent to administer the oath to the deponent in cases where affidavits can be used as a mode of proof.

3. "Any Court or Magistrate"—Clause (a).—"The person before whom an affidavit is sworn must be acting in the capacity of a Court or of the officer authorized to administer an oath." Hence, an affidavit sworn in the Bar Library before a pleader who is also an Honorary Magistrate is not admissible under this Section.²

A Village Munsif under the Madras Village Courts Act (1888) is a Court within the meaning of this clause.³

4. Any officer or other person appointed by the High Court—Clause (b).—"The expression "other person" shows that the person appointed by the High Court need not necessarily be an officer.

See also the undermentioned case.¹

140. [S. 645A.] (1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

1. Legislative changes. — The words "or as may be prescribed" in sub-section (1) are new.

141. [S. 647, Para. 1.] The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Synopsis

1. Legislative changes.
2. To what proceedings the Section applies.
3. Appeals in execution matters.
4. Proceedings for restitution.
5. Letters Patent Appeal.

6. "Court of civil jurisdiction."
7. "Procedure provided in this Code."
8. "In regard to suits."
9. "As far as it can be made applicable."

Note 3

1. (10) 8 Ind Cas 897 (898) : 4 Sind L R 88.
2. (10) 5 Ind Cas 537 (538) (Cal).
3. (04) 27 Mad 228 (227).
See also R. 34 of the Madras Civil Rules of Practice.
4. Note
1. (33) AIR 1933 Pat 713 (714).

Other Topics (miscellaneous)

- Appeals. See Note 8.
 Execution proceedings. See Note 2.
 Miscellaneous proceedings under C. P. C., S. 144, O. 9 and O. 21. See Note 2.
 Proceedings in Small Cause Court. See Note 2.
 Proceedings under the Arbitration Act. See Note 2.
 Proceedings under the Bengal Tenancy Act. See Note 2.
 Proceedings under the Companies Act. See Note 2.
 Proceedings under the Guardians and Wards Act. See Note 2.
 Proceedings under the Indian Divorce Act. See Note 2.
 Proceedings under the Land Acquisition Act. See Note 2.
 Proceedings under the Legal Practitioners' Act. See Note 2.
 Proceedings under the Lunacy Act. See Note 2.
 Proceedings under the Probate and Administration Act. See Note 2.
 Proceedings under the Registration Act. See Note 2.
 Proceedings under the Religious Endowments Act. See Note 2.
 Reference under O. 46 R. 1. See Note 7.
 Succession Certificate Act. See Note 9.

1. Legislative changes. —

- (1). The words "herein prescribed" have been changed into "provided in this Code in regard to suits."
 (2). The words "other than suits and appeals" have been omitted.

2. To what proceedings the Section applies. — The corresponding Section of the former Code (Section 647) as it originally stood ran as follows :

"The procedure herein prescribed shall be followed, so far as it can be made applicable, in all proceedings in any Court of civil jurisdiction *other than suits or appeals.*"

In interpreting this Section there arose a conflict of views as to whether proceedings in *execution* were "proceedings other than suits or appeals" to which this Section could be applied.¹ In order to set this conflict at rest the Legislature, by Act VI of 1892, added an Explanation to the Section as follows :

"*Explanation.* — This Section does not apply to applications for the execution of decrees which are proceedings in suits."

In the year 1894, however, the Privy Council had occasion to deal with the question in a case² which arose before the explanation was added to the Section and their Lordships observed as follows :

"Their Lordships think that the proceedings spoken of in Section 647 include *original matters* in the nature of suits such as proceedings in probates, guardianships and so forth and do not include executions Their Lordships' attention has been called to the recent Act VI of 1892 which would appear to have been passed in order to avoid the disturbance of practice caused by the Allahabad rulings their Lordships have thought it right to state their opinion that the Act of 1892 does nothing more than express the true meaning of the Civil Procedure Code."

Section 141 — Note 2**1. Applicable :—**

- ('67) 8 Suth W R 64 (64).
 ('69) 12 Suth W R 428 (429).
 ('81) 5 Bom 680 (681).
 ('82) 6 Bom 681 (683).
 ('90) 12 All 179 (183). (S. 373 of Act of 1877.)
 ('98) 22 Bom 778 (781, 782).
 ('90) 12 All 392 (395) (FB). (S. 373 of Act of 1859.)
 ('89) 11 All 228 (232). (S. 375 of Act of 1877.)
 ('88) 10 All 71 (76).
 ('76) 1 All 180 (181) (FB).
 ('72) 4 N W P H C R 10 (10).
 ('73) 5 N W P H C R 164 (165).
 ('76) 1 All 178 (179) (FB). (Power of Appellate Court to stay execution.)
 ('85) 7 All 359 (361, 362).
 ('84) 10 Cal 416 (422, 423). (Restoration of execution proceedings dismissed for default.)

- ('84) 10 Cal 538 (540).
 ('69) 11 Suth W R 567 (569). (Striking of execution proceedings.)
 ('85) 8 Mad 548 (550) (FB).
 ('94) 17 Mad 67. (68). (Amendment of execution application.)
 ('73) 10 Bom H C R 19 (20).
 ('81) 7 Cal 163 (165).
 ('88) 10 All 119 (122).
 ('68) 10 Suth W R 450 (451).

Not applicable :—

- ('69) 11 Suth W R 494 (494).
 ('91) 18 Cal 462 (466).
 ('91) 18 Cal 515 (518).
 ('92) 15 Mad 240 (241).
 ('88) 15 Cal 177. (179).
 ('91) 18 Cal 635 (638, 639).
 2. ('95) 17 All 106 (111) : 22 Ind App 44 (PC).
 (On appeal from 12 All 179.)

The explanation and the words "other than suits and appeals" were thus rendered superfluous and unnecessary and have accordingly been omitted from the present Section. As a result it would therefore seem to be clear that Section 141 does not apply to *any* proceedings in execution" but only to proceedings which are *original* matters in the nature of suits. There has however been a conflict of opinion in respect of the following points, due to different interpretations of the said Privy Council decision:

- (1) Whether proceedings under Order 21 Rules 89, 90, 91, 97 and 100 are proceedings in execution or *original* matters in the nature of suits?
- (2) Whether an application to restore a suit dismissed for default is an original matter in the nature of a suit?

whether original or not, provided they are not execution proceedings? On the first point all the Courts except the High Court of Patna and the Chief Court of Oudh have held that such proceedings are proceedings in execution, and that

See also the following cases decided on the basis of the Privy Council decision and the explanation to Section 647 :

- (902) 26 Bom 76 (82).
(97) 19 All 98 (100) (FB).
(95) 18 Mad 181 (184).
(921) AIR 1921 Bom 468 (468).
[See also (87) 9 All 86 (41, 42).]
3. (14) AIR 1914 Sind 61 (62); 8 Sind L R 327.
(93) AIR 1933 All 788 (784); 55 All 891 (FB).
(97) AIR 1937 Bom 111 (112); 1 L R (1937) Bom 144. (Reference to arbitration in execution proceedings at the instance of the parties is without jurisdiction.)
(99) AIR 1939 Lah 228 (228). (O. 9 Rr. 4 and 9 inapplicable but High Court has inherent power to restore.)
(95) AIR 1935 Pat 408 (409). (As S. 141, C.P.C., does not apply to execution of decrees, the Panchayat has no jurisdiction to transfer an execution against an immovable property under the C. P. Code, in contradistinction to powers conferred by S. 59 (3), Bihar and Orissa Village Administration Act, 1922.)
(99) AIR 1939 Mad 578 (579). (Provisions of O. 26 R. 4 are not applicable to execution proceedings and have not been made so by S. 141.)
(81) AIR 1981 Sind 97 (98); 25 Sind L R 475.
(O. 9 R. 9 does not apply.)
(16) AIR 1916 Pat 381 (382) (DO).
(15) AIR 1915 Mad 811 (812); 38 Mad 199. (O. 2 R. 2 does not apply.)
(16) AIR 1916 Mad 767 (767). (DO).
(18) AIR 1918 Pat 67 (68); 4 Pat L four 330.
(O. 9 does not apply.)
(92) 14 All 64 (66). (S. 11.)
(91) 18 All 564 (568). (DO).
(88) 15 Cal 177 (179). (S. 24—The contrary view taken in 1 All 180; 8 Mad 548 (FB) and 5 Bom 680 is obsolete in view of the P. C. case in 17 All 106.)
(94) 16 All 390 (394). (O. 9 R. 9.)
(93) 15 All 84 (94) (FB). (DO).
(22) AIR 1922 Nag 267 (269); 18 Nag L R 152. (DO).
(11) 11 Ind Cas 388 (387) (Cal). (DO).

Section 141 cannot be applied thereto.⁴ A Full Bench decision of the Patna High Court⁵ has held that a proceeding under O. 21 R. 90 is one in execution. But in the undermentioned decisions of the same High Court⁶ it has been held, distinguishing the Full Bench case, that a proceeding under O. 21 R. 100 is an original matter in the nature of suits to which Section 141 can be applied. The Oudh Chief Court has held that a proceeding under O. 21 R. 90 is an original matter and that Section 141 applies thereto.⁷

On the *second* point the High Courts of Madras⁸ and Lahore,⁹ the Chief Court of Oudh¹⁰ and the Judicial Commissioner's Court at Nagpur¹¹ hold that such a proceeding is an original matter and that therefore an application under O. 9 R. 9, will lie to restore a petition under O. 9 R. 9, which is itself dismissed for default. The Allahabad,¹² Calcutta¹³ and Patna¹⁴ High Courts are inclined to the view that such a proceeding is not an original proceeding to which Section 141 applies. See also Note 2 to Order 9 ("General") and Note 2 to Section 151, *infra*.

('26) AIR 1926 Cal 773 (777) : 53 Cal 679. (Application to set aside sale — AIR 1916 Cal 221; 12 Cal L Jour 6 and AIR 1917 Cal 548 held wrongly decided.)

('26) AIR 1926 Lah 109 (109). (Objection under O. 21 R. 90.)

('19) AIR 1919 Pat 192 (193) : 4 Pat L Jour 135 (FB). (Proceedings under O. 21 R. 90.)

('29) AIR 1929 Mad 757 (762) : 52 Mad 899. (Proceedings under C. P. O., O. 21 Rr. 97 and 100.)

('08) 4 Low Bur Rul 75 (75). (Objection to attachment.)

('09) 2 Ind Cas 105 (106) (All). (Do.)

('94) 1894 Pun Re No. 62. (Do.)

('20) AIR 1920 Cal 914 (915). (Proceedings under O. 21 R. 2.)

In the following cases, the procedure provided by the Code in regard to suits was applied to execution proceedings despite the explanation to Section 647. They must be regarded as not rightly decided, so far as effect of S. 141 is concerned :

('93) 15 All 49 (53, 54). (O. 17 R. 3 applied to execution proceedings.)

('94) 17 Mad 67 (68). (O. 6 R. 17 applied to execution proceedings.)

The opposite view held in the following cases that S. 141 applies to execution proceedings is no longer law :

('12) 13 Ind Cas 859 (860) (Lah).

('84) 10 Cal 416 (422).

('88) 10 All 119 (122).

('85) 7 All 359 (361).

('82) 6 Bom 681 (682).

('10) 7 Ind Cas 241 (241) (Cal).

[See ('35) AIR 1935 Lah 145 (145). (An application under Sec. 292, Succession Act (1925) is really made in proceedings in the nature of execution and is no bar to a fresh application being entertained in the exercise of inherent jurisdiction when the first application had been dismissed in default and not on merits : 17 All 106 (P C), Distinguished.)]

4. ('14) AIR 1914 Cal 126 (127) : 41 Cal 1. (Order 21 Rules 100 and 101.)

('15) AIR 1915 Cal 539 (540). (Order 21 Rule 90.)

('25) AIR Cal 360 (360). (Do.)

('25) AIR 1925 Cal 510 (511). (Order 21 Rule 90

—Dissenting from AIR 1916 Cal 613; AIR 1916 Cal 221; AIR 1919 Cal 50 and following AIR 1919 Pat 192 (FB).)

('26) AIR 1926 Cal 773 (777) : 53 Cal 679. (Order 21 R. 90—AIR 1916 Cal 221; 12 Cal L Jour 6 and AIR 1919 Cal 50 held wrongly decided—In view of this decision and of AIR 1925 Cal 510, the decision in 2 Ind Cas 156 (Cal) and 3 Cal W N 344 must also be held to be not correct.)

('29) AIR 1929 All 485 (487). (O. 21 R. 91.)

('25) AIR 1925 Mad 126 (127). (O. 21 R. 90.)

('26) AIR 1926 Bom 377 (378) : 50 Bom 457. (O. 21 R. 89.)

('21) AIR 1921 Sind 55 (56) : 17 Sind L R 105. (Order 21 R. 90.)

('29) AIR 1929 Mad 757 (762) : 52 Mad 899 (FB). (Order 21 Rr. 97 and 100.)

('26) AIR 1926 Lah 109 (109). (O. 21 R. 90.)

('31) AIR 1931 All 594 (594). (Order 9 does not apply to proceedings under O. 21 R. 90 dismissed for default but the Court may act under inherent power.)

5. ('19) AIR 1919 Pat 192 (193) : 4 Pat L Jour 135 (FB).

[See also ('24) AIR 1924 Pat 346 (347). (Proceedings under O. 21 R. 90—Point not decided.)]

6. ('23) AIR 1923 Pat 239 (241) : 2 Pat 372.

('18) AIR 1918 Pat 486 (487) : 3 Pat L Jour 250.

7. ('20) AIR 1920 Oudh 177 (178) : 23 Oudh Cas 349. (Follows AIR 1916 Cal 613 which has been dissented from in later Calcutta decisions.)

8. ('26) AIR 1926 Mad 325 (326).

('26) AIR 1926 Mad 654 (654).

9. ('23) AIR 1923 Lah 302 (303).

10. ('23) AIR 1923 Oudh 146 (146).

('37) AIR 1937 Oudh 344 (346) : 13 Luck 246. (Order of rejection is appealable under O. 43 R. 1 (c) read with Sec. 141.)

11. ('23) 72 Ind Cas 547 (548) (Nag). (Semble.)

[But see ('32) AIR 1932 Nag 101 (102) : 28 Nag L R 83.]

12. ('24) AIR 1924 All 503 (504) : 46 All 319. (Semble.)

13. ('27) AIR 1927 Cal 534 (535) : 54 Cal 405. (Decision in AIR 1917 Cal 548 held to be wrong.)

14. ('22) AIR 1922 Pat 121 (121) : 4 Pat L Jour 287.

- (3) Proceedings under the Companies Act, 1882 and under the Companies Memorandum of Association Act, 1895.²¹
 - (4) Application for the appointment of a common manager under Section 93 of the Bengal Tenancy Act, 1885.²²
 - (5) Applications under Section 158 of the Bengal Tenancy Act, 1885.²³
 - (6) Application to file an agreement to refer to arbitration under Paragraph 17 of Schedule II of the Code²⁴ or to file an award under the Arbitration Act, 1899.²⁵
 - (7) Application to a District Judge for sanction to lease wakf properties.²⁶
 - (8) Application to the High Court for the exercise of its extraordinary jurisdiction under Regulation II of 1927.²⁷
 - (9) Reference to the Court under the Land Acquisition Act, 1894.²⁸
 - (10) Proceedings to compel registration.²⁹
 - (11) Application under Section 18 of the Religious Endowments Act, 1863, for leave to sue.³⁰
 - (12) Proceedings in revision before the High Court.³¹
-
- (‘33) AIR 1933 Nag 62 (64 to 66): 28 Nag L R 332. (O. 39 R. 2, sub-rule (3) applied to disobedience of interim injunction restraining marriage under S. 12 of the Guardians and Wards Act.)
- (‘05) 1905 All W N 104 (105). (Evidence to be recorded as in suits.)
- (‘81) 6 Cal 762 (763). (Case under Minors Act, Bengal Act XL of 1858—Depositions to be recorded as provided by Ss. 182 and 183 of the Code of 1877.)
- (‘12) 11 Ind Cas 554 (557): 36 Bom 20. (Receiver may be appointed in such proceeding.)
- (‘25) AIR 1925 Lah 489 (489). (Do.)
- (‘29) AIR 1929 Nag 273 (273). (Appeal lies from order under O. 39 R. 2 in proceedings under the said Act.)
21. (‘03) 27 Bom 415 (418). (Companies Memorandum of Association Act.)
- (‘87) 9 All 180 (182, 183). (S. 24, C. P. Code, applies to cases of winding up of companies.)
- (‘20) AIR 1920 Lah 51 (53): 1 Lah 187. (O. 9 R. 13 applies *mutatis mutandis* to ex parte orders of Court under Companies Act.)
- (‘36) AIR 1936 All 826 (829): 58 All 742 (F.B.). (Proceedings under S. 187, Companies Act are proceedings in a Court of civil jurisdiction—S. 86 is therefore applicable to such proceedings—Per Thom, J.)
- (‘37) AIR 1937 Lah 82 (83). (Company law does not affect power of review especially when by S. 141, C. P. C., provisions of Code are to be followed in proceedings under the Company law—*Obtner*.)
- (‘37) AIR 1937 Oudh 62 (63). (Civil Court can review its order passed under S. 120, Companies Act.)
- (‘28) AIR 1928 Lah 376 (377). (Liquidation Court can order attachment before judgment.)
22. (‘16) AIR 1916 Cal 427 (427): 43 Cal 986. (Receiver may be appointed under O. 40 R. 1 pending the application.)
- (‘26) 91 Ind Cas 741 (741) (Cal). (O. 9 R. 13 applies to the proceeding.)
- (‘99) 3 Cal W N 344 (345). (A proceeding under S. 174 does not come under Explanation to S. 647 of the Code of 1882.)
23. (‘97) 24 Cal 197 (206). (S. 45 of the Code of 1882 (now O. 2 R. 3) applies to the case.)
24. (‘11) 9 Ind Cas 655 (656): 1911 Pun Re No. 35. (O. 2 R. 3 applies.)
25. (‘09) 4 Ind Cas 609 (610): 3 Sind L R 128. (Court can issue a temporary injunction in such cases.)
- (‘24) AIR 1924 Sind 56 (56). (O. 9 R. 13 applies to ex parte order for filing award.)
- (‘22) AIR 1922 Sind 6 (7): 16 Sind L R 79. (C. P. Code, S. 10 applies to such case—This case was doubted in AIR 1928 Sind 169.)
26. (‘24) AIR 1924 Cal 327 (328). (The fact that the Civil Procedure Code regulates its procedure does not make an order thereon appealable.) [See also (‘20) AIR 1920 Cal 129 (130): 47 Cal 592.]
27. (‘68) 5 Bom H C R A C J 215 (216).
28. (‘89) 16 Cal 31 (32).
- (‘05) 2 Cal L Jour 359 (368). (Objection of respondent can be dismissed for default of appearance—O. 9 Rr. 8 and 9 apply.)
29. (‘77) 2 Cal 131 (139).
30. (‘01) 24 Mad 685 (689). (Provisions of C. P. Code as to verification and presentation should be followed.)
- (‘16) AIR 1916 Mad 268 (271). (The decision in this case that proceedings under S. 10 of the Religious Endowments Act are not judicial proceedings and hence S. 141 does not apply to them is no longer law in view of the decision of the Privy Council in AIR 1917 P C 71.)
31. (‘07) 1907 Pun Re No. 97, p. 455. (O. 9 R. 9 applies to revision proceedings.)
- (‘92) 16 Bom 550 (551). (Order in revision to be executed by lower Court.)
- (‘91) 13 All 533 (537). (Revision under Provincial Small Cause Courts Act, S. 25—High Court can remand case under S. 562, C. P. C.)
- (‘07) 17 Mad L Jour 62 (63). (Memo of cross-objections can be filed.)

(13) Application to sue in *forma pauperis*.³²

(14) A proceeding under the Lunacy Act.³³

(15) A proceeding under the Indian Divorce Act.³⁴

(16) Issue sent by a Revenue Court for decision, under Section 271 of the Agrar Tenancy Act, 1926.³⁵

See also the undermentioned cases.³⁶

- The following are not proceedings of the kind contemplated by the Section —
- (1) Application for review of order dismissing execution application.³⁷
 - (2) Proceedings under Order 21 Rule 58.³⁸

But independent of this Section some of the provisions of the Code may apply directly and of their own force to matters which do not come within the meaning of the word "proceedings" as defined by the Privy Council.³⁹ Thus, a proceeding in execution can be reviewed under O. 47 R. 1 by force of its own language and not by virtue of Section 141.⁴⁰

In the undermentioned decision⁴¹ the Sind Judicial Commissioner's Court expressed the view that the provisions of Order 7 apply, by reason of this Section, to memoranda of appeals and that an appeal can be rejected under O. 7 R. 11. It is submitted that the view is not correct as an appeal is not an original proceeding. But, O. 7 R. 11 will apply to appeals by reason of the provisions of Section 107 *ante*. (See Notes to Section 107.)

3. Appeals in execution matters.—As Section 141 does not apply to execution proceedings but only to *original* matters in the nature of suits, it is conceived that it does not apply to appeals from orders in execution.¹ But *independently* of Section 141,

32. (14) AIR 1914 Mad 256 (258). (Amendment can be ordered under O. 6 R. 17.)
(38) AIR 1938 Mad 5 (5, 6). (O. 9 R. 9 applied.)
(29) AIR 1929 Sind 186 (186). (Applicability of Order 22 to said applications.)
[But see (13) 20 Ind Cas 640 (641) : 7 Low Bur

Rul 60.]
33. (18) AIR 1918 Cal 353 (355). (Application under, to be verified as provided in C. P. Code.)
34. (82) 6 Bom 416 (434). (S. 141 applied with-
out reference to the Section.)

35. (34) AIR 1934 All 86 (86) : 56 All 390.
36. (39) AIR 1939 All 507 (509) : 1 L R (1939) All 587. (A proceeding under the U. P. Encum-
bered Estates Act is a proceeding in the nature of

a suit to which the provisions of O. 32 R. 3, C. P. O., are applicable by virtue of R. 6 of the Rules made under Encumbered Estates Act and of S. 141, C. P. O. Where a creditor happens to be a minor, the failure to follow the mandatory provisions of O. 32 R. 3, C. P. O., necessarily vitiates the whole proceeding so far as the minor is concerned.)
(36) AIR 1936 Lab 388 (389). (An application under O. 34 R. 6, C. P. O., is not an application in execution but a substantive original applica-
tion for a new decree in the suit. The procedure applying to this application would be governed by S. 141, C. P. O. Where, therefore, a definite application had been made for a decree under O. 34 R. 6 and no prayer was granted by the Court for

1. The contrary decisions in 1 All 178 (179); 2 Beng L R A C 110 and 10 South W R 450 are not good law as they are based on the obsolete view that S. 141 applies to execution proceedings.)
[See (01) 25 Bom 478 (484). (Doubtful whether it applies.)]

Note 3

Kar 527.

41. (39) AIR 1939 Sind 221 (221) : 1 L R (1939) 40. (98) 2 Cal W N 606 (607).

See also Note 3 below.

ceedings—O. 1 R. 10.)
(Receiver can be made a party to execution pro-

(23) AIR 1923 Mad 144 (146) : 47 Mad 47.
(06) 3 Cal L Jour 276 (279). (Do.)

(O. 9 R. 13 applies to ex parte orders in execution.)
39. (14) AIR 1914 Mad 162 (169) : 37 Mad 462.

O. 21 R. 58.)
(Schedule 2 does not apply to proceedings under

38. (36) AIR 1936 All 378 (380) : 58 All 797.
37. See case in foot-note 34.

S. 26 F, Bengal Tenancy Act.)
C. P. O., O. 32 R. 7 applies to proceedings under

(38) 42 Cal W N 154 (160). (By virtue of S. 141, Encumbered Estates Act.)

proceedings under S. 78, Madras Hindu Religious

proceedings under O. 21 R. 97 to 99 are applicable to

(36) AIR 1936 Mad 612 (614) : 59 Mad 36. (Pro-
cesses shall be deemed to have been refused.)

the result that the relief which was not expressly

Explanation 5, S. 11, C. P. O., would apply with

passing of a personal decree, the provisions of

some of the provisions of the Code in regard to appeals may apply directly to appeals from orders in execution. Thus, where an order in execution is appealed from as a decree under Section 47, the Appellate Court may require the appellant to give security for costs under O. 41 R. 10.² Similarly, the Appellate Court can stay execution of the decree under Section 47 independently of Section 141 and of O. 41 R. 5.³

4. Proceedings for restitution. — Section 141 does not make Section 144 of the Code applicable to execution proceedings.¹ As to the *inherent* powers of the Court to order restitution in such cases, see Section 144, Note 34.

5. Letters Patent Appeal. — Letters Patent Appeals are not original proceedings of the kind contemplated by Section 141.¹ But by virtue of Section 117 of the Code, the provisions of the Code are applicable to High Courts except as provided in Part IX or Part X or in Rules. Hence the provisions of the Code may be followed in Letters Patent Appeals.²

6. "Court of civil jurisdiction." — The proceedings to which Section 141 applies are proceedings in a Court of *civil* jurisdiction. A proceeding under the Lunacy Act, 1912, is a "proceeding in a Court of civil jurisdiction." Consequently, the provisions of the Code as to verification of pleadings apply to such a proceeding.¹ Disciplinary proceedings under the Legal Practitioners' Act are, according to the High Courts of Madras² and Calcutta,³ "proceedings in a Court of civil jurisdiction." The High Court of Patna, on the other hand, has held that they are not.⁴ Proceedings under Section 195 of the Criminal Procedure Code for sanction to prosecute are not *civil* proceedings although they may be before the Judge of a Civil Court.⁵ A Revenue Court is a Court of civil jurisdiction.⁶

7. "Procedure provided in this Code." — Section 141 deals with procedure and procedure alone.¹ It does not confer any *substantive right* not expressly given elsewhere by the Code. Thus, a right of appeal² cannot be claimed merely on the strength of Section 141.³ Similarly, the Section does not confer a right to refer to

2. (1900) 24 Bom 314 (316).

3. ('01) 28 Cal 734 (737).

Note 4

1. ('15) AIR 1915 Cal 530 (531).

Note 5

1. ('04) 27 Mad 121 (123).

2. ('17) AIR 1917 Cal 626 (626) : 43 Cal 243.

('21) AIR 1921 P C 80 (82) : 48 Cal 481 : 48 Ind App 76 (P C).

Note 6

1. ('18) AIR 1918 Cal 353 (355).

2. ('03) 26 Mad 596 (597).

3. ('19) AIR 1919 Cal 474 (475). (Distinguishing 6 Ind Cas 327 (Cal).)

(1900) 27 Cal 1023 (1033).

4. ('16) AIR 1916 Pat 115 (116) : 1 Pat L Jour 576. (Inquiry under S. 14 is only administrative.)

5. ('07) 30 Mad 311 (313).

6. See Note 18 to the Preamble. *cf.* Application under S. 105, Bengal Tenancy Act, 1885 is not proceeding in Court of Civil jurisdiction.

('24) AIR 1924 Pat 104 (106) : 3 Pat 67.

Note 7

1. ('28) AIR 1928 Rang 137 (138) : 6 Rang 568.

('73) 19 Suth W R 122 (122).

('86) 10 Bom 433 (434).

2. See the following cases :

('04) 27 Mad 504 (508). (No right of appeal unless given by statute or some authority equivalent to statute.)

('87) 11 Mad 26 (34) : 14 Ind App 160 (P C). (Right of appeal must be conferred by statute or some equivalent authority.)

3. ('04) 27 Mad 504 (508).

('86) 10 Bom 433 (434).

('73) 19 Suth W R 122 (122).

('23) AIR 1923 All 460 (460) : 45 All 148.

('23) AIR 1923 Pat 180 (182).

('24) AIR 1924 Cal 327 (328).

('25) AIR 1925 All 431 (432) : 47 All 741.

('28) 117 Ind Cas 849 (851) (Cal). (O. 43 R. 1 (a) not applicable to order returning memorandum of appeal.)

('25) AIR 1925 Lah 489 (490). (Order appointing receiver in proceeding under Guardians and Wards Act is made under O. 40 R. 1 and therefore within purview of O. 43 R. 1(s). Hence it is appealable.)

Order 43 Rule 1 (c) which provides for an appeal against an order refusing to restore a suit dismissed for default cannot be applied by analogy to cases in which some other proceeding is dismissed for default. Thus there is no right of

arbitration, a right to a review or a right to proceed by way of execution against a surety who is not a party to the proceeding, on the analogy of Section 145 of the Code. On the same principle, the Section does not confer on any Court the power of making a reference to the High Court under O. 46 R. 1 in any case not coming strictly within the purview of that Rule.

Similarly, the principle that a suit against a dead man is not maintainable, is a point of substance and not of procedure, and cannot therefore be applied to an application to set aside an *ex parte* decree, so as to make it incompetent by reason of the fact that the deceased plaintiff's name, instead of his legal representatives, appears in the application as a party.⁸

But Sections 10 and 11⁹ and O. 39 R. 1¹⁰ of the Code are rules of *procedure* and may therefore be applied to "proceedings" within the meaning of Section 141.

8. "In regard to suits."—The word "suits" in Section 141 is used in a comprehensive sense so as to include appeals which are only continuations of suits. Hence, the procedure prescribed by the Code in regard to *appeals* governs appeals arising out of miscellaneous proceedings and miscellaneous proceedings in the nature of appeals.¹

9. "As far as it can be made applicable."—Section 141 does not make the whole of the procedure in regard to suits applicable to proceedings under the Section. Such procedure applies only as far as it can be made applicable.¹ Thus, the appointment of a guardian cannot be referred to arbitration because guardianship is not a matter purely of *private right*.² Similarly, a surety for a guardian cannot be proceeded against in execution under Section 145, Civil Procedure Code, because even

appeal against an order refusing to restore an application to set aside the dismissal of a suit for default. See the following cases:

(122) AIR 1922 Cal 572 (573).
(123) AIR 1923 Lah 802 (803).
(118) AIR 1918 Pat 612 (613) : 2 Pat L Jour 720.
(123) 72 Ind Cas 547 (548) (Nag).
(113) 19 Ind Cas 97 (98) : 9 Nag L R 38.
(132) AIR 1932 Nag 101 (102) : 28 Nag L R 83.
(A I R 1923 Nag 293, Overruled.)

Similarly there is no right of appeal against an order refusing to set aside dismissal of an order, of an application to set aside an *ex parte* decree. See the following cases:

(119) AIR 1919 Cal 125 (125).
(122) AIR 1922 All 337 (337).
(124) AIR 1924 All 682 (683) : 46 All 538.

So also there is no right of appeal against an order refusing to set aside the dismissal for default of an application to set aside an execution sale. See the following cases:

(15) AIR 1915 Cal 539 (540).
(10) 6 Ind Cas 148 (148, 149) (Cal).
(104) 31 Cal 207 (209).
(107) 10 Oudh Cas 353 (354).

(88) 11 Mad 319 (321).
(1900) 27 Cal 414 (415).
(17) AIR 1917 Cal 815 (816).

(The decisions in (1889) 16 Cal 31, (1882) 4 Mad 295 and A I R 1923 Nag 293 which are inconsistent with the above view cannot be supported.)

1. (20) AIR 1920 Cal 743 (745).
(35) AIR 1935 All 195 (197). (O. 2 R. 2 and: S. 11, Expt. 4 do not apply to proceedings for restitution.)
(16) AIR 1916 Mad 268 (271, 272).
(88) 10 All 97 (105).
(2) (08) 30 All 137 (140).
(24) AIR 1924 Mad 484 (484) : 47 Mad 459.
(28) AIR 1928 Rang 187 (138) : 6 Rang 563.

Note 9

1. (28) AIR 1928 Lah 488 (489). (Appeal under S. 47, Guardians and Wards Act.)
(79) 3 Bom 204 (205). (Section 98 applicable.)
(1900) 27 Cal 1023 (1033).

Note 8

4. (08) 30 All 137 (140).
(28) AIR 1928 Rang 187 (188) : 6 Rang 563.
5. (19) AIR 1919 Mad 244 (246).
[But see (15) AIR 1915 All 172 (174) : 37 All 380. (District Judge can reconsider an order granting letters of administration, whether under S. 114 or under the inherent powers of the Court recognised by S. 151 of the C. P. C., apart altogether from the provisions of S. 50 of the Probate and Administration Act.)]
6. (26) AIR 1926 Sind 35 (36) : 19 Sind L R 390. (Observations of Ruppchand, A. J. O.)
7. (11) 10 Ind Cas 879 (880) : 36 Mad 16.
(25) AIR 1925 Cal 391 (392).
8. (27) AIR 1927 Nag 261 (252) : 29 Nag L R 71.
9. (22) AIR 1922 Sind 6 (8) : 16 Sind L R 79.
10. (09) 4 Ind Cas 609 (610) : 3 Sind L R 128.

the guardian himself cannot be proceeded against in execution in that way.³ So also, though the procedure laid down in Order 22 requiring a plaintiff to bring on record the legal representatives of a deceased defendant may apply to applications to sue in *forma pauperis*, it does not follow that the *penalties* provided in O. 22 R. 4 can, without express provision in that behalf, apply to such applications.⁴

Again, where an express or special procedure is provided for a particular proceeding, Section 141 cannot be applied so as to defeat the operation of such provisions. See the undermentioned cases.⁵

142. [S. 94.] All orders and notices served on or given

Orders and notices
to be in writing.

to any person under the provisions of this Code
shall be in writing.

1. **Legislative changes.**—The words “and shall be served in the manner hereinbefore provided for the service of summons” which occurred at the end of the old Section have been omitted and reproduced in Order 48 Rule 2. The alteration is merely verbal.

143. [S. 95.] Postage, where chargeable on a notice,

Postage.

summons or letter issued under this Code and forwarded
by post, and the fee for registering the same, shall be
paid within a time to be fixed before the communication is made :

Provided that the *Provincial Government* may remit such
postage, or fee, or both, or may prescribe a scale of court-fees to
be levied in lieu thereof.

[1877, S. 95.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for “Local Government.”

1. **Service by post.**— See Order 51 Rules 21, 25, 30 and Order 29 Rule 2 (b), *infra*.

3. ('27) AIR 1927 Sind 262 (262).

4. ('29) AIR 1929 Sind 136 (136).

5. ('30) AIR 1930 Mad 105 (107).

('06) 1906 Pun Re No. 143, page 514. (Order appointing guardian is final under the Guardians and Wards Act. No review under S. 114 of the Code therefore can be made thereof.)

('12) 15 Ind Cas 559 (559) : 1912 Pun Re No. 116. (Do.)

('03) 26 Mad 438 (440). (Decree under S. 9, Specific Relief Act—Order in execution of—Not appealable because S. 9 prohibits an appeal from any order in a suit.)

('24) AIR 1924 All 376 (378) : 46 All 372. (Succession Certificate Act provides special procedure. S. 141 does not apply. But see AIR 1927 Sind 187 which dissents from this decision.)

(1900) 27 Cal 484 (487). (Prohibition of second appeal by S. 153 of the Bengal Tenancy Act.)

('13) 20 Ind Cas 640 (641) : 7 Low Bur Rul 60. (Petition in *forma pauperis* not framed as per Rr. 2 and 3 of O. 33—R. 5 requiring rejection of the petition—Amendment cannot be made by resort to S. 141.)

('24) AIR 1924 Pat 104 (106) : 3 Pat 67. (Proceedings under S. 105 Bengal Tenancy Act, S. 107 providing special procedure—S. 141 cannot be applied. Note—The observation that Revenue Courts are not Civil Courts and therefore also S. 141 does not apply is, it is submitted, not correct. See Note 18 to Preamble.)

('12) 16 Ind Cas 675 (676) : 6 Sind L R 67. (Mamlatdar's Courts Act itself providing its summary procedure—S. 141 does not apply.)

Application for
restitution.

144. [S. 583.] (1) Where and in so far as a decree is varied or reversed,³ the Court of first instance¹⁷ shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made¹⁹ as will, so far as may be,²¹ place the parties in the position which they would have occupied²⁰ but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest,²³ damages, compensation and mesne profits,²² which are properly consequential on such variation or reversal.

(2) No suit²⁹ shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

Synopsis

1. Legislative changes.
2. Scope and object of the Section.
3. The decree must have been varied or reversed.
4. Modes of variation and reversal.
5. Effect of setting aside ex parte decree and passing the same decree on the merits.
6. Effect of reversal of main decree on dependent decrees.
7. Who may apply for restitution.
8. Persons not actually parties.
9. Party not in possession.
10. Right of auction-purchaser to apply for restitution.
11. Against whom restitution can be granted.
12. Transferee of a decree. See Note 11.
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14. Surety — Restitution against.
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16. Trustee.
17. What Court can grant restitution.
18. Extent of power to grant restitution.

19. "Shall cause restitution to be made."
20. "Place the parties in the position which they would have occupied but for such decree as has been varied or reversed."
21. "So far as may be."
22. Mesne profits.
23. Interest.
24. Refund of compensation money in land acquisition cases.
25. Possession of property or money obtained otherwise than in execution.
26. Splitting up claim of restitution.
27. Pecuniary jurisdiction of Court in awarding restitution. See Note 17.
28. Security for restitution.
29. Bar of suit.
30. Nature of proceedings under the Section.
31. Appeal—Tenability of.
32. Court-fee.
33. Limitation.
34. Inherent power of Court to grant restitution.
35. Revenue Court.
36. Revision.

Other Topics (miscellaneous)

- Directions for restitution in the reversing decree — Need for. See Note 19.
- Restitution — Meaning of. See Note 2.
- Restitution of property sold. See Note 18.

1. **Legislative changes.** — Under the corresponding Section 583 of the Code of 1882¹ a practice had grown up which was not justified by the language of that Section

Section 144 — Note 1

1. S. 583 of the Code of 1882 ran as follows: — "Where a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court

and the same has now been recast in sub-section (1) of this Section "so as to bring it into closer conformity with that practice."²

Sub-section (2), barring the institution of suits for relief claimable under this Section, is new. It compels litigants to have matters falling within the Section cleared up in proceedings under this Section only.³ It necessarily implies the widest possible construction of sub-section (1).⁴

2. Scope and object of the Section. — It is a cardinal principle of law that the acts of Courts should not be allowed to work injury on the suitors.¹ In the leading English case of *Rodger v. Comptoir D'Escompte de Paris*,² Lord Cairns said :

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to the suitors and when the expression 'the act of the Court' is used it does not mean merely the act of the primary Court or of any intermediate Court of appeal but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter to the highest Court which finally disposes of the case."

The doctrine of restitution is based upon this principle³ and contemplates a case where property has been received by the decree-holder under his decree and the decree is subsequently wholly or partially reversed or varied in other proceedings. In such a case the law raises an *obligation* on the party who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost;⁴ and this obligation, it is the duty of the Courts to *enforce*, unless it is shown that restitution would be clearly contrary to the real justice of the case.⁵

Section 144 only embodies this doctrine of restitution and does not confer any *new* substantive rights which a successful party did not possess under the general law.⁶ It merely *regulates* the *exercise* of the rights and prescribes a convenient *procedure* therefor.⁷

The Section is a salutary provision of law enacted with a view to shorten litigation and to afford speedy relief and should not, therefore, be narrowly construed.⁸

which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for execution of decrees in suits."

2. See the Report of the Select Committee.

3. ('19) AIR 1919 Bom 1 (10) : 43 Bom 433 (FB).

4. ('24) AIR 1924 Sind 101 (102) : 17 Sind L R 73. (Thus, restitution is granted as against auction-purchaser if his sale is not bona fide.)

Note 2

1. ('71) 40 L J P C 1 (3), *Rodger v. Comptoir D'Escompte de Paris*.

2. ('22) AIR 1922 P C 269 (271) : 49 Ind App 351 : 2 Pat 10 (P O).

3. ('29) AIR 1929 Nag 138 (138).

4. ('37) AIR 1937 Bom 173 (175).

2. ('71) 40 L J P C 1 (3, 4).

3. ('38) AIR 1938 Cal 554 (557).

4. 6 Peters, 17. *Bank of United States v. Bank of Washington*. (Followed in 23 Mad 306 (310).)

5. ('32) AIR 1932 All 239 (240). (Decree directing appointment of Receiver reversed in appeal — Party in possession before, can apply under this Section.)

6. ('32) AIR 1932 Cal 29 (32) : 58 Cal 1070.

7. ('33) AIR 1933 Lah 791 (792). (It is also incumbent on the Courts to restore the parties to status quo.)

(1900) 23 Mad 306 (310).

8. ('39) AIR 1939 All 66 (69) : I L R (1939) All 108.

[See ('37) AIR 1937 Bom 101 (102) : I L R (1937) Bom 150.]

[See also ('33) AIR 1933 Lah 798 (800).

5. (1900) 23 Mad 306 (310). (Very purpose of restitution is to redress injustice.)

6. ('68) 9 Suth W R 402 (407) (FB). (Per Peacock, C. J.)

7. ('06) 33 Cal 927 (932, 933).

8. ('72) 17 Suth W R 232 (233).

9. ('03) 27 Mad 504 (507, 508).

10. ('22) AIR 1922 Nag 82 (84) : 18 Nag L R 24.

[See also ('37) AIR 1937 Mad 95 (96).

6. ('12) 16 Ind Cas 966 (966) (Cal). (It merely provides a more convenient procedure.)

7. ('98) 8 Mad L Jour 276 (277).

8. ('21) AIR 1921 Lah 234 (235).

9. ('28) AIR 1928 All 293 (294) : 50 All 767.

10. ('12) 17 Ind Cas 121 (122, 123) (Cal). (Suit for possession decreed in first Court—Plaintiff taking forcible possession—Subsequent reversal of decree — Application for restitution and mesne profits may be entertained.)

11. ('29) AIR 1929 Cal 814 (815) : 57 Cal 226.

The variation or reversal must, of course, have been by a Court of *competent jurisdiction* for otherwise there cannot be a *legal* variation, or reversal.²

Again, the Section will apply only where a *decree* is varied or reversed. It will not apply where an *order* (which is not a decree) is varied or reversed³ though in such cases, the Court can order restitution under its inherent powers, on the analogy of Section 144.⁴ The Nagpur Judicial Commissioner's Court has however held that the word "decree" in Section 144 covers an "order".⁵ The decision is clearly against the definition of the word "decree" in Section 2 (2) of the Code and further, the decisions cited by that Court in support of its view do not bear it out. The decision cannot therefore be accepted as sound.

4. Modes of variation and reversal. — Section 583 of the old Code allowed restitution only in cases where the decree was reversed in *appeal* preferred under Chapters 41 and 42 of that Code, corresponding to Orders 41 and 42 of the present Code. It did not, therefore apply to variations and reversal *otherwise* than in appeal¹ nor to a variation or reversal in appeal to the Privy Council.²

This Section contains no such restriction as to the manner in which a decree should be varied or reversed and none can be legitimately read into it, except, of course, that it should be in "accordance with law."³ The Section has also been transferred to the Chapter headed "Miscellaneous" from its position in the Chapter headed "Appeals from Original Decrees" under the old Code. The effect of it is to extend its operation to all cases of reversals, *howsoever* the variation has been effected.⁴

2. ('98) 20 All 237 (239, 240).

('87) AIR 1937 All 232 (234).

3. ('22) AIR 1922 Mad 99 (99). (Order for rateable distribution.)

('18) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206. (Order setting aside execution sale.)

('19) AIR 1919 Mad 581 (581) : 41 Mad 467. (Do.)

('17) AIR 1917 Pat 495 (496) : 2 Pat L Jour 361. (Do.)

('14) AIR 1914 Cal 692 (692). (Do.)

('24) AIR 1924 Rang 181 (181) : 1 Rang 770. (Order removing receiver.)

('85) AIR 1935 Mad 783 (783). (Variation of order in appeal under S. 75, Provincial Insolvency Act.)

('35) AIR 1935 All 126 (127).

4. ('17) AIR 1917 Pat 495 (496) : 2 Pat L Jour 361. (Section does not apply when an order setting aside sale is reversed.)

('33) AIR 1933 Mad 888 (888). (Decree against a dead man a nullity — Money recovered — There being no decree Court has inherent power to order restitution.)

('23) AIR 1923 All 394 (396) : 45 All 369.

('96) 1896 Pun Re No. 49. (Order as to costs reversed in appeal — Restitution on general principles.)

('18) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

('14) AIR 1914 Cal 692 (692). (Setting aside of auction sale.)

('19) AIR 1919 Mad 581 (581) : 41 Mad 467. (Order refusing to set aside sale — Reversal of — No restitution under S. 144.)

('35) AIR 1935 Mad 783 (783).

('38) AIR 1938 Lah 833 (834).

[See also ('32) AIR 1932 Bom 96 (98). (Section construed liberally.)]

See also Note 34.

5. ('24) AIR 1924 Nag 258 (261) : 20 Nag L R 93.

[See also ('06) 9 Oudh Cas 101 (103).

('38) AIR 1938 Lah 456 (456). (Order passed on appeal setting aside the sale of a judgment-debtor's property — Application for restitution on such order being passed falls under S. 144.)]

Note 4

1. ('09) 1 Ind Cas 744 (744) : 31 All 364.

('98) 20 All 139 (142).

('89) 1889 All W N 163 (164).

('06) 28 All 665 (667). (Case of review.)

[See ('05) 27 All 485 (487). (Application for restitution on amendment of decree treated as application under S. 244 (S. 47 of 1908 Code).

('02) 1902 Pun Re, No. 76. (In this case order for restitution made on the supersession of the decree by decree in another suit was treated as falling under S. 244 (S. 47 of the Code of 1908).]

2. ('98) 20 All 139 (142).

3. ('19) AIR 1919 Sind 79 (79) : 13 Sind L R 153.

('22) AIR 1922 Mad 70 (71).

4. ('22) AIR 1922 Mad 70 (71).

('33) 1933 Mad W N 641 (642). (Section is not confined to cases where restitution is claimed on the reversal of the decree in first or second appeal.)

('17) AIR 1917 Mad 293 (293) : 40 Mad 299.

('19) AIR 1919 Bom 1 (10) : 43 Bom 433 (FB).

(Reversal in second appeal.)

('26) AIR 1926 Lah 488 (488) : 7 Lah 232. (Reversal by Privy Council.)

('19) AIR 1919 Bom 175 (176) : 43 Bom 235. (Ex parte decree set aside.)

merits.² As to the effect of the subsequent passing of the same decree, where the sale has not been set aside before the passing of such decree, see Note 20, *infra*.

6. Effect of reversal of main decree on dependent decrees. — It is a general rule of law that upon a reversal of a judgment, order or decree, all connected or dependent judgments or orders fall with it.¹

Illustrations

1. *A* obtains a *preliminary* decree for partition against *B*. Pending appeal by *B* therefrom, *A* obtains a *final* decree, executes it and recovers money from *B*. The preliminary decree is then set aside by the Appellate Court. *B* is entitled to claim restitution from *A* of the amount recovered from him. The reason is that no effect remains in the final decree after the reversal of the preliminary decree.²

2. *A* obtains a decree for enhanced rent against *B*. Pending appeal by *B* therefrom, *A* files another suit against *B* for enhanced rent for another period and obtains a decree *conditional on the first decree being confirmed in appeal*, and recovers money from *B* in execution of that decree. The first decree is subsequently reversed on appeal. *Held*, that *B* is entitled to claim restitution from *A* of the money recovered from him under the second decree, as it was made conditional on the confirmation of the first decree and became infructuous on its being reversed in appeal.³

7. Who may apply for restitution. — In order to entitle a person to apply under this Section two conditions must be satisfied —

(1) He must be a *party to the decree varied or reversed*,¹ and

(2) He must have become "*entitled to any benefit* by way of restitution or otherwise" under the reversing decree.² But it is not necessary that the decree by which the original decree is reversed or varied should declare the party's right to restitution. Where the effect of the decree of the Appellate Court is to reverse that of the lower Court, the party against whom the lower Court's erroneous decree has been enforced and who has lost possession of the property is entitled to apply for restitution under this Section irrespective of the question whether or not the appellate decree declares the party's right to the property.³

2. ('09) 3 Ind Cas 30 (31) (Cal).

Note 6

1. ('17) AIR 1917 Cal 188 (191). (Specially judgments subsequently entered and dependent thereupon.)

('38) AIR 1938 Pat 209 (209). (Application for execution of transferred decree—Execution dismissed and certificate of non-satisfaction sent to transferor Court—Execution allowed to proceed on appeal — On reversal the certificate of non-satisfaction also falls to the ground.)

('13) 21 Ind Cas 510 (512) (Cal).

('13) 19 Ind Cas 630 (632) (Cal).

2. ('18) AIR 1918 Cal 457 (457). (Following 21 Ind Cas 510 (Cal).)

('31) AIR 1931 All 655 (656). (Decree varied by the Appellate Court.)

[See also ('38) AIR 1938 All 364 (366) : I L R (1938) All 494. (*A* obtained a preliminary decree for foreclosure against *B*. Subsequently *A* applied for amendment of the preliminary decree and the application was allowed and the decree amended. *B* thereupon applied in revision to High Court and the amendment was set aside in revision. In the meanwhile *A* obtained a final decree for foreclosure on the basis of the amended decree and obtained possession of the properties in execution. *Held* that *B* was en-

titled to restitution of the property taken in excess of the original preliminary decree as the final decree would automatically conform with the preliminary decree as amended in revision.)].

3. ('80) 5 Cal 589 (592).

Note 7

1. ('93) 3 Mad L Jour 258 (259).

('19) AIR 1919 Cal 503 (504).

('29) AIR 1929 Lah 657 (658). (An objector under O. 21 R. 58 deemed a party to suit.)

('37) AIR 1937 Bom 101 (103) : I L R (1937) Bom. 150.

2. ('02) 25 Mad 426 (428). (Decree of reversal in appeal, limited to the interests of the appealing defendant alone—Non-appealing defendant cannot claim restitution.)

('94) 17 Mad 82 (84, 85). (Appeal not in favour of party—No restitution can be had.)

('30) AIR 1930 Lah 352 (353).

('25) AIR 1925 Rang 215 (216) : 3 Rang 251.

('86) 8 All 545 (548).

('37) AIR 1937 Bom 101 (103) : I L R (1937) Bom 150.

3. ('35) AIR 1935 Mad 476 (477). (Reversal of decree in appeal—Party losing possession by first decision can apply for restitution.)

('37) AIR 1937 Bom 101 (103) : I L R (1937) Bom. 150.

In either case the auction-purchaser is entitled to a return of the purchase price less the mesne profits he has enjoyed. In fact where an auction sale is set aside it is incumbent upon the Court to order that the recovery of possession by the judgment-debtor is made conditional on his paying up to the purchaser the purchase-money.²

Where, however, no such conditional order is passed, can the auction-purchaser apply under *this Section* for the return of the purchase-money? It has been held that he cannot. The reason is that he is neither a *party to the decree varied or reversed* nor is he a person *entitled to any benefit* under the reversing decree.³

He may, of course, *sue* the judgment-debtor for a refund of his purchase-money.⁴

11. Against whom restitution can be granted. — Under Section 583 of the Code of 1882 an appellate decree reversing a decree of the lower Court had to contain, or was deemed to contain, a *direction* for restitution in favour of the successful appellant, who had, in order to claim restitution, to *execute the appellate decree*. This, of course, could not be done against a person who was not a *party to the appellate decree*.

It was therefore held that the transferee of a decree reversed in appeal, or other person who was not a party to the appeal, could not be proceeded against under the Section.¹

There is no such restriction under the present Section. A right to claim restitution may now be enforced against a party or his *representative* or assignee even if he is not a party to the appeal.² *A mortgages to C certain property and then sues B,*

2. ('14) AIR 1914 Cal 718 (719). (Order is made under the inherent powers of the Court.)
 - ('24) AIR 1924 All 273 (273, 274).
 - ('22) AIR 1922 PC 269 (271) : 49 Ind App 351 : 2 Pat 10 (PC).
 - ('17) AIR 1917 Pat 55 (57).
[See ('88) AIR 1938 Pat 447 (449). (Decree in favour of third party that the property sold in auction really belonged to him and not to the judgment-debtor—Auction-purchaser's remedy to get back his purchase-money is only by getting the sale set aside under O. 21 R. 91 and applying under O. 21 R. 93; without getting sale set aside there is no independent right to obtain refund under inherent powers of Court.)]
 3. ('22) AIR 1922 Mad 228 (229, 230). (Nor can he invoke the aid of S. 151, C. P. C.)
('25) AIR 1925 Rang 215 (216) : 3 Rang 251.
 4. ('13) 18 Ind Cas 381 (382). (Bom.).
- Note 11**
1. ('01) 5 Cal WN 426 (428). (Assignee of decree.)
('98) 20 All 139 (143). (Do.)
('97) 19 All 136 (139). (Do.)
('02) 24 All 288 (291). (Do.)
('17) AIR 1917 Mad 293 (293) : 33 Ind Cas 739 (740) : 40 Mad 299. (Where he is a party to the reversing decree, he will of course be bound to make restitution.)
('85) 7 All 681 (687).
('05) 8 Oudh Cas 115 (115).
 2. ('16) AIR 1916 Mad 745 (746) : 17 Ind Cas 420 (422) : 38 Mad 36.
 - ('32) AIR 1932 Lah 527 (528, 529). (The representative can therefore also move the Court to ascertain the amount of restitution payable by him.)
 - ('30) AIR 1930 Mad 787 (788) : 53 Mad 796. (A decree-holder attaching another decree is representative of the decree-holder under attached decree.)
 - ('24) AIR 1924 Sind 101 (102) : 17 Sind L R 73. (Restitution granted against auction-purchaser whose sale was not bona fide.)
 - ('18) AIR 1918 Mad 673 (674).
 - ('20) AIR 1920 Cal 550 (551, 552).
 - ('17) AIR 1917 Mad 293 (294) : 40 Mad 299.
 - ('38) AIR 1938 Oudh 169 (170) : 14 Luck 106. ('Parties' in S. 144 must be taken to include their representatives and further representative does not mean only a party's legal representative but means his representative-in-interest judgment creditor of party attaching and with drawing latter's money lying in Court is his representative and can be ordered to refund.)
 - ('35) AIR 1935 All 65 (66). (Restitution can be claimed against tenant deriving title from opposite party.)
 - ('37) AIR 1937 Mad 95 (96). (A suing B for possession—Receiver appointed—Profits pending suit deposited in Court—A claiming those profits—Trial Court refusing A's claim—A appealing—C obtaining decree during pendency of A's appeal attaching profits lying in Court in B's name — A's title established on appeal — A's claim for restitution against C is valid.)

14 who is in possession thereof, in effectment, and obtains a decree and gets delivery of possession in execution. Pending appeal by B, C sues on his mortgage, obtains a decree and purchases the property in execution of his decree and obtains possession. A's decree is reversed in appeal. *Held*, B can claim restitution from C of the property taken from him. The reason is that C is a *representative* of A and cannot be in a better position than A.³

Where the inability to make restitution is a joint one, a claim against *some only* of the persons liable in the absence of the others is not sustainable.⁴

Restitution can be ordered under this Section only against a party who has benefited under the *reversed* decree.⁵ Thus, suppose that in a suit for possession A obtains a decree against B and his usufructuary mortgagees. The decree being reversed on appeal B is given possession instead of the mortgagees. Here the mortgagees cannot claim the mortgaged property from B by way of restitution. The reason is that B was given possession of the property not under the reversed decree of the lower Court but under the reversing decree of the Appellate Court.⁶

12. Transferee of a decree. — See Note 11 above.

13. Auction-purchaser. —

The question whether restitution can be claimed against an auction-purchaser on the reversal of the decree in execution of which the sale took place, depends upon the question whether he is a *bona fide* purchaser. By the phrase "*bona fide* purchaser" the Courts imply the test of knowledge of the pending proceedings to set aside the decree, and opportunity to defend his own interests in those proceedings.¹

In the case of *bona fide* purchasers the rule is that the sale will be upheld notwithstanding the reversal of the decree,² because otherwise there will be less inducement to intending purchasers to buy at an execution sale, and consequently less chance of property fetching proper value at such sales.³ Another reason is that a purchaser cannot be expected to go behind the judgment to inquire into the irregularities in the suit.⁴

- [But see (92) AIR 1932 Rang 148 (150) : 10 Rang 480.
(30) AIR 1930 All 415 (416). (Vendee from party—*Held* not to fall under the Section.)]
(23) AIR 1929 Pat 371 (373) : 2 Pat 277.
(32) AIR 1932 Lah 527 (528, 529).
(29) AIR 1929 Cal 590 (591). (Analogous case of lease.)
4. Compare (21) AIR 1921 Pat 350 (351).
(17) AIR 1917 All 117 (118). (Co-plaintiff—No decree in his favour — No restitution against him.)
5. (36) AIR 1936 Mad 694 (695).
6. (36) AIR 1936 Mad 684 (685).
Note 13
1. (24) AIR 1924 Sind 101 (103) : 17 Sind L.R. 75. [But see (17) AIR 1917 Mad 250 (253, 254). (Where the test applied is the knowledge of and participation by the purchaser in the frauds or irregularities committed by the decree-holder.)]
2. (37) AIR 1937 Mad 694 (695).
[See (38) AIR 1938 Nag 525 (526).]
3. (13) 21 Ind Cas 570 (572) : 16 Oudh Cas 225. (The Court must have jurisdiction to sell the property.)

- (12) 14 Ind Cas 886 (886) (Mad). (Following 10 All 166 (P O).)
(1900) 22 All 168 (176, 179, 181).
(26) AIR 1926 All 35 (35, 36) : 48 All 94. (Amendment of decree.)
(99) 26 Cal 734 (737). (No distinction between case of sale under money decree and that of sale under mortgage decree.)
(11) 38 Cal 622 (627).
(25) AIR 1925 Lah 176 (177).
(03) 27 Mad 98 (100, 101). (But in the case of decree-holders purchasers the rule is otherwise.)
(17) AIR 1917 Mad 250 (253).
(26) AIR 1926 Mad 78 (80, 81) : 48 Mad 767.
(Principle should not be extended to defendant or a party to the suit.)
(05) 29 Bom 435 (448) (F B). (Pendency of appeal immaterial to the applicability of this principle.)
(16) AIR 1916 All 159 (160) : 38 All 240.
(10) 12 Cal L. Jour 357 (367).
(85) 11 Cal 362 (365).
4. (1900) 22 All 377 (379).
(15) AIR 1915 Cal 203 (206).
(88) 10 All 166 (172) (P O).
[See (23) AIR 1923 Cal 588 (550). (Case of a decree obtained by fraud.)]

This, however, does not mean that an execution sale cannot be set aside on *other* grounds such as want of jurisdiction to sell the property,⁵ fraud,⁶ want of saleable interest in the judgment-debtor⁷ and, the sale being affected by the doctrine of *lis pendens*,⁸ etc. In such cases restitution can be ordered against the auction-purchaser⁹ under the inherent powers of the Court.¹⁰

The reason of the rule upholding an execution sale in favour of a *bona fide* purchaser disappears where the *decree-holder* is himself the purchaser, and has notice of all the proceedings in the suit. The rule itself consequently becomes inapplicable in accordance with the maxim *cessante ratione legis, cessat et ipsa lex*.¹¹ The *decree-holder* purchaser will therefore be bound, on the reversal of the decree, to make restitution to the person entitled thereto.¹² An assignee from such purchaser will be in no better position than his assignor though he is a *bona fide* purchaser from the decree-holder,¹³ unless the reversal of the decree has been obtained fraudulently by the decree-holder himself after the assignment.¹⁴

In the principles enunciated above there is no distinction between the auction-purchaser at a sale in execution of a money decree and that in execution of a mortgage decree.¹⁵

The above discussion relates to cases where the decree of the first Court is *reversed* subsequently. Where the decree is modified the sale need not necessarily be set aside even in cases where the decree-holder is the purchaser. See Note 20 *infra*.

14. Surety — Restitution against. — Section 144 applies only to the parties or the representatives of the original parties, and does not apply to sureties as against whom, therefore, no restitution can be claimed under this Section.¹

15. Third persons — Restitution against. — This Section does not apply to third persons who are neither parties nor their representatives.¹

5. ('13) 41 Cal 590 (599, 600) : 41 Ind App 98 (P C). (Sale can be set aside where it is of property not attached.)

[But see ('97) 21 Bom 463 (464). (Sale in execution of satisfied decree — Not void on that ground — 13 Ind App 106 (P C), Followed.) ('88) 15 Cal 557 (563). (13 Ind App 106 (P C), Foll.)

6. ('10) 5 Ind Cas 390 (395) (Cal).

7. ('24) AIR 1924 All 273 (274).

8. ('01) 23 All 60 (65, 66). (But see the obiter dictum in 21 Ind Cas 570 (Oudh).)

('08) 27 Bom 266 (270).

('06) 28 All 337 (339). (The decision however does not refer to the doctrine of *lis pendens*.)

('18) AIR 1918 Cal 229 (230).

('31) AIR 1931 All 655 (656). (Remedy under Section 144 is independent of remedy under O. 21, R. 90.)

9. ('37) AIR 1937 Mad 694 (695). (Property sold on a wrong date.)

10. ('37) AIR 1937 Mad 694 (695).

11. "When the reason for any law ceases so does the law itself "

12. ('04) 31 Cal 499 (501, 502).

('97) 1897 All W N 28 (29).

('82) 5 Mad 106 (106, 107).

('73) 10 Bom H C R 297 (298).

('16) AIR 1916 Mad 706 (707).

(1900) 27 Cal 810 (814).

('88) 10 All 166 (172) : 15 Ind App 12 (P C).

('16) AIR 1916 Pat 299 (300) : 1 Pat L Jour 43.

[See also ('10) 14 Cal W N 182 (182, 183). (Decree set aside under S. 108 C. P. C. (old Code) — It cannot be taken to be revived by any subsequent proceedings and the proceedings under it are consequently invalid.)

('07) 6 Cal L Jour 102 (104).]

13. ('20) AIR 1920 Cal 550 (551, 552). (Decree-holder settling property with a tenant—Tenant held liable for restitution.)

('16) AIR 1916 Cal 710 (711) : 22 Cal L Jour 412 (414).

[See also ('15) AIR 1915 Cal 363 (364).]

[See however ('03) 13 Mad L Jour 231 (236).

('90) 30 Mad 295 (297).]

14. ('25) AIR 1925 Cal 1074 (1076). (Decree-holder entering into compromise with the judgment-debtor behind the back of the assignee.)

[See also ('24) AIR 1924 Sind 101 (103, 104) : 17 Sind L R 73.]

15. ('99) 26 Cal 734 (737).

Note 14

1. ('19) AIR 1919 P C 55 (58) : 42 All 158 : 46 Ind App 228 (P C).

('98) 1898 Bom P J 830.

('38) AIR 1938 Nag 101 (102) : ILR (1938) Nag 354.

Note 15

1. ('19) AIR 1919 P C 55 (58) : 42 All 158 : 46 Ind App 228 (P C). (Such as sureties.)

('32) AIR 1932 Cal 29 (34) : 58 Cal 1070.

('13) 21 Ind Cas 570 (572) : 16 Oudh Cas 225.

16. Trustee. — Where a trustee of a temple obtains a decree and in execution thereof recovers money and hands it over to the temple and then the decree is reversed in appeal, restitution can be had only against the temple and not against the trustee personally.¹

17. What Court can grant restitution. — Section 583 of the old Code required that the person entitled to restitution "shall apply to the Court which passed the decree against which the appeal was preferred." Thus, where a first Appellate Court reverses a decree of the original Court, which reversal is again set aside by the second Appellate Court, it was held that the application should be made to the first Appellate Court against whose decree the second appeal was preferred and not to the original Court.¹

Under the present Section, the application should be made in all cases to "the Court of first instance." It is only the Court which executes the decree that has jurisdiction to order restitution to the parties.²

Where the Court of first instance loses its territorial jurisdiction or ceases to exist, the Court which gets such jurisdiction will be "the Court of first instance."³

Where a decree is transferred for execution to another Court, the latter Court can exercise the same powers as the Court of first instance.⁴

The jurisdiction of the Court of first instance is not ousted by the fact that the value of the subject-matter of the restitution exceeds the limits of its pecuniary jurisdiction,⁵ nor by the fact that after its decree has been set aside, the case has been transferred for re-hearing to another Court.⁶

18. Extent of power to grant restitution. — Before the passing of the Code of 1908, there was no *legislative expression* as to the *extent* of the power of the Court to make restitution. This Section now specifies that the power extends to "cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such a decree as has been varied or reversed." The

(38) AIR 1938 Cal 554 (556). (Decree passed by Court A—Purchase of judgment-debtor's property by decree-holder in execution at A—Sale set aside—Decree transferred to Court B—Appeal against order setting aside sale allowed—Meanwhile decree executed in Court B—Application by judgment-debtor for restitution in Court B—Court B cannot grant restitution as it is not Court of first instance.) (37) AIR 1937 All 515 (523, 524) : 1 L R (1937) All 670. (Application for restitution by person who is successful in appeal to Privy Council—Applicant should only approach Court of first instance and need not apply to High Court under O. 45 R. 15.) [See (21) AIR 1921 All 241 (241).]

3. (26) AIR 1926 Mad 813 (814). ("Court of first instance" must be interpreted on principles laid down in S. 37 (b), C. P. C.) (21) AIR 1921 Mad 103 (104). (Ceases to exist.) (37) AIR 1937 All 515 (520) : 1 L R (1937) All 670. (13) 20 Ind Cas 540 (541) : 7 Sind L R 19. (The transferee Court has under S. 42 the same powers as the transferor Court.) (89) 13 Bom 485 (488). (8 Bom 31, Followed.) [Compare (702) 1902 Pnn Re No. 29, page 114.]

6. (20) AIR 1920 Bom 12 (12) : 44 Bom 702.

(32) AIR 1932 Bom 826 (327). (Nominee of decree-holder.) (37) AIR 1937 Lah 169 (170). (Section 144 only permits restitution, as far as may be, and does not justify restitution when rights of third parties intervene. Where after reversal of a decree the attachment of certain money was removed and subsequently there was a second decree after remand in decree-holder's favour: *Held*, A could not be made to restore money paid to him.) [See also (30) AIR 1930 All 415 (416).]

Note 16

1. (04) 14 Mad L Jour 377 (378).

Note 17

1. (01) 5 Cal W N 287 (289). (But the practice was otherwise. See notes on S. 37.)

2. (27) AIR 1927 Mad 898 (899). (22) AIR 1922 All 71 (72) : 44 All 283. (Subject-matter of Revenue Court reversed by District Judge and confirmed by High Court. Revenue Court is the "Court of first instance.") (31) AIR 1931 Rang 21 (23). ("Court of first instance" means Court which did the act which turned out to be wrong.) (28) AIR 1928 Pat 502 (504).

Courts ought not to adopt a narrow construction so as to restrict the application of this salutary provision of law which has been enacted with a view to shorten litigation, and afford speedy relief.¹ In *L. Guran Ditta v. T. R. Ditta*,² their Lordships of the Privy Council observed as follows :

"The duty of the Court when awarding restitution under Section 144 of the Code is imperative. It shall place the applicant in the position in which he would have been if the order had not been made : and for this purpose the Court is armed with powers (the 'may' is empowering, not discretionary) as to mesne profits, interest and so forth."

19. "Shall cause restitution to be made." — The Section is mandatory.¹ The Court has *no discretion* to grant restitution or not, in matters falling within the terms of the Section.² It is the legal effect of a decree of reversal that a party against whom the decree reversed was given is to have restitution of all that he had been deprived of under it.³ It is not necessary that the reversing decree should contain any direction or provision for restitution.⁴

But in cases not falling within the terms of the Section restitution is not a matter of *right* but depends upon the *discretion* of the Court and will be ordered only when the justice of the case demands it.⁵

20. "Place the parties in the position which they would have occupied but for such decree as has been varied or reversed." — The object of restitution is to restore the *status quo ante* between the parties.¹ Under the old Code the power of

Note 18

1. ('12) 17 Ind Cas 121 (122) (Cal).
2. ('35) AIR 1935 P C 12 (13) (PC).

Note 19

1. ('26) AIR 1926 Lah 685 (687).
(18) AIR 1918 Mad 673 (674). (Section gives no discretion to Court.)
(17) AIR 1917 Mad 250 (254).
(22) AIR 1922 P C 269 (271) : 2 Pat 10 : 49 Ind App 351 (PC).
(74) 22 Suth W R 434 (486).
(35) AIR 1935 P C 12 (13) (PC).
(35) AIR 1935 All 65 (66).
[See also ('28) AIR 1928 Oudh 208 (208).]
2. ('20) AIR 1920 All 127 (128).
(78) 3 Cal 720 (723, 724).
(28) AIR 1928 Rang 293 (294).
3. ('68) 10 Suth W R 131 (132). (Reversal of a decree for possession only gives right to mesne profits.)
(32) AIR 1932 Cal 313 (315). (Joint and several decree against *A* and *B*—Amount deposited by *A* on his own behalf and also for *B*—Decree reversed as against *A* only—*A* is entitled to restitution of full amount and not of an amount proportionate to his share.)
(09) 4 Ind Cas 376 (378) : 32 All 79.
(21) AIR 1921 All 241 (241). (Refund of Costs—Interest allowed.)
(73) 20 Suth W R 49 (49). (Do.)
(86) 8 All 262 (264). (Do.)
(20) AIR 1920 All 127 (128). (Refund of costs.)
(06) 3 Cal L Jour 181 (182).
(25) AIR 1925 Lah 177 (178). (Refund of purchase price deposited under pre-emption decree, Appellate Court awarded a higher amount and

on the same not being paid, the suit was dismissed.)

- (26) AIR 1926 Rang 126 (126). (Decree modified in small part—Judgment-debtor is not entitled to have execution sale set aside but is entitled to the balance of the sale proceeds.)
(68) 9 Suth W R 402 (407, 408) (FB). (Per Peacock, C. J.)
(75) 23 Suth W R 441 (442). (Reversal of decree for possession gives right to mesne profits.)
(97) 21 Bom 55 (57).
(17) AIR 1917 Cal 188 (192).
(94) 21 Cal 340 (343). (Partition decree set aside—Party successful is entitled to be placed in joint possession.)
(15) AIR 1915 Cal 502 (503). (Decree absolute erroneous—Mortgaged property has to be restored.)
(37) AIR 1937 Mad 229 (230). (Decree against *A* and *B* jointly and severally—Amount deposited by *B* on behalf of himself and *A*—Decree reversed as against *B* only—*B* entitled to restitution of whole amount.)
[See also ('04) 27 Mad 504 (508).]
4. ('94) 21 Cal 989 (996, 997).
(93) 21 Cal 340 (343).
(89) 13 Bom 485 (488).
(15) AIR 1915 P C 92 (93) : 38 All 163 : 43 Ind App 43 (PC). (Affirming the reasons given in 32 All 79 (84, 85).)
(70) 14 Suth W R 465 (465).
(16) AIR 1916 Mad 1204 (1205).
5. ('17) AIR 1917 Cal 188 (192). (But the test of what is just must be determined with reference to the imperative requirements of the law applicable to the subject-matter.)

Note 20

1. ('17) AIR 1917 Mad 185 (185) : 40 Mad 780.

The restoration is to be as nearly as possible to their positions *at the time* the erroneous order was passed and not to later positions taken up by them of their own accord as resulting from that order.⁹ Such restoration may be ordered after taking evidence in the matter, if necessary.¹⁰

Where a party has obtained possession or recovered money under an erroneous decree, it will not be a restoration of the *status quo ante* merely to restore the possession or to return the money recovered. The party deprived of it would have lost the *profit* of the property or the *interest* on the money, of which he had been deprived. The Court has therefore been empowered to pass "any orders including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits" consequential on the variation or reversal of the decree.¹¹

But the restitution claimed must have been *properly consequential* on the reversal or variation.¹² Thus, where a judgment-debtor, pending appeal by him against the decree sells his property and deposits the decree amount in Court fearing that he may not succeed in the appeal, but the appeal is subsequently allowed, he cannot claim damages caused by the private sale, in restitution, he being under no obligation to pay the amount and the damages claimed also not being consequential on the reversal of the decree.¹³

It has been held that where a judgment-debtor against whom an *ex parte* decree was passed, chooses to set aside the sale held in execution of the decree by making the necessary deposit under O. 21 R. 89 and afterwards the *ex parte* decree also is set aside, the judgment-debtor would not be entitled to claim a refund of the amount which he had deposited as the auction-purchaser's compensation. The reason given is that such a deposit is not made by the judgment-debtor directly in connexion with the decree which has been passed against him but is made in order that he may obtain a special privilege which the law provides.¹⁴

9. ('17) AIR 1917 Pat 55 (58) : 37 Ind Cas 863 (865, 866, 869).

('17) AIR 1917 Mad 314 (315).

('06) 29 All 143 (144).

('97) 21 Bom 55 (57). (Uncertified payment.)

('94) 21 Cal 340 (343). (Partition decree reversed — Defendant will be restored to joint possession.)

('08) 12 Cal W N 642 (644).

('20) AIR 1920 Lah 499 (499).

('73) 20 Suth W R 238 (239, 240).

('29) AIR 1929 All 527 (528). (In ordering restitution, the Court cannot ignore other proceedings whereby the parties' rights are affected.)

('29) AIR 1929 Oudh 426 (426) : 5 Luck 302 (F B). (Money recovered under illegal arrest in execution of a decree.)

10. ('20) AIR 1920 Cal 919 (919, 920). (Question of prior possession as between parties to proceeding under this Section.)

('98) 8 Mad L Jour 276 (278).

11. ('12) 14 Ind Cas 456 (457) (Cal). (Refund of profits got by party in possession under erroneous decree.)

('34) AIR 1934 All 626 (631) (F B).

('87) 11 Bom 724 (726). (Money recovered.)

(1865) 2 Suth W R 275 (275). (Do.)

('35) AIR 1935 P C 12 (13) (P C). (The word 'may' is empowering and not discretionary.)

[See ('35) AIR 1935 Cal 206 (208) : 62 Cal 217.

(But in assessing what a party may have lost

or of what he may have been deprived during his dispossession, the law takes into account not what he could have made, but what his opponent did in fact make or could with reasonable diligence have made. There may be cases in which in addition to mesne profits claimed on the ground of the wrong-doer remaining in possession, damages or compensation may be claimed on other grounds.)]

[See also ('18) AIR 1918 Lah 313 (313). (Refund of costs.)]

12. ('39) AIR 1939 All 66 (69) : I L R (1939) All 103. (Suit for specific performance of contract of sale decreed — Execution delayed for four years owing to objections of other party which were ultimately disallowed by the High Court—Application under S. 144 claiming compensation for loss of profits of property for four years — Held claim was not properly consequential and not maintainable by application under S. 144, and the decree for specific performance entitled the plaintiff only to the execution of the sale-deed and did not award him possession, and the loss of profits of four years which had resulted to the plaintiff owing to the delay in execution of his sale-deed could not be said to be properly consequential as it was remote and indirect.)

13. ('27) AIR 1927 Mad 353 (354).

[See ('32) AIR 1932 Cal 303 (307) : 59 Cal 647.]

14. ('39) 43 Cal W N 104 (106).

21. "So far as may be." — It will not be possible in many cases to restore the *exact status quo ante* between the parties. Crops, for instance, which have been removed by the respondent pending appeal cannot be restored. In such cases the Court can grant damages representing the *value* (but only the net value) of the moveable property of which the restitution is claimed.¹

The Court is, in fact, bound to do everything and make every order fairly and properly consequential on the reversal of the original judgment so as to restore the parties to the same position as they were in at the time of the erroneous order.² Where each party is found entitled to restitution from the other, the restitution should, as near as possible, be *simultaneous*. Thus, where an auction sale is set aside, the judgment-debtor can claim restitution only on payment to the purchaser of the purchase money. In such a case the restoration of the property must be made *conditional* on the payment back of the purchase money so that the mutual restoration is, as far as possible, *simultaneous*.³

Where a decree for pre-emption obtained by a plaintiff is reversed in appeal, the plaintiff is entitled to restitution of the money deposited by him and which had been taken by the defendant vendee.⁴ In such a case it cannot be said that because the plaintiff is unsuccessful in the appeal, there could be no question of restitution to him.

As the Section only permits restitution "so far as may be," such restitution cannot be ordered so as to prejudice the rights of third parties.⁵

22. *Mesne profits*.—The use of the words 'damages,' 'compensation' and 'mesne profits' indicate that the possession obtained under an erroneous decree subsequently reversed is *wrongful* possession.⁶ On the reversal of the decree, the judgment-debtor will be not only entitled to the possession of the property taken from him but also to *mesne profits* during the period he was kept out of possession.⁷ Where, however, the Appellate Court sets aside the decree and *remands* the case for fresh or further enquiry and the question of nature of the possession of the party who has been in possession

Note 21

1. (11) 12 Ind Cas 105 (Mad).

(89) 18 Bom 485 (488).

2. (98) 1898 Bom P J 335. (Such as giving costs and interest on refund.)

(29) AIR 1929 Lah 657 (658).

(31) AIR 1931 Oudh 12 (12). (Restitution should clear the account between parties.)

[See (34) AIR 1934 Lah 45 (46).]

3. (17) AIR 1917 Pat 55 (57).

(29) AIR 1929 Rang 157 (158) : 7 Rang 107.

4. (34) AIR 1934 All 13 (14). (Pre-emption decree aside in appeal—Right of plaintiff to get his deposit of money by plaintiff—Decree set

money back is covered by S. 144.)

5. (37) AIR 1937 Lah 169 (170).

Note 22

1. (15) AIR 1915 Mad 1133 (1134).

(30) AIR 1930 Cal 89 (91, 92) : 56 Cal 550. (Case of a compromise appellate decree and so of no wrongful possession.)

(39) AIR 1939 All 66 (69) : ILR (1939) All 103.

2. (75) 23 Subh W R 441 (442).

(68) 10 Subh W R 131 (132).

(73) 20 Subh W R 238 (249).

(74) 21 Subh W R 195 (195).

(99) 21 All 1 (3).

(78) 3 Cal 720 (724).

(87) 14 Cal 484 (486).

(94) 21 Cal 989 (997).

(95) 22 Cal 501 (503, 504).

(24) AIR 1924 Lah 166 (167).

(88) 11 Mad 261 (262).

(91) 15 Mad 203 (209).

(09) 4 Ind Cas 376 (378) : 32 All 79.

(18) AIR 1918 Pat 396 (398) : 3 Pat L Jour 367.

(20) AIR 1920 Cal 550 (552).

(19) AIR 1919 Lah 218 (220).

(05) 8 Oudh Cas 254 (256).

(06) 9 Oudh Cas 254 (258).

(08) 11 Oudh Cas 236 (237).

(29) AIR 1929 Cal 590 (591). (Dispossession in execution of decree — Appeal against decree—Pending appeal, respondent leased the lands—Reversal on appeal — In restitution, held lessee

which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them with interest during the time that the money has been withheld".

The rule of interest allowable is however in the judicial discretion of the Court which will not be interfered with in appeal.³ Where no interest is claimed in an application for restitution it will not be allowed.⁴

In granting restitution it is the injury which has been caused to the party who is ultimately successful, that the Court seeks to remedy. The Court is not concerned with the actual benefit which may or may not have been gained by the other party.⁵ Thus, where a defendant against whom a decree was passed deposited into Court certain amount which the degree-holder did not draw out as he was unable to furnish security as ordered by the Court, it was held that the defendant was entitled, on the reversal of the decree, to get back the amount with interest thereon, though the other party did not get any benefit from the money deposited.⁶

24. Refund of compensation money in land acquisition cases.—Where Government deposits money in a land acquisition case and that is taken by a party and on appeal to the High Court the amount payable is reduced, the party must refund the excess amount to the Government with interest in accordance with the principle of restitution.¹

25. Possession of property or money obtained otherwise than in execution.—It is not necessary for the application of the Section that the possession of the

(192) AIR 1932 Cal 313 (315). (Costs deposited in Court.—Interest runs only from date of withdrawal of amount.)
(17) AIR 1917 Pat 696 (696). (Liability to pay interest not affected by execution of security bond by which principal alone was secured.)
(18) AIR 1918 Oudh 119 (120): 20 Oudh Cas 327. (Costs recovered.—Interest should be allowed on it.)
(25) AIR 1925 Bom 313 (314).
(26) AIR 1926 Lah 488 (488): 7 Lah 232. (Reversal of decree in Privy Council.—Interest allowed.)
(24) AIR 1924 Mad 87 (87). (Interest was substituted as compensation.)
(71) 15 Suth W R 74 (75).
(78) 20 Suth W R 49 (49). (Costs wrongfully recovered.)
(81) AIR 1931 Mad 661 (661): 54 Mad 887. (Do.)
(96) 1896 Pun Ro No. 82, p. 229.
(98) 1898 Bom P J 835.
(85) AIR 1935 P O 12 (13) (P O).
(84) AIR 1934 All 13 (14). (Pro-emption decree set aside in appeal.—Plaintiff is entitled to restoration of money deposited into Court and withdrawn by defendant together with interest thereon.)
(84) AIR 1934 Lah 604 (604). (Executing Court has discretion to allow interest even if refund is occasioned by compromise which does not mention interest.)
(See also (05) 28 Mad 355 (356, 357).
(37) A I R 1937 Mad 178 (179). (An application by the petitioner claiming interest on the

refund of the court-fee paid by him in the trial Court falls under S. 151 but it is discretionary to the Court to award it.)
(1871) 24 Law Tim 111, Rodger v. Comptoir D'Escompte de Paris.
3. (192) AIR 1932 P O 233 (234): 44 Mad 570: 48 Ind App 160 (PC).
4. (89) 13 Bom 485 (489).
5. (93) AIR 1933 Mad 33 (35, 37): 55 Mad 1025. (25) AIR 1925 Bom 313 (314). (Money paid under decree by one defendant.—Plaintiff pursuing his appeal against another defendant and succeeding—First defendant while withdrawing money is entitled to interest thereon.)
(29) AIR 1929 Pat 593 (594). (Following AIR 1925 Bom 313.)
[But see (25) AIR 1925 Rang 215 (217): 3 Rang 251. (Money lying in Court and none deriving benefit from it.—No interest is payable.)
(18) 19 Ind Cas 1 (1) (All). (Money deposited in Court by pre-emptor after first Court's decree—Decree set aside by Appellate Court.—Plaintiff not entitled to interest on deposit money as it was held that the suit ought not to have been brought.)
(66) 6 Suth W R 285 (285). (Defendant depositing decretal amount in Court.—Decree reversed in appeal.—Plaintiff not withdrawing money—Interest not allowed.)
6. (93) AIR 1933 Mad 33 (35, 37): 55 Mad 1025.
Note 24
1. (11) 10 Ind Cas 818 (818): 35 Bom 255. (30) AIR 1930 Mad 577 (578): 53 Mad 708.

property or money should have been obtained *in execution* of the decree which was subsequently reversed.¹ The Section would apply even if the possession of the property or money was taken *otherwise* than in execution provided it was obtained *under colour of, or in consequence of, the decree*.²

Where possession is obtained by the decree-holder independent of, and in *opposition*, to the decree, this Section does not apply. Thus, where *A* gets only a decree for *injunction* against *B* and then enters into *possession* with the aid of the police and the decree is subsequently reversed in appeal, *B* cannot be given restitution by removal of the superstructure erected on the property.³

26. Splitting up claim of restitution. — The principle of constructive *res judicata*, whether Section 11 Explanation IV or O. 2 R. 2 of the Code is invoked in its aid, cannot be applied to proceedings under this Section.¹ Where therefore a party is entitled by way of restitution to *two* reliefs, the claiming of *one* only of such reliefs in an application does not bar a subsequent application for the *other* relief. Thus, where *A* is entitled to the restoration of a *property* and *mesne profits*, a first application for the restitution of the *property* does not bar a subsequent application for the *mesne profits*.² The same principle will apply where a party is entitled to restitution of a sum of money and the interest thereon.³

A second application for the *same relief* as was previously granted is however clearly barred on the principles of *res judicata*.⁴

See also the undermentioned case.⁵

27. Pecuniary jurisdiction of Court in awarding restitution. — See Note 17, *ante*.

28. Security for restitution. — The Appellate Court has an inherent power to call upon the respondent to furnish security (notwithstanding the decree has been executed) for the due performance of any decree that might be made in appeal.¹

Where a decree-holder, at the time of the withdrawal of money, executes a security bond by which the *principal* alone is secured, the Court is not deprived

Note 25

1. ('13) 21 Ind Cas 84 (85) (Cal).
('87) 1887 Bom P J 75.
[See also ('07) 29 All 348 (350).]
2. ('20) AIR 1920 All 190 (191) : 42 All 568.
('27) AIR 1927 Lah 37 (38) : 8 Lah 41. (AIR 1920 All 190, Followed.)
('27) AIR 1927 Lah 625 (626) : 8 Lah 356. (Payment made not in consequence of any decree not recoverable.)
('10) 5 Ind Cas 776 (776) (Mad).
('37) AIR 1937 All 728 (730). (Decree-holder obtaining decree for holding charge of institution — Decree-holder obtaining possession of buildings under colour of decree — Decree set aside on appeal — Decree-holder must restore possession under S. 144.)
[See also ('05) 2 Cal L Jour 537 (539, 540). (Decree for confirmation of possession only — However decree-holder obtaining possession in execution.)]
3. ('18) AIR 1918 Mad 1293 (1294).
('37) AIR Mad 315 (316).

Note 26

1. ('17) AIR 1917 Mad 185 (185) : 38 Ind Cas

806 (806, 808) : 40 Mad 780.

- ('19) AIR 1919 Sind 79 (79) : 13 Sind L R 153.
(Suit for declaration that decree is null and void — Omission to ask for restitution — Right is not relinquished — Subsequent application is maintainable.)
- ('35) AIR 1935 All 195 (197). (S. 141 does not require that O. 2 R. 2 or S. 11 Expl. 4 should be applied to such proceedings.)
2. ('18) AIR 1918 Pat 396 (397) : 3 Pat L Jour 367.
('21) AIR 1921 Nag 112 (113) : 17 Nag L R 62.
('35) AIR 1935 Cal 206 (208) : 62 Cal 217
3. ('17) AIR 1917 Mad 185 (185) : 38 Ind Cas 806 (806) : 40 Mad 780.
('35) AIR 1935 All 195 (197).
4. ('17) AIR 1917 Mad 202 (203).
5. ('37) AIR 1937 Mad 173 (174, 175). (Application after reversal of decree on appeal — Grant of — Subsequent reversal of appellate decision — Appellate decision restored on Letters Patent Appeal — Fresh application for restitution lies.)

Note 28

1. ('05) 33 Cal 927 (934, 942).

If the application is one in execution, then Section 141 would not apply thereto. Otherwise it would apply and an application under Section 144 dismissed for default may be restored by applying O. 9 R. 9 thereto.

The nature of proceedings becomes important also where the question is whether Article 151 or Article 152 of the Limitation Act applies to such proceedings (see Note 33), and whether the court-fee payable on the memorandum of appeal from an order under this Section is to be *ad valorem* under Schedule I, Article 1 of the Court-fees Act, or under Schedule II, Article 11 thereof. (See Note 32.)

The adjustment of a claim for restitution before it has been ordered by the Court is not the adjustment of a decree.

See also Notes 31, 32 and 33, below.

31. Appeal — Tenability of. —

The determination of a question under this Section has been *expressly* declared to be a decree under Section 2 (2) and is appealable as such under Section 96.¹ But does an adjudication in an application for restitution *not falling* within Section 144 amount to a decree? There is a difference of opinion on this point. The Calcutta High Court holds that it is a decree under Section 2 (2).² The Patna High Court holds that it is not;³ while Mr. Justice Chapman of the same Court has expressed an *obiter dictum* in the undermentioned case⁴ that it will amount to a decree. The Nagpur High Court has held that an order for restitution under Section 151 is appealable on the analogy of an order under this Section.⁵ The Madras High Court has held that an order for restitution made as between the parties to the

- (133) AIR 1934 Pat 246 (245, 251, 253) : 13 Pat 411 (F.R.). (Overruling AIR 1925 Pat 1 and AIR 1925 Pat 593.)
 [See (137) AIR 1937 Mad 173 (175, 176). (Application for restitution may be made in such manner as the nature of each case might require and need not follow in every case the procedure in O. 21 R. 11, C. P. C.).]
 6. (122) AIR 1922 All 223 (226) : 44 All 407. (This case however did not consider the question whether a proceeding under this Section is in the nature of an original proceeding to which alone S. 141 has been held to be applicable by the Privy Council in 17 All 106 (P.C.). See notes to S. 141.)
 7. (136) AIR 1936 Mad 840 (841).
Note 31
 1. (121) AIR 1934 All 64 (65). (Decision wrong as being under S. 144—Appeal lies.)
 (132) AIR 1932 Pat 317 (319) : 11 Pat 553. (Decision on the footing that S. 144 was applicable—Appellate Court finding that matter is not governed by S. 144—Appeal lies.)
 (134) AIR 1934 Pat 109 (109) : 13 Pat 108. (Order for restitution by delivery of possession—Obstruction by stranger—Application under O. 21 R. 97 to remove obstruction dismissed—The order is still one under this Section and an appeal lies.)
 (124) AIR 1924 Nag 328 (330) : 20 Nag L. R. 170.
 (115) AIR 1915 Cal 330 (331).
 (112) 14 Ind Cas 836 (836) (Mad).
 (125) AIR 1925 Cal 102 (103). (No distinction between a decree in suit and a decree in a proceeding under this Section.)
 (114) AIR 1914 Mad 828 (829) : 38 Mad 1120. (Order for restitution is tantamount to a decree.)

4. (118) AIR 1918 Pat 52 (53) : 2 Pat L. Jour 206. [See also (138) 1938 Pat W N 310 (311). (Held, that the Court having decided the rights of the parties and in effect given a decree which was capable of execution, the order was appealable, though it was styled as falling under S. 144 or S. 151 or under both Sections 144 and 151.)]
 5. (135) AIR 1938 Nag 326 (328) : 1 L. R. 1939 Nag 350. (If the inherent powers are used to expand a remedy in order to do justice to cover a case not within the exact words of but within the purpose of a procedural Section, the Court is in effect using its inherent powers to act as if the orders were made under the Section in question. In such a case, even justice demands that one side should be given a remedy and otherwise should, as a matter of justice, be allowed the right to appeal that would have existed had a particular Section really applied instead of its being applied by means of a fiction.)

suit would be appealable as falling under Section 47 though it is not covered by this. Se
No
Section.⁶

The decision in order to constitute a determination of a question under this Section and therefore a decree, must have been one *on the merits* of the application and must not relate to matters *incidentally* connected with or *collateral* to the decision of any such question.⁷

An order dismissing an application for restitution on the ground that the applicant had already obtained restitution⁸ or an order holding that the application is not time-barred⁹ are not decisions on the merits and therefore are not decrees which are appealable. But it has been held that the *rejection* of a prayer for restitution under this Section amounts to a determination of a question under this Section.¹⁰ It has been held by the Rangoon High Court that an order on an application on the original side of the High Court under this Section is not a "judgment" within the meaning of Clause 13 of the Letters Patent of the Rangoon High Court and hence is not appealable.¹¹

32. Court-fee. — The court-fee payable on a memorandum of appeal against an order under Section 144 depends upon the question whether such an application is one for execution, discharge or satisfaction of the decree within the meaning of Section 47 of the Code.

Under the Court-fees Act, 1870, the court-fee payable on memorandum of appeal against *decrees* is *ad valorem* under Schedule I Article 1 thereof. But under Section 35 of the Act, the Government of India and the Local Governments have directed that the fee payable on appeals from orders under Section 47 of the Code [which are "decrees" under Section 2 (2) of the Code] shall be limited to the amounts chargeable with a *fixed* fee under Article 11 Schedule II of that Act.¹

If an order under Section 144 is therefore considered to be one under Section 47, then the fee chargeable is that under Article 11 Schedule II of the Court-fees Act. If not, it will be payable as on an appeal from a decree *ad valorem* under Article 1 of Schedule I of the Act, on the amount dealt with by the order.

There is a conflict of decisions as to whether an order under this Section is to be considered as one under Section 47 for purposes of court-fees. According to the High Courts of Madras,² Nagpur,³ Patna⁴ and Lahore,⁵ such an order is to be treated as falling under Section 47 for purposes of court-fees. But the contrary view has been

6. ('86) AIR 1936 Mad 636 (638).

7. ('14) AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110. (The question of limitation is collateral to the merits of the application.)

('33) AIR 1933 Pat 498 (499). (Preliminary objection to application that it is barred by limitation—Court holding that it is not barred — No appeal lies against the order.)

8. ('14) AIR 1914 Lah 9 (11) : 20 Ind Cas 203 (205); 1914 Pun Re No. 10.

9. ('14) AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110.

10. ('36) AIR 1936 Cal 812 (812).

11. ('38) AIR 1938 Rang 446 (446).

Note 32

1. [See (1) Government of India Notification

No. 4650, dated 10th September 1889, (Gazette of India 1889, Part I, p. 506); (2) Madras Government Notification No. 358, dated 11th October 1921 (Fort St. George, pp. 1008-1011); (3) Bombay Government Notification No. 590, dated 22nd September 1921 (Bombay Government Gazette, pp. 2271 to 2274); (4) U. P. Government Notification No. 560/VII — 419, dated 3rd May 1921.)]

2. ('23) AIR 1923 Mad 270 (271).

3. ('22) AIR 1922 Nag 62 (64) : 18 Nag L R 15.

4. ('17) 1 Pat L W 150n.

('25) AIR 1925 Pat 577 (580) : 4 Pat 249.

5. ('27) AIR 1927 Lah 635 (636).

('28) AIR 1928 Lah 143 (143, 144).

[But see ('30) AIR 1930 Lah 24 (25).]

held by the High Courts of Allahabad,⁶ Calcutta⁷ and Rangoon⁸ according to which an appeal from such an order must be stamped with *ad valorem* court-fee.

33. Limitation.—There is a great divergence of judicial opinion as to whether Article 181 or Article 182 of the Limitation Act applies to an application for restitution under this Section.

Article 182 applies to an application for the *execution of a decree or order of a Civil Court*, and Article 181 applies where no limitation is provided elsewhere for such applications.

Under Section 583 of the old Code, an application for restitution under that Section was one in *execution of the appellate decree* and Article 179 (now Article 182) of the Limitation Act of 1877 was applied.¹ In cases not falling within that Section, the application was not treated as one in execution of any decree and the Article applied was 178 (now 181) of the Limitation Act, 1877.²

Under the present Code, the Madras, Bombay, Patna, Rangoon and Oudh Courts hold that an application for restitution is one in "execution of a decree" within Article 182 of the Limitation Act, 1908.³ Further, Section 6 of that Act would also apply to such cases, and in cases of disability of the applicant, the time would be extended by virtue thereof.⁴

The other High Courts hold that an application for restitution is not a proceeding in "execution of a decree" and that therefore the Article applicable is 181.⁵ The High Courts of Allahabad, Calcutta and Lahore have held that where a decree reversing that

6. ('01) 1901 All W N 180 (182).
- (25) AIR 1925 All 137 (138) : 47 All 98.
7. ('37) AIR 1937 Cal 152 (155) : 1 L R (1937) 1 Cal 637. (Even application for restitution under S. 151 requires *ad valorem* court-fee.)
- (38) 42 Cal W N 152.
- [But see ('18) AIR 1918 Cal 335 (335).
- (10) 6 Ind Cas 125 (125) (Cal).]
8. ('80) AIR 1930 Rang 241 (243) : 3 Rang 271.
- (39) AIR 1939 Rang 32 (33, 34) : 1939 Rang L R 635.
- [But see ('33) AIR 1933 Rang 180 (183) : 11 Rang 275.]

Note 33

1. ('97) 20 Mad 448 (449). (Not following the obiter dictum in 10 Mad 66.)
- (98) 22 Bom 998 (1001).
- (76) 1 Bom 19 (22).
- (86) 8 All 545 (548).
2. ('05) 27 All 485 (487). (Restitution due to amendment of decree.)
- (08) 30 All 476 (479). (Ex parte decree set aside.)
- (01) 28 Cal 113 (115). (Do.)
3. ('17) AIR 1917 Mad 194 (195).
- (84) AIR 1934 Pat 246 (247, 251, 253) : 13 Pat 411 (FB). (Overruling AIR 1925 Pat 1 and AIR 1928 Pat 598.)
- (33) AIR 1933 Rang 180 (183, 184) : 11 Rang 275.
- (31) 1931 Mad W N 1006 (1007).
- (21) AIR 1921 Bom 67 (67) : 45 Bom 1137.
- (26) AIR 1926 Oudh 199 (199, 200) : 1 Luck 40.
- (31) AIR 1931 Oudh 51 (52) : 6 Luck 448.
- (36) AIR 1936 Oudh 185 (188) : 12 Luck 52.
- (37) AIR 1937 Mad 150 (150).
- [But see ('19) AIR 1919 Bom 175 (176) : 43 Bom 235. (Where Art. 181 was applied.)

- (15) AIR 1915 Low Bur 141 (142) : 8 Low Bur Rui 262.]
4. ('17) AIR 1917 Bom 210 (211) : 41 Bom 625.
- (26) AIR 1926 Oudh 199 (200) : 1 Luck 40.
5. ('21) AIR 1921 All 321 (321).
- (34) AIR 1934 All 626 (634, 645) (FB). (Difference between execution application for restitution explained in detail—Case law discussed.)
- (82) AIR 1932 Cal 308 (309, 310) : 59 Cal 337.
- (28) AIR 1928 Cal 646 (650, 651) : 56 Cal 61 (SB).
- (26) AIR 1926 Cal 981 (981).
- (17) AIR 1917 Cal 188 (192, 193).
- (26) AIR 1926 Lah 685 (686).
- (81) AIR 1931 Lah 504 (504).
- (24) AIR 1924 Lah 166 (166).
- (39) AIR 1939 All 66 (69) : 1 L R (1939) All 103.
- (38) AIR 1938 All 552 (554).
- (39) AIR 1939 Cal 349 (350) : 69 Cal L Jour 293 (296).
- (38) AIR 1938 Lah 456 (457).
- (39) AIR 1939 Lah 73 (76) : 1 L R (1938) Lah 571.
- (35) AIR 1935 Nag 76 (77).
- (21) AIR 1921 Nag 112 (113) : 17 Nag L R 62.
- [See also ('18) AIR 1918 Cal 457 (457). (Question raised but not decided.)
- (18) AIR 1918 Lah 378 (379, 380) : 1918 Pun Re No. 67. (Decree passed under the old Code of 1882—Hence application for restitution is an application for execution and Art. 182 applies—Under the present Code such an application will be governed by Art. 181.)
- (37) AIR 1937 Cal 152 (154, 155) : 1 L R (1937) 1 Cal 637.]
- [But see ('23) AIR 1923 Nag 101 (101) : 18 Nag L R 200.]

of a trial Court is confirmed in second appeal, the period of limitation for an application for restitution begins to run from the date of the lower Appellate Court's decree and not from the date of the decree in second appeal confirming the reversing decree.⁶ The High Court of Allahabad⁷ has, however, held that, where the application for restitution is for recovery of mesne profits, time does not begin to run until possession of the property has been restored to the successful applicant.

An application for restitution on the reversal of the decree of the High Court by the Privy Council is one to "enforce" the decree of the Privy Council and is therefore governed by Article 183 of the Limitation Act.⁸

For fuller discussion, see the Author's Commentaries on the Limitation Act, Article 181 Note 7 and Article 183 Note 4.

34. Inherent power of Court to grant restitution.—It has already been seen in Note 2 that this Section does not confer any *new* rights which a successful party did not possess otherwise under the general law.¹ The jurisdiction to make restitution is *inherent* in every Court and will be exercised whenever the justice of the case demands it.² Such powers will be exercised, where an

- 6. ('34) AIR 1934 All 626 (643, 645) (FB).
- ('32) AIR 1932 All 609(610):54 All 770. (Limitation is not suspended by the filing of second appeal.)
- ('32) AIR 1932 Cal 308 (310) : 59 Cal 337.
- ('28) AIR 1928 Cal 646 (650, 651): 56 Cal 61 (SB).
- ('39) AIR 1939 Lah 73 (76): I L R (1938) Lah 571.
- [See also ('33) AIR 1933 Cal 422 (423).
- ('39) AIR 1939 Cal 349 (351): 69 Cal L Jour 293 (296). (Ex parte decree set aside in suit—Order confirmed in appeal—Time for application for restitution runs from order of trial Court and not of Appellate Court.)]
- [See however ('33) AIR 1933 Rang 180 (182) : 11 Rang 275. (Assuming that Art. 181 is applicable time begins to run from date of final decree.)]
- [But see ('26) AIR 1926 Cal 981 (982). (Not followed in AIR 1928 Cal 646 which is a decision of three Judges.)]
- 7. ('34) AIR 1934 All 626 (637, 643, 645) (FB).
- 8. ('22) AIR 1922 All 238 (239) : 44 All 555.
- ('28) AIR 1928 All 293 (294) : 50 All 767.

Note 34

- 1. ('12) 16 Ind Cas 966 (966) (Cal).
- 2. ('24) AIR 1924 All 718 (718, 719): 46 All 767. (Costs disallowed as being not necessary for the ends of justice.)
- ('32) AIR 1932 Cal 29 (31): 58 Cal 1070. (Ex parte decree set aside—Restitution under inherent powers of Court.)
- ('33) AIR 1933 All 117 (118). (Provincial Insolvency Act 1920, S. 5—Adjudication annulled yet distribution ordered—Order set aside—Payments under distribution order can be ordered to be refunded.)
- ('33) AIR 1933 All 218 (221) : 55 All 221. (Decree rendered inoperative in a separate suit—Restitution may be granted under inherent powers though the terms of this Section do not apply.)
- ('34) AIR 1934 Mad 320 (322) : 57 Mad 849. (Money improperly drawn out under decree—Permission to draw subject to execution of bond undertaking to repay—Court has inherent power to accord restitution.)

- ('34) AIR 1934 Lah 322 (323). (Mesne profits not granted as possession was not wrongful.)
- ('34) AIR 1934 Pat 150 (151).
- ('71) 7 Moo P C (N S) 314 (PC).
- ('30) AIR 1930 Mad 988 (990, 991). (Section 144 can be applied to interim orders pending final disposal of partition suit.)
- ('26) AIR 1926 All 274 (276). (Sale under prior mortgage decree—Subsequent sale under decree on subsequent mortgage to which the prior decree-holder and purchaser were parties—Court can order refund of the money received from the latter by the former.)
- ('11) 10 Ind Cas 818 (819) : 35 Bom 255. (Refund of money wrongly taken from Court.)
- ('13) 18 Ind Cas 144 (144) (Low Bur). (Property sold in execution *held* not liable for attachment in claim suit—Court can order restitution to successful claimant.)
- ('87) 14 Cal 484 (486).
- ('14) AIR 1914 Cal 692 (692). (Sale set aside on ground of fraud—Court has inherent power to grant mesne profits from auction-purchaser.)
- ('05) 2 Cal L Jour 537 (539, 540). (Decree for confirmation of possession only—Decree-holder obtaining possession in execution—Court can grant restitution under its inherent powers.)
- ('05) 2 Cal W N 381 (382).
- ('06) 33 Cal 927 (932, 934). (Respondent may be ordered to furnish security pending appeal.)
- ('06) 3 Cal L Jour 181 (182). (Ex parte decree set aside—Court has inherent power to order restitution.)
- ('07) 6 Cal L Jour 662 (666).
- ('16) AIR 1916 Cal 241 (244) : 43 Cal 269. (Money deposited in Court wrongly withdrawn—Court has inherent power to order restitution.)
- ('26) AIR 1926 Lah 685 (687).
- ('22) AIR 1922 P C 269 (271) : 49 Ind App 351 : 2 Pat 10 (PC). (Auction sale—Deposit of price by purchaser and subsequent discharge of incumbrance—Sale set aside—Judgment-debtor must refund deposit before claiming restoration of possession.)

of the Code.⁴

Illustrations

1. *A* purchases a property in a sale held in execution of a decree and obtains possession thereof. On the application of *B*, the judgment-debtor, the sale is set aside. *B* applies for restitution of possession and mesne profits from *A*. Does the application lie under Section 144? No: for, no decree has been varied or reversed. But the restitution can be granted under Section 151,⁵ on the principle that an erroneous act of the Court should not be allowed to do injury to the suitors.⁶

2. *A* obtains a decree against *B* and recovers the money due under the decree by execution. Subsequently it appears to the Court that *B* was dead at the time of the institution of the suit. The decree is a nullity and the Court, having levied execution while there was legally no decree, has inherent power to rectify the mistake and order restitution.⁷

There is one distinction between the exercise of the powers under S. 144 and the exercise of the Court's inherent jurisdiction. While the Section is mandatory the exercise of the power under Section 151 depends upon the *discretion* of the Court which will be used only in the interests of justice.⁸

The inherent powers of a Court do not extend to convert an application which has nothing to do with restitution into one for restitution.⁹ Nor does it extend to ordering restitution against a person who is neither a party to nor bound by any order of the appellate or reversing Court.¹⁰

35. Revenue Court. — The jurisdiction to make restitution being inherent in all Courts, the principles of Section 144 will apply to Revenue Courts also.¹

decree does not amount to reversal or variation nor does the new decree passed after retrial amount to reversal or variation of the original decree as that decree has been already set aside.) [See ('14) AIR 1914 Lah 9 (11) : 20 Ind Cas 203 (205) : 1914 Pun Re No. 10.

('10) 6 Ind Cas 508 (511, 512) (Cal).]

4. ('20) AIR 1920 Bom 12 (12) : 44 Bom 702. (Ex parte decree set aside — Property must be restored whether under Sec. 47 or this Section.)

('33) AIR 1933 All 218 (221) : 55 All 221. (Power under S. 151 will be exercised where it is necessary for preventing injustice and where it does not contravene any statutory provision.)

('19) AIR 1919 Bom 175 (176) : 43 Bom 235.

5. ('14) AIR 1914 Cal 692 (692, 693).

('18) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

('94) 21 Cal 989 (997). (Mesne profits.)

('12) 14 Ind Cas 456 (457) (Cal).

('37) AIR 1937 Mad 694 (695). (Mesne profits also can be awarded.)

[See also ('19) AIR 1919 Bom 175 (176) : 43 Bom 235.

('36) AIR 1936 Lah 497 (498, 499). (Execution sale set aside—Court can order decree-holder to refund purchase-money to auction-purchaser.)]

6. ('22) AIR 1922 PC 269 (271) : 49 Ind App 351 : 2 Pat 210 (P C).

('02) 6 Cal W N 710 (712).

('22) AIR 1922 Nag 82 (84) : 18 Nag L R 24.

7. ('33) AIR 1933 Mad 888 (888). (Under Section 151, C. P. C.)

8. ('17) AIR 1917 Cal 188 (192). (But the test of what is just must be determined with reference

to the imperative requirements of the law applicable to the subject-matter.)

('37) AIR 1937 Mad 178 (179). (Interest refused in view of peculiar circumstances of the case.)

9. ('17) AIR 1917 Mad 453 (453) : 34 Ind Cas 774 (775).

[See also ('39) AIR 1939 All 66 (69) : I L R (1939) All 103. (Where the relief claimed is not really restitution and can appropriately be claimed in a suit, recourse cannot be had to the inherent powers of the Court under S. 151.)

('37) AIR 1937 Pat 647 (650) : 16 Pat 729. (Decree against Hindu father and sons based on compromise—Sale of family property in execution—Purchase by decree-holder—Full satisfaction of decree entered—Subsequent suit by sons to declare compromise decree not binding on them — Decree releasing half share in property—Decree and sale remaining as a whole—Application by decree-holder for compensation not maintainable—Doctrine of *caveat emptor* applied.)]

10. ('19) AIR 1919 Mad 581 (581) : 41 Mad 467. (Order refusing to set aside execution sale reversed in appeal — Auction-purchaser not party to proceedings — Claim to restitution not maintainable.)

Note 35

1. ('04) 26 All 149 (151, 152). (Restitution due in virtue of the modification in appeal of the decree of a Rent Court.)

('22) AIR 1922 All 71 (72) : 44 All 283.

('67) 7 Suth W R 520 (521) (F B).

('90) 1890 Rent Act Rul No. 56. (1900 Jacob Reprint, page 84.)

('18) 46 Ind Cas 475 (476) (Bur.)

36. Revision.—No revision lies from an order on an application falling under Section 144, for such an order is *appealable* as a decree under Section 2 (2).¹ Where the Court refuses to order restitution in the exercise of its discretion in a case not falling within Section 144, the order is not open to revision.²

It has been seen in Note 31 that in cases of restitution not falling within Section 144 there is a difference of opinion as to whether the order made amounts to a "decree." Where the order is held not to amount to a decree and no other remedy is open, a revision will lie.³

145. [S. 253.] Where any person has become liable as surety—

(a) for the performance of any decree³ or any part thereof, or

(b) for the restitution of any property taken in execution of a decree,⁴ or

(c) for the payment of any money,⁵ or for the fulfilment of any condition imposed on any person,⁶ under an order of the Court in any suit or in any proceedings consequent thereon,

the decree or order may be executed against him,⁷ to the extent to which he has rendered himself personally liable,⁸ in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal,¹² be deemed a party within the meaning of section 47 :

Provided that such notice¹¹ as the Court in each case thinks sufficient has been given to the surety.

[1877, S. 253; 1859, S. 204; See S. 55 (4), O. 25 R. 1; O. 38, Rr. 2 and 5; O. 41 R. 10; O. 45 R. 7.]

Synopsis

1. Legislative changes.
2. Scope, applicability and object of the Section.
- 2a. Security by person primarily responsible—Applicability of Section.
- 2b. Security in favour of the Court—Applicability of the Section.
- 2c. "Has become liable as surety."
3. Security for the performance of any decree.
4. Security for restitution of property taken in execution of a decree—Clause (b).
5. Security for payment of money.
6. Security for fulfilment of any condition imposed on any person—Clause (c).
- 6a. Under an order of the Court—Clause (c).
- 6b. "In any suit or in any proceedings consequent thereon."
7. "The decree or order may be executed against him."

Note 36

1. See S. 115 of the Code and the Notes thereon.
2. (11) AIR 1935 AH 878 (570).
2. (11) AIR 1911 Lah 9 (11) : 20 Ind Cas. 203 (1907) 7 South W R 529 (1911).
- (1907) 5 M.L.J. 191 (1907). (For the meaning of this.)
3. (102) 1902 Pan Hc No. 70, page 701. (The order is a final order.)

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| <p>8. "To the extent to which he has rendered himself personally liable."</p> <p>9. Discharge of surety.</p> <p>9a. Surety if can recover sum forfeited.</p> <p>10. Form of surety bond.</p> <p>10a. Enforceability of surety bond in execution apart from the Section.</p> | <p>11. Maintainability of separate suit by or against the surety.</p> <p>12. Appeal.</p> <p>13. Limitation.</p> <p>14. Notice to surety.</p> |
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Other Topics (miscellaneous)

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| <p>Appellate decree. See Note 3.</p> <p>Duration and extent of liability. See Note 8.</p> <p>Enforcement of surety bond. See Notes 8 and 11.</p> <p>Ex parte decree. See Note 3.</p> <p>Liability of legal representative of surety. See Note 9.</p> <p>Oral contract of suretyship. See Note 10.</p> <p>Proceedings. See Note 9.</p> | <p>Refund of security money. See Notes 7 and 12.</p> <p>Registration. See Note 10.</p> <p>Revision. See Note 12.</p> <p>Such person shall be deemed a party. See Note 12.</p> <p>Surety bond—Whether to be in favour of Court. See Note 10.</p> <p>Surety under adjustment. See Note 6.</p> |
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1. Legislative changes. — The present Section has altered the law in the following respects:—

1. The old Section applied only to sureties for the performance of *decrees*. It did not apply to securities for the fulfilment of a condition imposed by an order of Court. It was also doubtful whether it applied to securities for the performance of appellate decrees and to securities for restitution of property taken in execution of a decree. It did not also apply to securities for payment of money which were not securities for the performance of decrees. The present Section applies to all these kinds of securities.

2. The word "personally" has been newly added in the present Section before the word "liable."

3. The competency of an appeal from an order under this Section is made clearer by the provision as to the surety being deemed a "party" for purposes of appeal.

4. Notice under the present Section need not be in writing.

2. Scope, applicability and object of the Section. — The object of this Section is to provide a *summary remedy* for the enforcement of the liability of a surety who has given security for any of the purposes enumerated in the Section. But for this Section, the party for whose benefit the security has been given would have to file a separate *suit* to enforce the security. This Section dispenses with the necessity of a suit and enables him to enforce the security by *execution proceedings* in the same manner as if the surety was a party to the decree or order in respect of which security has been given.¹ But the procedure provided by the Section applies only to the extent to which the surety has rendered himself *personally* liable.

2a. Security by person primarily responsible — Applicability of Section. — A surety is one who takes upon himself, and guarantees the performance of, an obligation which rests primarily upon another. The surety's liability is an accessory one. Hence the Section has no application unless the person sought to be proceeded against has taken upon himself the liability of *another*.¹ The liability need not be that of either the judgment-debtor or the decree-holder but it may be the liability of an officer of the Court.² Thus, this Section applies to the enforcement of the liability of a

Section 145 — Note 2

1. ('36) AIR 1936 Lah 463 (464). (It does not matter that the name of the surety is not mentioned in the decree.)

Note 2a

1. ('39) AIR 1939 Cal 316 (319).

(16) AIR 1916 Mad 521 (522) : 39 Mad 584.

(33) AIR 1933 Mad 691 (693) : 56 Mad 989.

2. ('39) AIR 1939 Cal 316 (319).

[See ('28) AIR 1928 Nag 294 (294). (In this case it was only decided that in the particular circumstances of the case the surety was a surety

person who has stood surety for a receiver. See also Note 4 below.

2b. Security in favour of the Court — Applicability of the Section. — The security under this Section is intended to be given to some named officer or other individual and not to be a mere undertaking to the Court. The Court is not a judicial person. It cannot be sued. It cannot take property and as it cannot take property it cannot assign it. Where therefore a security bond is executed in favour of the Court, this Section has no application. But independently of this Section it can be enforced by an order on an application to which the sureties are parties that the properties be sold unless, before a day named, the sureties find the money.

In the undermentioned case¹ a security bond was executed in favour of a certificate officer under the Bengal Public Demands Recovery Act in respect of a debtor by a certificate debtor to a certificate holder. It was held that the certificate officer who was deemed to be a Court under Section 57 of the Act, could not maintain a suit on the surety bond, and that the certificate holder as the beneficiary under the bond could sue on it.

See also Note 11 *infra*.

2c. "Has become liable as surety." — Where I was appointed commissioner to attach certain moveable property and keep it in custody and he after attaching such property locked the goods in a shop and appointed two watchmen to look after the shop and locks, it was held that the watchmen could not be said to have become liable as sureties and that this Section did not apply.

3. Security for the performance of any decree. — Old Section 253 used the words "whenever a person has before the passing of a decree in an original suit become liable as a surety," etc. Hence it did not apply to securities given subsequent to the passing of a decree except when the bond expressly stipulated for its enforcement.

for a party to the suit and so the objection that the surety was not a surety for a party was groundless. But the case does not decide the question whether this Section will not apply unless the surety is a surety for a party to the suit.

(16) AIR 1916 Mad 521 (522) : 39 Mad 534. (The remark in this decision that the Section contemplates proceedings against a third party who has given an undertaking for the due discharge of the obligations resting upon a party to the suit only means that the Section does not apply to the enforcement of the liability of the person on whom the primary responsibility lies.)

3. (15) AIR 1915 Cal 331 (334).
(17) AIR 1927 Rang 334 (334).
(20) AIR 1920 Low Bur 58 (59) : 10 Low Bur 236.

Note 25

1. (19) AIR 1919 P C 55 (59) : 42 All 155 : 46 Ind App 228 (P C).

(93) AIR 1933 Mad 691 (693) : 56 Mad 989.

(93) AIR 1933 Mad 349 (349).

(94) AIR 1934 Cal 67 (67) : 60 Cal 1298.

(94) AIR 1934 Mad 186 (188, 189) : 51 Mad 688.

1. (36) S All 639 (641).
(81) 3 All 509 (511).
(87) 1 Mad 284 (287).

Note 3

1. (33) AIR 1933 All 335 (336).

Note 2c

2. (37) AIR 1937 Cal 623 (630) : 11 L B (1937) 3 Cal 698. (Certificate-holder's suit not barred by the principle in (1561) 30 L J Q B 233.)

[See also (36) AIR 1936 Mad 539 (541). (The same procedure can be followed even where security, the property is alienated to a third party inasmuch as such alienation will be affected by the principle of the *principle*.)]

(74) AIR 1924 Cal 454 (456, 457) : 51 Cal 150. (The decision to the contrary in AIR 1919 Cal 173 is not good law.)

(16) AIR 1916 All 51 (59, 60) : 33 All 327.
(93) 17 All 99 (109).
(97) AIR 1927 Mad 416 (420).
(99) AIR 1929 Lah 393 (394).
(99) AIR 1929 Rang 196 (197) : 1 Rang 534.
(98) AIR 1928 All 327 (329) : 51 All 342.
(96) AIR 1926 All 651 (653).
(94) AIR 1924 All 105 (107) : 45 All 649.
(95) AIR 1928 Bom 42 (47, 48) : 52 Bom 116.

right of making a person, not a party to a pending suit, amenable to the jurisdiction of the Court in execution proceedings and that it therefore could not be applied to proceedings other than suits. See Section 141 Note 7, *ante*.

Where the judgment-debtor deposited the decree amount into Court and the next friend of the minor decree-holder applied for withdrawing the money and for re-depositing it in the form of Government Promissory Notes, it was held that such an application was a "proceeding consequent on the suit" and that a surety for such re-deposit can be proceeded against under this Section.⁴

7. "The decree or order may be executed against him." — This Section provides for the enforcement of the surety's liability by *execution* against the surety of the decree or order in connexion with which the security was given. But the Court is not *bound* to issue execution against the surety. It has a discretion to refuse such execution.¹ If execution is issued the Court cannot declare a forfeiture in favour of the Government but the security money should be paid to the decree-holder.² The decree-holder must apply it towards the satisfaction of his decree and is not entitled to it over and above the decree amount as a solatium for delay brought about in the execution of his decree.³

The mere fact that the applicant for execution mentions the breach of one condition in the security bond as having given him the right to apply for execution does not disentitle the Court from ordering execution if in the course of the proceedings it finds that some other condition has been broken.⁴

The legality of the order for security cannot be questioned by the surety in the execution proceedings against him under this Section.⁵

The Court has no power under the Section to order the refund of moneys deposited as security. But refund can be ordered under Section 151.⁶

8. "To the extent to which he has rendered himself personally liable." — The word "personally" has been newly added in the present Section. Under the former Section there was a conflict of opinion as to whether the Section applied to cases where the surety had not undertaken a *personal* liability but had merely given a charge on his property.¹ Under the present Section it is clear that it applies only where the surety has rendered himself *personally* liable.² If therefore a security bond were given by the Government on behalf of the Secretary of State for India in Council, Section 145 would not apply to the case, as the Secretary of State would not be personally liable under the bond.³ For the same reason, where a surety bond does not create a personal liability but merely creates a *charge or mortgage* on the surety's property, it cannot be enforced by proceedings under *this Section*.⁴ Where, however, the charge on the surety's property is declared by the *decree* itself, the liability can be enforced by executing the

4. ('33) AIR 1933 Mad 678 (678, 679): 56 Mad 687.

Note 7

1. ('22) AIR 1922 Bom 340 (341): 46 Bom 702.
2. ('25) AIR 1925 Rang 135 (137): 2 Rang 567.
3. ('12) 16 Ind Cas 118 (119): 39 Cal 1048.
4. ('36) AIR 1936 Sind 244 (246): 30 Sind L R 177.
- [See also ('22) AIR 1922 Bom 340 (340, 341): 46 Bom 702.]
5. ('21) AIR 1921 Cal 559 (560).
6. ('36) AIR 1936 Sind 244 (246): 30 Sind L R 177.
7. ('36) AIR 1936 Cal 143 (145).
8. ('11) 12 Ind Cas 692 (693) (Mad).
9. ('26) AIR 1926 Lah 544 (544).

Note 8

1. ('17) AIR 1917 All 104 (106): 39 All 225. (Observation of Banerji, J.)
2. ('16) AIR 1916 Cal 30 (30).
3. ('84) AIR 1934 Mad 262 (263): 57 Mad 803.
4. ('11) 9 Ind Cas 862 (872): 38 Cal 754.
5. ('19) AIR 1919 P C 55 (59): 42 All 158: 46 Ind App 228: 22 Oudh Cas 212 (PC).
6. ('17) AIR 1917 All 104 (105, 106): 39 All 225.
7. ('16) AIR 1916 Cal 30 (31). (Equitable charge on Government Promissory note.)
8. ('28) AIR 1928 Bom 42 (48): 52 Bom 72.
9. ('34) AIR 1934 Lah 138 (139): 15 Lah 282 (FB).
10. (Per Division Bench— Bond creating both per-

decree and no suit on the mortgage is necessary.⁵ The reason is that in such a case the surety is virtually in the position of a judgment-debtor.⁶

Where the surety makes himself personally liable and, in addition, charges his property, it is only the *personal* liability that can be enforced under this Section.⁷ The decree-holder may give up the mortgage and enforce the *personal liability* of the surety by attachment and sale of the property charged.⁸ O. 34 R. 14 does not preclude such a course because there is no *decree* for the payment of money against the surety in such cases as required by that Rule.⁹ But where the surety has transferred his equity of redemption to another person, his *personal liability* cannot be enforced by the sale of the *mortgaged property*, because it no longer belongs to him. In such a case the property can only be brought to sale by a suit on the mortgage.¹⁰

Where a judgment-debtor himself gives his property as security, the property can be sold in execution under Section 47.¹¹

A surety for costs payable by a party to a suit is personally liable for the costs and the mere fact that he deposits a certain amount by way of security does not exclude his personal liability.¹²

The surety's liability is co-extensive with that of the judgment-debtor and he is jointly and severally liable with the judgment-debtor for the decree amount. A decree against the principal can, in fact, be treated as a decree against him.¹³ Hence, the party for whose benefit security has been given is not bound to execute the decree against the judgment-debtor before proceeding against the surety,¹⁴ except where the decree otherwise provides.¹⁵ Within the limits prescribed by the security bond, the

sonal liability and hypothecating property — Surety can be proceeded against under this Section—AIR 1929 Lah 393, Followed.)

(‘36) AIR 1936 All 549 (551).

5. (‘26) AIR 1926 Cal 889 (891, 892) : 54 Cal 1.

(‘28) AIR 1928 Lah 209 (212).

6. (‘28) AIR 1928 Lah 209 (210).

7. (‘34) AIR 1934 Oudh 139 (140).

(‘35) AIR 1935 Oudh 510 (514, 515) : 11 Luck 449.
(Surety bond executed by member of joint Hindu family containing personal covenant — Personal liability of member is enforceable after his death against his son.)

8. (‘15) AIR 1915 Cal 533 (534).

(‘26) AIR 1926 Bom 279 (280) : 50 Bom 339.

(‘27) AIR 1927 Mad 416 (420).

(‘17) AIR 1917 Pat 489 (489).

(‘16) AIR 1916 All 57 (59) : 38 All 327.

(‘17) AIR 1917 Pat 596 (596) : 2 Pat L Jour 197.
[See also (‘17) AIR 1917 All 104 (106) : 39 All 225.]

9. (‘17) AIR 1917 Pat 596 (596) : 2 Pat L Jour 197.

(‘16) AIR 1916 All 57 (59, 60) : 38 All 327.

(‘17) AIR 1917 Pat 489 (489).

See the following cases:

(‘28) AIR 1928 Lah 802 (803, 804). (O. 34 R. 14 not being applicable in the Punjab, it is no bar to the surety's liability being enforced against the mortgaged property.)

(‘13) 18 Ind Cas 900 (904) (Cal) (FB). (Property already under attachment given as security — O. 34 R. 14 is no bar to sale of property consequent on the attachment.)

(‘17) AIR 1917 Cal 82 (83, 84). (But where a suit is brought on the security bond and a money decree is obtained therein, the mortgaged pro-

perty cannot be sold under the decree as O. 34 R. 14 clearly applies.)

10. (‘17) AIR 1917 All 104 (106) : 39 All 225.

11. (‘24) AIR 1924 Cal 485 (487) : 51 Cal 150.

(‘18) AIR 1918 Mad 442 (442) : 41 Mad 327.

(‘75) 2 Ind App 219 (233) (PC).

(‘30) AIR 1930 Pat 108 (109) : 8 Pat 801.

(‘03) 30 Cal 1060 (1063). (Decision to contrary in 32 Cal 494 is not sound law especially in view of Privy Council decision in 2 Ind App 219 (PC).)

12. (‘32) AIR 1932 Mad 188 (188).

13. (‘34) AIR 1934 Bom 252 (254) : 58 Bom 485.

(‘38) AIR 1938 Nag 148 (149) : 1 L R (1939) Nag 536. (Section 145 permits the execution of a decree (passed against a stranger) against the surety as though it were a decree passed against the surety — It may be that he is a party only for a limited purpose.)

14. (‘33) AIR 1933 Nag 287 (289). (This Section must be read with S. 128 of the Contract Act.)

(‘29) AIR 1929 Lah 393 (394).

(‘13) 20 Ind Cas 540 (541) : 7 Sind L R 19.

(‘26) AIR 1926 All 657 (657).

(‘29) AIR 1929 Lah 205 (206).

(‘25) AIR 1925 Lah 552 (555).

(‘21) AIR 1921 Nag 99 (100).

15. (‘27) AIR 1927 Lah 846 (846). (Cf. AIR 1928 Lah 209.)

(‘79) 4 Cal 331 (334).

(‘95) 19 Bom 578 (581). (Partition decree—Judgment-debtor depositing in Court property in obedience to decree—Execution must first proceed against property.)

[See also (‘32) AIR 1932 P C 131 (133) (PO). (Surety for deficiency in mortgage suit pending

surety's liability extends to any amount recoverable from the judgment-debtor.¹⁶ Where a surety undertakes a liability not contained in the decree, he cannot afterwards dispute it.¹⁷ The fact that security has been given does not take away any legal rights which the decree-holder may otherwise have. Hence, where security has been given by the judgment-debtor, the decree-holder is not bound to proceed only against the properties specified in the security bond but is entitled to attach and sell any property of the judgment-debtor which he could otherwise proceed against.¹⁸ Where a Hindu father has become liable as a surety under this Section, the liability can be enforced by execution proceedings under this Section against the sons' share in the joint family property to the same extent as if a decree had been passed against the father.¹⁹

9. Discharge of surety. — The question whether a surety has incurred liability under his bond depends upon the terms of the bond.¹ Where there is a doubt

appeal—Surety liable only after hypotheca is exhausted and deficiency determined.)]

16. ('29) AIR 1929 All 905 (906).

('07) 30 Mad 167 (168). (Decree against judgment-debtor for Rs. 5,000 and against surety for Rs. 9,000. Amounts received on rateable distribution of assets recovered from judgment-debtor plus amount recoverable from surety must not exceed Rs. 5,000.)

('29) AIR 1929 Lah 386 (387). (Sapurdar's liability not limited to price of article but extends to decree amount.)

('16) AIR 1916 Pat 66 (67). (Surety for removal of attachment — Surety's liability extends to decree amount.)

('99) 23 Bom 478 (483, 484). (Surety not liable where liability expressly excluded.)

('10) 5 Ind Cas 189 (141) (Cal). (Surety liable for sale expenses and poundage fees.)

17. ('27) AIR 1927 Mad 416 (421). (Relying on 2 Ind App 219 (PC).)

[But see ('25) AIR 1925 Pat 128 (129).]

18. ('18) AIR 1918 Pat 384 (385).

19. ('38) AIR 1938 Nag 148 (149); ILR (1939) Nag 536.

('35) AIR 1935 Oudh 510 (514, 515) : 11 Luck 449.

Note 9

1. See the following cases:

('14) AIR 1914 Low Bur 54 (55).

('38) AIR 1938 Mad 360 (361, 362).

('16) AIR 1916 Lah 169 (170). (Surety for appearance of defendant—Notice not reaching defendant—Defendant not appearing—Surety not liable.)

('70) 14 Suth W R 410 (411). (Security for restitution of property taken in execution — No execution held—Surety not liable though decree reversed.)

('87) 14 Cal 757 (760). (Obligation to produce debtor not discharged by his voluntary appearance in Court for his own purposes and then disappearing.)

('17) AIR 1917 Mad 237 (238, 239). (Surety to produce debtor in Court—Bond providing for notice to surety—Surety may waive notice.)

('18) AIR 1918 Lah 134 (135). (Bond making surety liable if dispute not settled—Surety not liable if dispute is compromised.)

('28) AIR 1928 Lah 974 (975). (Surety to produce judgment-debtor on a day fixed—Decree-holder absent on that day—Surety is not exempt.)

('21) AIR 1921 Pat 72 (73) : 5 Pat L Jour 417. (Surety for debtor filing insolvency petitions—Failure of debtor to do so within the prescribed time—Surety liable.)

('28) AIR 1928 Lah 696 (697). (Surety to produce judgment-debtor on a particular day—Court closed on that day—Surety not bound to produce on any other day.)

('24) AIR 1924 Lah 490 (491, 492). (Surety for appearance of debtor on any hearing till final decision — Judgment-debtor appearing and obtaining an adjournment — Judgment-debtor not appearing at adjourned hearing—Surety is liable.)

('31) AIR 1931 All 243 (244) : 52 All 1014. (Surety for production of judgment-debtor—Judgment-debtor produced on the due date — Surety not liable for further default.)

('25) AIR 1925 Rang 209 (209) : 3 Rang 53. (Operative portion of bond and not recital controls its meaning.)

('24) AIR 1924 Rang 347 (347). (Surety to produce debtor obtaining adjournment on false affidavit and producing debtor on the adjournment date—Surety is released though he may be proceeded against criminally.)

('32) AIR 1932 Mad 168 (168).

('18) AIR 1918 Cal 488 (489). (Security on behalf of claimant of attached property.)

('37) AIR 1937 Rang 189 (192). (Preliminary decree on mortgage—Agreement between judgment-debtor and creditor to pay mortgage amount by instalments and on failure of one instalment, creditor to bring to sale mortgaged property—Sons of judgment-debtor also binding themselves as sureties to make up deficiency — Failure of debtor to pay instalment but property not brought to sale—Creditor proceeding against mortgagor and surety—No liability held attached to surety until mortgage property was sold.)

('38) AIR 1938 Nag 259 (261) : I L R (1939) Nag 276. (Appeal by judgment-debtor against decree—Execution stayed on judgment-debtor's providing surety for due performance of any decree likely to be passed against him by Appellate Court.—Surety using Form No. 3, Appendix G instead of Form 2, Appendix G of First Schedule to

decree also.¹³ The liability cannot, however, apply to a different proceeding altogether. Where a person gives security for production of property in one suit, he cannot be called upon to produce it in another.¹⁴ As regards the liability and discharge of a surety under Section 55 (4), see Note 12 to Section 55, *ante*, and the undermentioned cases.¹⁵

Section 17 of the Provincial Small Cause Courts Act requires that a defendant applying to set aside an *ex parte* decree should furnish security for the performance of the decree. It has been held that the security only applies to the *ex parte* decree itself in case the application should fail. Hence, where the *ex parte* decree is set aside the surety is discharged and he is not liable in respect of the decree that may be passed subsequently.¹⁶

A surety for the appearance of judgment-debtor is discharged if the judgment-debtor is in jail for a criminal offence and cannot be produced on the required date.¹⁷ A surety for the appearance of the judgment-debtor if a particular pending proceeding is dismissed, is discharged if on the dismissal of such proceeding the judgment-debtor surrenders himself before the Court.¹⁸ Where a judgment-debtor is released on security, but owing to the default of the decree-holder the execution petition is dismissed and the surety discharged, the liability is not automatically revived by the mere restoration of the execution petition.¹⁹ It has been held in Rangoon²⁰ that where the surety has bound himself to make the judgment-debtor pay the decree amount on a specified date or, in default, to pay it himself, the judgment-debtor's death before the prescribed date does not end the surety's liability. This view has, however, been dissented from in the undermentioned case.²¹ A surety under O. 38 R. 5 (attachment before judgment) is not discharged by the death of the defendant pending the suit where the cause of action survives against the legal representative and the legal representative is brought on the record.²² But where a person who is not the legal representative is brought on the record and a decree is passed against the estate of the deceased, neither the legal representative nor the surety is bound by the decree.²³

The surety's liability being co-extensive with that of the principal debtor, the extinction or diminution of the latter's liability operates as a discharge of the surety to a corresponding extent.²⁴ Conversely, a surety is bound as long as the judgment-debtor is bound. Hence, when the decree is sought to be executed against the surety, no uncertified

13. ('37) AIR 1937 All 682 (684).

14. ('24) AIR 1924 All 64 (65).

15. ('24) AIR 1924 Pat 487 (488). (Liability under Sec. 55 (4) enures to the benefit of the Court as well as to that of the decree-holder.)

(13) 21 Ind Cas 612 (613, 614) (Cal).

16. ('36) AIR 1936 All 593 (593).

(38) AIR 1938 Nag 75 (75, 76) : I L R (1939) Nag 371.

17. ('23) AIR 1923 Rang 26 (26) : 4 Upp Bur Rul 99.

[But see ('22) AIR 1922 All 390 (390) : 44 All 174. (Where surety knew at the time of entering into the bond about the impending imprisonment, he cannot claim to be discharged by such imprisonment.)]

18. ('33) AIR 1933 Cal 337 (338).

19. ('34) AIR 1934 Lah 349 (351).

[See ('37) AIR 1937 Mad 721 (723). (A surety who secures the release of an arrested judgment-debtor by undertaking to produce the judgment-debtor whenever called upon by the Court until the execution petition is finally disposed, cannot

claim to be discharged from his liability on such a dismissal of the execution petition; he continues liable, and his liability can be enforced in the subsequent application for revival.)]

20. ('10) 8 Ind Cas 985 (986) (Low Bur).

21. ('23) AIR 1923 Rang 26 (26) : 4 Upp Bur Rul 99.

22. ('16) AIR 1916 Bom 55 (56) : 41 Bom 402.

(24) AIR 1924 Lah 428 (429).

23. ('27) AIR 1927 Bom 63 (65) : 50 Bom 802.

24. ('70) 13 Suth W R 403 (406). (Decree against judgment-debtor being set aside in appeal.)

(88) 12 Bom 71 (76). (Decree against principal debtor being reversed in appeal.)

(23) AIR 1923 Mad 340 (341, 344). (Execution by merger of estates of principal debtor and creditor.)

(76) 25 Suth W R 250 (251).

(95) 19 Bom 578 (581). (Debtor himself performing one portion of obligation—Surety liable only for the rest.)

payment by the judgment-debtor can be recognized by the executing Court²⁵ [O. 21, R. 2 (3)]. The Sind Court has expressed a contrary view on this point.²⁶

Where the Court varies the terms of the security bond without the surety's consent, the surety is discharged.²⁷ But where the variation is obviously for the benefit of the surety, he is not discharged.²⁸ Similarly, if the Court in whose favour the surety bond is executed is not in the least responsible for the change in the situation of the surety, the surety is not entitled to ask the Court to relieve him of his obligation under the bond on the ground that the decree-holder has arrived at a certain arrangement with the debtor.²⁹

Is the surety discharged by the failure of the creditor to sue the principal debtor within the period of limitation? Yes, according to Allahabad,³⁰ Rangoon³¹ and Nagpur.³² No, according to Bombay,³³ Calcutta³⁴ and Madras.³⁵ The conflict is due to this reason. Under Section 134, Contract Act, *any omission* of the creditor, the legal consequence of which is the discharge of the principal debtor, operates as a discharge of the surety. Under Section 137 the mere forbearance of the creditor to sue the principal debtor does not discharge the surety. According to the first group of Courts mentioned above, Section 134 is the Section applicable to such cases; while according to second group it is Section 137. In a recent decision of the Allahabad High Court³⁶ it has been held that Section 134 of the Contract Act does not apply to a security bond executed in favour of the Court.

A contract³⁷ between the creditor and principal debtor, by which the creditor promises to give time to,³⁸ or not to sue,³⁹ the principal debtor, discharges the surety.

25. ('23) AIR 1923 Cal 313 (313).

('26) AIR 1926 Mad 674 (675) : 49 Mad 325.

26. ('26) AIR 1926 Sind 105 (107) : 20 Sind LR 362.

27. ('26) AIR 1926 Bom 565 (566).

28. ('26) AIR 1926 Sind 105 (108) : 20 Sind LR 362.

29. ('35) AIR 1935 Nag 253 (263, 264) : 31 Nag L R (Sup) 88. (The obligation which a surety incurs under the bond which he gives to the Court under the Code of Civil Procedure, is excluded from the definition of a "contract of guarantee" as contained in the Contract Act, and the provisions of Ss. 133 to 139 of the Act, cannot be made applicable to the bond given by a surety to the Court. The liability of the surety under such a bond may, however, be determined by the Court if it has itself been responsible for a change in the situation which materially affects the terms of the surety bond.)

[See also ('36) AIR 1936 Lah 470 (471).]

30. ('02) 24 All 504 (508).

('89) 11 All 310 (313).

('86) 8 All 259 (261).

[See ('16) AIR 1916 Pat 203 (204) : 1 Pat L Jour 497. (The Patna High Court without deciding the point has expressed a leaning to the Allahabad view.)]

31. ('96) 2 Upp Bur Rul 308 (310).

[See also (1900) 1 Low Bur Rul 150 (150). (Waiver of claim against principal debtor—By virtue of Section 134, Contract Act, surety is discharged.)]

32. ('06) 2 Nag L R 42 (44).

33. ('25) AIR 1925 Bom 244 (245) : 49 Bom 202.

('81) 5 Bom 647 (652).

34. ('86) 12 Cal 330 (333).

[See ('36) 40 Cal W N 465 (467). (The mere fact that an execution against the principal judgment-debtor has been allowed to be barred by lapse of time is no ground for the release or discharge of the surety.)]

35. ('10) 33 Mad 308 (310).

36. ('36) AIR 1936 All 549 (552).

37. See Section 136, Contract Act.

38. ('27) AIR 1927 Cal 239 (240).

('32) AIR 1932 Pat 313 (314) : 11 Pat 590.

('33) AIR 1933 Mad 309 (312) : 56 Mad 625.

('79) 4 Cal 331 (336) (PO).

('79) 4 Cal 132 (134). (Acceptance of interest in advance operates as promise to give time.)

(1900) 22 All 351 (352). (The agreement to give time must be supported by consideration.)

('37) AIR 1937 Mad 584 (585). (But there is one exception to this general rule and that is when the decree-holder gives concession to the judgment-debtor, but his right to proceed against the surety is specifically reserved.)

('33) AIR 1933 Mad 309 (312) : 56 Mad 625.

[See ('36) AIR 1936 Mad 576 (580). (Receiver appointed under consent order—Security for discharge of his duties—Consent order providing that on default being made by receiver plaintiff to have another person appointed as receiver—Receiver making default—Plaintiff granting time to receiver—Surety discharged as contract was varied.)]

[See also ('39) AIR 1939 Lah 368 (368) : 41 Pun L R 282 (283). (Judgment-debtor given time after time to pay decree without surety's consent—Surety is not liable.)]

39. [See ('26) AIR 1926 All 657 (658): (Mere col-

unless the surety assents to such contract.⁴⁰ Is the surety under this Section discharged by the creditor entering into a compromise with the principal debtor? The answer to this question depends on the terms of the security bond.⁴¹

Under Sections 142 and 143 of the Contract Act, 1872, a security which the creditor has obtained by misrepresentation or silence as to material circumstances is invalid.⁴² A surety is discharged by the failure of the consideration for his bond.⁴³ Where the surety has not performed his obligation because the decree-holder has expressly dispensed with its performance, the surety is not liable to be proceeded against, under his bond.⁴⁴ Where a surety dies after the accrual of his liability under the bond, the liability can be enforced against his legal representatives to the extent of his estate in their hands.⁴⁵ Where the surety is not otherwise discharged from his liability the Court has no power to make an order for his discharge⁴⁶ except in the case provided for by O. 38 R. 3 (arrest before judgment).⁴⁷ The High Court of Allahabad has, however, held in the undermentioned case⁴⁸ that the Court to which a guarantee is given has power in a proper case to exonerate the surety from all future transactions.

A surety may be precluded by estoppel⁴⁹ or *res judicata*,⁵⁰ from disputing his liability under the bond.

Where a bond is given to the Court, the liability of the surety cannot be determined by the surety by giving notice as in the case of a continuing guarantee.⁵¹

Where security for the appearance of a judgment-debtor in the course of certain execution proceedings has been given, the termination of such proceedings will not absolve the surety from a liability already incurred by him before such termination.⁵²

9a. Surety, if can recover sum forfeited. — Where a man stands surety for the appearance of another, he should take every precaution to ensure the carrying out of his undertaking and he cannot be allowed on grounds of public policy to recover any sum forfeited under the bond from the principal or from any one else; for, if he is so allowed, it would only tend to render the surety callous and the whole object of demanding the bond would be defeated.¹

lusion not amounting to such contract is not enough.]]

40. ('01) 23 All 137 (147) : 27 Ind App 168 (PC). [Surety may have consented that the dealings between the creditor and the principal debtor shall not affect his liability.]

41. ('31) AIR 1931 Bom 55 (56) : 55 Bom 97. (Terms not excluding compromise decree.)

('94) 1894 Bom P J 25 (25, 26). (Do.)

('28) AIR 1928 Cal 177 (178) : 55 Cal 91. (Decree on award by arbitrator—Bond construed as providing only for decree after contest.)

('20) AIR 1920 Mad 355 (357) : 43 Mad 272. (Terms not limiting liability to contest decree.)

('26) AIR 1926 Cal 518 (518). (Order giving leave to defend suit under O. 37—Security bond passed without knowledge and consent of surety—Surety discharged.)

42. ('71) 3 N W P H C R 264 (266).

43. ('25) AIR 1925 Lah 552 (555).

('29) AIR 1929 Lah 770 (771) : 11 Lah 77.

44. ('25) AIR 1925 All 5 (6).

('24) AIR 1924 Mad 241 (242). (Merely asking for production of debtor on a subsequent date does not amount to waiver of obligation to produce on a prior date.)

[See also ('37) AIR 1937 Nag 269 (269, 270) : I L R (1939) Nag 497. (Surety undertaking that judgment-debtor would file insolvency within one month—Surety and judgment-debtor filing within one month certificate showing application to Debt Conciliation Board—Execution case struck off thereon—Order accepted by decree-holder—Security cannot be realized.)

45. ('14) AIR 1914 Mad 328 (329) : 38 Mad 1120. ('26) AIR 1926 Sind 294 (295) : 19 Sind L R 165.

46. ('27) AIR 1927 Mad 294 (295).

('28) AIR 1928 Lah 61 (62).

47. ('29) AIR 1929 Lah 435 (436).

[But see ('70) 13 Suth W R 403 (405).]

48. ('32) AIR 1932 All 262 (262, 263) : 54 All 293.

49. (06) 4 Cal L Jour 311 (315, 316).

('36) AIR 1936 Mad 990 (991).

50. ('07) 31 Bom 128 (135, 136). (Abandonment of plea—*Res judicata*.)

('30) AIR 1930 Lah 80 (80). (*Res judicata*.)

51. ('36) AIR 1936 Mad 576 (578).

52. ('39) AIR 1939 Sind 270 (272) : I L R (1939) Kar 401.

Note 9a

1. ('32) AIR 1932 Lah 23 (23).

10. Form of surety bond. — A surety bond may be in favour of the Court or the decree-holder. No particular form is necessary.¹ To make the Section applicable, it is not necessary that the surety's liability must have accrued upon an application presented to the Court or a security bond filed in the proceedings.² According to the High Court of Madras,³ however, the Section does not apply to surety bonds executed *outside Court*.

It has been held that a surety bond charging immovable property with a sum exceeding Rs. 100 is compulsorily registrable, and is inadmissible in evidence without registration.⁴

10a. Enforceability of surety bond in execution apart from the Section. — A security can be enforced in execution under the inherent powers of the Court apart from the provisions of this Section.¹

11. Maintainability of separate suit by or against the surety. — As has been seen in Note 63 to Section 9 *ante*, a regular suit is not barred by the fact that a summary and concurrent remedy is also provided for. It was held under the old Section that the summary remedy under it was *additional* and not exclusive, and therefore it did not bar a regular suit to enforce the security.¹ The present Section provides that the surety "shall, for the purposes of appeal, be deemed a party within the meaning of Section 47." This does not make the surety a party to the suit for all purposes.² He is a party only for the limited purpose of appeal. Hence, a *suit* to enforce the security is not barred under the present Section also.³ Similarly, a suit *by* the surety to negative

Note 10

1. ('26) AIR 1926 Cal 877 (879): 53 Cal 515. (Obiter—Contract of suretyship may be oral.)
- ('33) AIR 1933 Lah 913 (914): 15 Lah 44. (It need not be in the form of a security bond or in writing or in favour of the Court.)
- ('35) AIR 1935 Mad 209 (210): 58 Mad 777.
- ('36) AIR 1936 Lah 463 (464). (Surety making statement before Court and undertaking liability.)
2. ('12) 16 Ind Cas 859 (860) (Cal).
- ('30) AIR 1930 Lah 185 (186). (Surety signing deed of compromise, enough.)
- ('35) AIR 1935 Mad 209 (210): 58 Mad 777. (Letter addressed to decree-holder by surety undertaking to discharge the decree debt held sufficient.)
- [See also ('39) AIR 1939 All 517 (517). (On dismissal of his objection to attachment of certain property in execution of a decree against the judgment-debtor, objector suing decree-holder for a declaration of his title to the same but compromising suit, and on decree-holder's reducing his claim undertaking to pay the amount within a certain time—Objector is a surety under S. 145 and is liable as the judgment-debtor; and the intention of the parties being to keep alive the original suit the decree-holder at his option can proceed in either of the suits.)]
3. ('19) AIR 1919 Mad 813 (815). (Surety bond taken out of Court and not recorded by Court—Section not applicable.)
- ('19) AIR 1919 Mad 527 (527). (Security bond taken out of Court and filed in Court—Section applies.)
- [But see (1935) 41 Mad L W 144 (146). (Section applicable to suretyship outside Court. AIR 1919 Mad 813, Dissented from.)]

4. ('99) 26 Cal 222 (224). (However the bond can be admitted to prove personal liability of the surety.)
- ('08) 31 Mad 330 (332).
- ('10) 8 Ind Cas 985 (986). (However if the bond contains personal covenant it may be admitted as regards such personal covenant.)
- [But see ('34) AIR 1934 Lah 138 (141): 15 Lah 282 (FB).]

Note 10a

1. ('33) AIR 1933 Mad 691 (693): 56 Mad 989.
- ('33) AIR 1933 Mad 722 (723).
- ('26) AIR 1926 Mad 1005 (1007).

Note 11

1. ('04) 7 Oudh Cas 210 (211).
- ('74) 6 N W P H C R 261 (264).
- ('03) 1903 Pun L R No. 31 page 94.
2. ('28) AIR 1928 All 527 (528). (Application by surety to have sale set aside does not fall within S. 47.)
- ('31) AIR 1931 Rang 206 (207): 9 Rang 434.
- ('39) AIR 1939 Lah 175 (176).
3. ('11) 12 Ind Cas 549 (550): 36 Bom 42.
- ('28) AIR 1928 Rang 249 (251): 6 Rang 474.
- ('35) AIR 1935 All 373 (374). (AIR 1939 All 266 dissented — Case law referred — Suit against superddar.)
- ('37) AIR 1937 Cal 625 (627): 1 I L R (1937) 2 Cal 638.
- ('39) AIR 1939 Lah 175 (176).
- ('38) AIR 1938 Nag 148 (149): 1 I L R (1938) Nag 536. (Hindu father incurring liability as surety — Decree-holder can sue to enforce the surety's liability, and in execution proceed against the sons' share also—But this does not mean that

his liability is not barred.⁴ But a suit for injunction restraining the *executing Court* from executing the decree against the surety cannot be maintained.⁵

Until an application is made for execution against the surety he does not become a "party". Hence, he cannot apply to the executing Court for cancellation of his bond.⁶ Nor will the rejection of such application made by him, where he makes one, constitute *res judicata*.⁷ But when it is sought to enforce the decree against him, he becomes a "party" and his objections therefore have to be determined in the proceedings and he cannot be compelled to file a separate suit to vindicate his objections.⁸ For the same reason, his omission to raise any objection in proceedings against him under this Section will make the decision as to his liability *res judicata* and he cannot dispute it afterwards.⁹

A surety cannot have a sale set aside by separate suit, where it is vitiated only by irregularities and not for want of jurisdiction.¹⁰

See also Note 9 to Section 47.

12. Appeal. — This Section provides that the decree or order may be executed against the surety "in the manner herein provided for the *execution of the decrees*" and that the surety shall for the purposes of appeal "be deemed a party within the meaning of Section 47." Hence an order enforcing¹ or refusing to enforce² a security under this Section is appealable as a *decree*. This was also the law under the old Code.³ It has been held by the High Court of Madras that even where Section 145 does not apply, but the surety bond is enforced without recourse to suit in the manner mentioned by the Privy Council in A. I. R. 1919 Privy Council 55 referred to in Note 2b, *ante*, there is a right of appeal.⁴

the sons' shares cannot be proceeded against by execution proceedings under this Section.)

[But see ('29) AIR 1929 All 266 (266).]

4. ('27) AIR 1927 Bom 63 (66) : 50 Bom 802.

('25) AIR 1925 Lah 618 (618). (Left open.)

('37) AIR 1937 Lah 658 (660) : I L R (1938) Lah 140.

[See ('11) 9 Ind Cas 862 (872) : 38 Cal 754. (Suit to enforce liability—Surety's objections to his liability can be gone into in such suit.)]

[But see ('05) 23 Mad 117 (118). (This was not followed in AIR 1920 Mad 75.)]

('29) AIR 1929 All 266 (266).]

5. ('25) AIR 1925 Lah 618 (618).

6. ('20) AIR 1920 Mad 75 (77) : 43 Mad 325.

7. ('25) AIR 1925 Lah 552 (553).

8. ('25) AIR 1925 Lah 552 (553).

('23) AIR 1923 Mad 340 (342).

9. ('28) AIR 1928 All 527 (530) : 51 All 346.

('30) AIR 1930 Lah 399 (400).

[See ('25) AIR 1925 Lah 618 (618).]

10. ('28) AIR 1928 All 527 (529) : 51 All 346.

Note 12

1. ('15) AIR 1915 Cal 688 (688).

('34) AIR 1934 Lah 538 (539). (When surety does not appeal, the order is final and cannot be questioned in subsequent proceedings.)

('11) 9 Ind Cas 862 (872) : 38 Cal 754.

('15) AIR 1915 Cal 287 (287, 288).

('32) AIR 1932 Bom 77 (78).

('35) AIR 1935 Rang 39 (41).

[See also ('33) AIR 1933 Rang 64 (66) : 11 Rang (134).]

2. ('17) AIR 1917 Upp Bur 16 (17) : 2 Upp Bur Rul. 103. (Security under S. 55 (4).)

('15) AIR 1915 Mad 653 (654).

('33) AIR 1933 Nag 287 (288).

[See also ('36) AIR 1936 Lah 684 (684). (Order of District Judge under S. 299, Succession Act, refusing to assign a bond should not be considered to be of a purely formal or interlocutory nature and as such not open to appeal. The order might be considered to be in some respects similar to one under S. 145, C. P. C., and an order under that Section is appealable, so order under S. 299 is also appealable.)]

3. ('88) 12 Bom 71 (76).

('03) 13 Mad L Jour 484 (484, 485). (Surety under S. 336 (now S. 55) can also appeal.)

('71) 15 Suth W R 538 (540).

('67) 8 Suth W R 24 (24).

('86) 1886 Pun Re No. 104, page 249.

('93) 15 All 183 (185). (But surety under S. 336, now S. 55, could not appeal as he was not a surety for the payment of the amount of the decree and so could not be considered to be a party.)

[But see ('02) 1902 Pun L R No. 58, p. 210.

('02) 1902 Pun Re No. 72, p. 261.]

4. ('33) AIR 1933 Mad 780 (781) : 56 Mad 909.

('38) AIR 1938 Mad 215 (217). (Surety depositing money in Court and therefore not personally liable—S. 145 therefore not applicable—Still there is right of appeal as under Privy Council ruling in A I R 1919 P C 55 surety is "party" to proceedings.)

[But see ('33) AIR 1933 Mad 342 (342). (Per Walsh, J.)]

But, until an application is filed for execution against a surety under this Section, he is not a *party*⁵ and hence an order discharging him before such application is made is not appealable.⁶

This Section does not apply to an order for refund of security. Such refund can be ordered only under Section 151. Hence no appeal lies from an order for refund of security.⁷

13. Limitation. — The general trend of opinion is that an application for execution against a surety is governed by Article 182 of the Limitation Act, whether the security was given before or after the decree.¹ The Chief Court of Oudh has, however, held that where security is given after decree, the application does not fall within any of the clauses of Article 182 of the Limitation Act and is therefore governed by Article 181 of that Act,² though in a later decision the same Court has proceeded on the footing of the applicability of Article 182 to such cases.³ Even among the High Courts which hold that Article 182 applies, there is a difference of opinion as to whether the application is governed by Explanation I to that Article or clause (5) of that Article. According to the High Courts of Calcutta,⁴ Lahore⁵ and Patna,⁶ where security is given after the passing of the decree, the decree cannot be said to have been "jointly passed" against the judgment-debtor and the surety within the meaning of Explanation 1 to Article 182 and that an application for execution filed against the judgment-debtor alone or the surety alone does not save limitation against the other. The same view has been expressed by the High Courts of Bombay⁷ and Rangoon⁸ even when the security is given in the suit *before* the passing of the decree. The High Court of Allahabad, while agreeing that the decree passed in such cases is not a joint decree, nevertheless holds that an application against the one will save limitation against the other under clause (5) of Article 182.⁹ The Chief Court of Oudh has also held the same view in the undermentioned case.¹⁰

Where an appeal is preferred against a decree for the performance of which security has been given, limitation for an application to execute the decree against the surety under this Section is three years from the date of the *appellate* decree under clause (2) of Article 182 of the Limitation Act.¹¹

As to whether a decree-holder who has allowed his remedy against the judgment-debtor to become time-barred is entitled to proceed against the surety, see Note 9 above.

14. Notice to surety. — Notice to the surety is a condition precedent to the validity of the proceedings against him under this Section.¹ The surety may, however,

5. ('20) AIR 1920 Mad 75 (77) : 43 Mad 325.

6. ('33) AIR 1933 All 382 (383, 384) : 55 All 548.
(Application by surety for cancellation of surety bond—Order passed thereon is not open to appeal by decree-holder.)

('31) AIR 1931 Lah 503 (503). (Do.)

See also cases cited in foot-notes 6 and 7 in Note 11, *supra*.

[See ('16) AIR 1916 Bom 55 (56) : 41 Bom 402.
(Revision lies if S. 115 applicable.)]

[But see ('25) AIR 1925 All 344 (345).]

7. ('26) AIR 1926 Lah 544 (544).

Note 13

1. See cases cited in foot-notes 4 to 9, *infra*.

('37) AIR 1937 Cal 452 (454).

2. ('33) AIR 1933 Oudh 209 (212, 213) : 8 Luck 427.

3. ('37) AIR 1937 Oudh 351 (353) : 13 Luck 353.

4. ('26) AIR 1926 Cal 267 (269).

5. ('22) AIR 1922 Lah 203 (209).

[See ('35) AIR 1935 Lah 174 (175). (In this case it seems to have been assumed that Art. 181 will apply to such cases.)]

6. ('29) AIR 1929 Pat 595 (596) : 8 Pat 310.

('29) AIR 1929 Pat 597 (601).

7. ('07) 31 Bom 50 (54).

('99) 23 Bom 478 (483).

8. ('28) AIR 1928 Rang 282 (283) : 6 Rang 334.

9. ('21) AIR 1921 All 291 (293) : 43 All 152.

('22) AIR 1922 All 481 (483) : 44 All 743.

10. ('37) AIR 1937 Oudh 351 (353) : 13 Luck 353.

11. ('20) AIR 1920 Bom 331 (331) : 44 Bom 34.

Note 14

1. ('78) 3 Cal 318 (319).

wave the notice, in which case it need not be given.² The notice need not be "in writing"³ as was necessary under the old Code. Nor need it necessarily be given by the Court.⁴ It may be given by the decree-holder.⁵ It may also be given by the Court to which the decree is sent for execution.⁶ It has been held that only one notice is required by this Section and where such notice has been given, a fresh notice is not necessary each time an application for execution is made against the surety.⁷

The mere *arrest* of the surety does not constitute the execution of the decree but *detention in prison* does constitute it. (See O. 21 R. 30.) Where notice is given to the surety at the same time as the order for arrest, *but before the order for imprisonment* (which is really the order for execution) the notice is valid.⁸

146. [New.] Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

[1882, *cf.* S. 582A. See Order 22.]

Synopsis

1. Legislative changes.
2. Scope and object of the Section.
3. "Save as otherwise provided."
4. Application for execution by or against representatives.
5. Proceeding or application.
6. Appeal. See Note 5.
7. Application to set aside *ex parte* decree.
8. "Claiming under," meaning of.
9. Legal representative need not be brought on the record in order to maintain an application under this Section.

('16) AIR 1916 Mad 1078 (1078, 1079).
 ('31) AIR 1931 Mad 828 (829). (Court cannot order execution against surety directly on failure to produce judgment-debtor after a notice to produce. A further notice to show cause against execution is necessary.)
 ('31) AIR 1931 Oudh 311 (311). (Pending order directing the sapurdar to deliver property in his custody on a certain date attachment of his property without notice is illegal.)
 ('23) AIR 1923 Rang 26 (26) : 4 Upp Bur Rul 99.
 ('28) AIR 1928 Rang 249 (251) : 6 Rang 474.
 ('25) AIR 1925 Rang 135 (137) : 2 Rang 567.
 ('29) AIR 1929 Lah 205 (206).
 ('25) AIR 1925 Lah 170 (171).
 ('36) 40 Cal W N 465 (467). (Service of notice—Proof—Record of service and of appearance of party in order sheet of Court is sufficient.)
 ('38) AIR 1938 Lah 593 (593) : I L R (1938) Lah 624. (It is immaterial however whether such notice is given by the Court which passed the decree or the Court to which it is sent for exe-

cution.)
 ('35) AIR 1935 Lah 145 (146).
 2. ('16) 19 Mad L Tim (Jour) 81 (82).
 ('37) AIR 1937 Lah 772 (777). (Objection of want of notice not raised in executing Court—Objection deemed to be waived.)
 3. ('37) AIR 1937 Lah 772 (776). (All that is necessary under the law is that before the attachment actually takes place, the surety should have notice of the order directing attachment, the object being that he may be able to raise objections, if any, to the validity of the order.)
 4. ('05) 29 Bom 29 (33).
 5. ('05) 29 Bom 29 (34).
 6. ('05) 29 Bom 29 (34).
 [See ('38) AIR 1938 Lah 593 (593) : I L R (1938) Lah 624. (It is immaterial whether notice is given by the Court which passed the decree or the Court to which it is sent for execution : AIR 1929 Lah 205 and 29 Bom 29, Relied on.)]
 7. ('36) 40 Cal W N 465 (466).
 8. ('27) AIR 1927 Lah 131 (132).

3. *A* files a suit for partition against *B*, *C* and *D*, and pending the suit mortgages his share to *X*. *A* thereafter dies leaving his widow. *X* applies to be impleaded as co-plaintiff or supplemental defendant. The application is not maintainable. The reason is that O. 22 R. 10 which governs such cases is not applicable inasmuch as there is no devolution or assignment absolutely of the plaintiff's interest on *X*, but only a derivative interest in the subject-matter. Section 146 cannot also be applied because, there is a specific provision governing such cases and a party cannot be allowed to avoid the conditions of such provision by purporting to proceed under the general provision.³

Similarly, O. 21 R. 16 precludes any one who is not a decree-holder or transferee of the decree by assignment in writing or by operation of law from applying to execute the decree. (See Note 4.)

See also the undermentioned decision.⁴

4. Application for execution by or against representatives. — Order 21 Rule 16 makes it clear that besides the decree-holder any person to whom the decree has been transferred by assignment in writing or by operation of law, may execute the decree. Section 146 cannot be read as extending the scope of O. 21 R. 16 as the former is expressly made subject to the other provisions of the Code. Hence, a transferee of property which is the subject-matter of a suit¹ or which is covered by a decree² is not entitled to apply for the execution of a decree in favour of the transferor, although he may be a person "claiming under" the decree-holder within the meaning of this Section.³ Further, such a transferee is not a transferee of the decree within the meaning of O. 21 R. 16.⁴

The expression "transferee" in Order 21 Rule 16 is however not confined to a transferee of the whole decree, but includes a transferee of a portion of the decree and hence such a person can apply to execute the decree.⁵

A decree may be executed against the property in the hands of a transferee thereof pending the suit.⁶

Where a decree-holder dies during the pendency of an execution application, his legal representatives may be substituted in the execution application and be allowed to continue the execution proceedings without a fresh application for execution.⁷ The same principle applies where the execution has to proceed against the legal representatives of a judgment-debtor who dies during the pendency of an execution application.⁸ It has also been held that an application by the legal representative of the decree-holder under O. 21 R. 16, in a pending execution application, is only a continuation of prior proceedings and not a fresh application for the purposes of Section 48 of the Code.⁹ (For fuller discussion, see O. 22 R. 12 Note 1.)

3. ('34) AIR 1934 Mad 485 (489).

4. ('35) AIR 1935 Cal 738 (739). (S. 73 permits rateable distribution only when decrees are against the same judgment-debtor. S. 146 cannot enlarge its scope as it is expressly made subject to the other provisions of the Code. By reason of S. 146 the words 'passed against the same judgment-debtor' in S. 73 cannot be read as 'passed against the same judgment-debtor or the legal representative of the same judgment-debtor'.)

Note 4

1. ('12) 17 Ind Cas 512 (513) (All).

('22) AIR 1922 Pat 563 (564).

2. ('27) AIR 1927 Mad 240 (241).

('08) 30 All 28 (30).

('24) AIR 1924 Bom 426 (427, 428). (30 All 28, Followed.)

('22) AIR 1922 All 98 (99). (Decision to contrary in AIR 1924 Mad 709 is opposed to authority. Moreover the judgment does not refer to O. 21 R. 16 or any of the rulings bearing upon it.)

3. ('19) AIR 1919 Mad 755 (756) : 41 Mad 510.

4. ('24) AIR 1924 Cal 661 (665) : 51 Cal 703.

5. ('21) AIR 1921 Mad 599 (601, 603, 605) : 44 Mad 919.

('28) AIR 1928 Lah 70 (71).

6. ('21) AIR 1921 Mad 126 (132).

7. ('32) AIR 1932 Mad 73 (80, 82, 83) : 55 Mad 352 (FB). (Dissenting from AIR 1927 Mad 184.)

('31) AIR 1931 Bom 423 (423).

('30) AIR 1930 Sind 283 (284) : 24 Sind L R 195.

('37) AIR 1937 Pesh 18 (19). (Transferee of decree or his legal representative can continue execution.)

8. ('31) AIR 1931 Mad 303 (308).

('28) AIR 1928 P C 162 (164) : 55 Ind App 227-3 Luck 314 (PC).

('09) 4 Ind Cas 839 (841) : 34 Bom 142.

('20) AIR 1920 All 171 (172) : 42 All 570.

[See also ('29) AIR 1929 Mad 275 (280).]

9. ('27) AIR 1927 All 165 (167) : 49 All 509.

('24) AIR 1924 Pat 576 (578) : 3 Pat 596.

5. Proceeding or application. — An appeal is a “proceeding” contemplated by the Section. Hence a person claiming under a party to the suit may prefer an appeal from the decree in the suit although he was not himself a party to the suit.¹

Applications under O. 21 R. 2,² or under O. 21 R. 94,³ or under O. 21 R. 95 and 98,⁴ or under O. 34 R. 5,⁵ are all examples of applications contemplated by the Section.

As to when a person can be said to “claim under” another, see Note 8 below.

6. Appeal. — See Note 5 above.

7. Application to set aside *ex parte* decree. — As has been observed in Note 2 above, there was a conflict of decisions under the old Code as to whether the legal representative of a defendant against whom an *ex parte* decree had been passed, could apply to set it aside. The present Section now makes it clear that such an application is maintainable.¹

8. “Claiming under,” meaning of. — A person “claiming under” a party to a litigation is one who —

- (1) has succeeded to the position of the latter in the litigation,¹ or
- (2) has acquired from him, subsequently to the commencement of the litigation, an interest in its subject-matter.² In this case he can be said to claim under the party *only in respect of the rights and interests* in property which he has so acquired.³ Further, the person claiming under the original party must be one who by a title derived from or under the party has *himself the right to take the proceeding or make the application* and not merely one who has a derivative interest in the property (like that of a mortgagee subsequent to suit) which may, in some manner, be affected by the result of the proceeding.⁴

Illustrations

(1) An *ex parte* decree is passed against A, a defendant in a suit. Subsequently, A dies. B, his legal representative, may apply to set aside the *ex parte* decree.⁵

(2) A, who has obtained a preliminary decree in a mortgage suit assigns the decree to B. B, as a person claiming under A, may apply for a final decree.⁶

(3) A, an auction-purchaser, transfers the property purchased by him to B. B may apply to the Court under O. 21 R. 95 for possession of the property transferred.⁷

[In the above illustrations, B has *succeeded to A's position* in the litigation.

The following illustration will show that this is not always necessary. It is

(‘21) AIR 1921 Pat 180 (182) : 6 Pat L Jour 358.

Note 5

1. (‘18) AIR 1918 Mad 409 (410). (Appeal by plaintiff's mortgagee.)

(‘19) AIR 1919 Mad 755 (756) : 48 Mad 510. (Transferee *pendente lite* of the suit property.)

(‘17) AIR 1917 Oudh 176 (177). (Appeal may be filed by assignee of subject-matter.)

2. (‘12) 17 Ind Cas 617 (618) (Mad). (Assignee of a decree may apply to record satisfaction of it without applying for execution or having the assignment recognised.)

3. (‘36) AIR 1936 Bom 137 (138). (Application under O. 21 R. 94 may be made by assignee from auction-purchaser.)

4. (‘18) AIR 1918 All 405 (405) : 40 All 216. (Application under O. 21 R. 95 may be made by transferee from auction-purchaser.)

(‘11) 34 Mad 450 (452). (Application under R. 98 may be filed against judgment-debtor's representative.)

(‘20) AIR 1920 Mad 943 (944). (Application under O. 21 R. 98 may be made against judgment-debtor's representative.)

5. (‘27) AIR 1927 Mad 560 (561). (Assignee of preliminary decree may apply for final decree.)

Note 7

1. (‘15) AIR 1915 Mad 1204 (1205) : 38 Mad 422 (444.)

(‘23) AIR 1923 All 30 (30).

(‘25) AIR 1925 Oudh 370 (371) : 27 Oudh Cas 299.

Note 8

1. (‘12) 17 Ind Cas 512 (513) (All).

2. (‘37) AIR 1937 Oudh 488 (490) : 13 Luck 554.

3. (‘10) 33 Mad 459 (462).

4. (‘34) AIR 1934 Mad 485 (490).

5. (‘15) AIR 1915 Mad 1204 (1205) : 38 Mad 442.

(‘23) AIR 1923 All 30 (30).

(‘25) AIR 1925 Oudh 370 (371) : 27 Oudh Cas 299.

6. (‘27) AIR 1927 Mad 560 (561).

7. (‘18) AIR 1918 All 405 (405) : 40 All 216.

enough if *B* has acquired from *A* an interest in the property concerned in the litigation, *subsequently to the commencement thereof*]:

(4) *A* sues *B* to establish his right to certain property. While the suit is pending, *B* mortgages the property to *C*. The suit is decreed against *B*. *B* does not appeal from the decree. *C*, as a person claiming under *B*, may appeal from the decree.⁸ If, in the above case, *B* had mortgaged the property to *C*, prior to the institution of the suit, *C* would not be a person claiming under *B*. This is shown by the next illustration.

(5) *A*, a mortgagee of immovable property, sues *B*, the mortgagor, for the enforcement of the mortgage. Prior to the suit, *B* has granted to *C*, a puisne mortgage of the property. *C* is not made a party to the suit. An *ex parte* decree is passed against *B* in the suit. *C* cannot apply to set aside the *ex parte* decree as a person claiming under *B*, because *C*'s interest was not acquired *subsequently to the institution of the suit* but was acquired *before*.⁹

(6) *A*, a member of a Hindu joint family, obtains a preliminary decree for partition of his share of the family property. Then he transfers his rights in the family property to *B*. *B* takes no steps to be impleaded in the suit, but after the final decree, applies to execute it as a person claiming under *A*. *B* is not entitled to do so.¹⁰ The reason is that *B* claimed under *A* only in respect of the preliminary decree which gave *A* merely an unspecified share in the family property. The right to secure separate possession granted by the final decree did not vest in *A* himself on the date of the transfer and could not pass to *B* under the transfer. *B* cannot therefore be said to "claim under" *A* in respect of that right which alone would enable him to execute the decree.

(7) *A* sues *B* and attaches before judgment, a debt due to *B* from *C*. The suit is decreed in *A*'s favour. Upon this, under O. 38 R. 11, *A*'s attachment before judgment ripens into attachment in execution. Then *B* sues *C* and obtains a decree on the debt. *A* does not attach this decree but applies for its execution as a person claiming under *B*. It was held by Venkatasubba Rao, J., that *A* was entitled to do so and by Reilly, J., that he was not.¹¹ It is respectfully submitted that the view of Reilly, J., is correct. *A* was neither the legal representative of *B* nor the assignee of *B*'s decree. Hence, he had not succeeded to *B*'s position as a decree-holder. Nor can he be said to have acquired any interest in the subject-matter of the suit inasmuch as his attachment cannot be said to create any interest in it; and even if it does, it cannot be said to have been acquired *subsequently to the institution of B's suit*, because the attachment was complete before *B* filed his suit. Under O. 21 R. 53 (3), a decree-holder, who attaches another decree of the nature specified in the said Rule, becomes a representative of the holder of the latter decree for the purposes of execution.¹²

(8) Under O. 21 R. 53, where *A* attaches in execution of his decree against *B*, a decree obtained by *B* against *C*, *A* becomes the representative of *B*. But *A* becomes the representative of *B* only for the limited purpose of executing the decree against *C*. *B* has no right to adjust the attached decree and release *C* from his liability under the decree.¹³

It has been held that a Hindu co-parcener is not a person 'claiming under' the manager of the joint family against whom a suit is filed.¹⁴

8. ('19) AIR 1919 Mad 755 (756): 41 Mad 510. ("Claiming under" is wide enough to cover the case of devolution of interest mentioned in O. 22 R. 10.)

('24) AIR 1924 Mad 709 (710). (Do.)

See also the following cases decided on the same principles:

('17) AIR 1917 Oudh 176 (177). (Assignee of the subject-matter of the litigation between the date of decision of the first Court and the filing of appeal ought to be allowed to join in the appeal under this Section.)

('21) AIR 1921 Mad 126 (132). (Per Seshagiri Aiyer J.—Execution proceedings can be continued against the purchaser *pendente lite*.)

('29) AIR 1929 Oudh 353 (354). (Decree for arrears of rent may be executed against transferee of holding.)

('24) AIR 1924 Mad 470 (471). (Private purchaser from judgment-debtor after the property has been sold in auction claims under judgment-debtor.)

('20) AIR 1920 Mad 943 (944). (Auction-purchaser under simple money decree of property against which mortgage decree has been passed is representative of the judgment-debtor for purpose of O. 21 R. 98 against whom proceedings can be taken under S. 146.)

('11) 34 Mad 450 (452). (Application to remove obstruction caused to delivery of possession to decree-holder purchaser by a purchaser from the judgment-debtor of the attached property after attachment must be disposed of under O. 21 R. 98.)

9. ('26) AIR 1926 Cal 1015 (1015).

[See also ('37) AIR 1937 Oudh 488 (490): 13 Luck 554.]

10. ('26) AIR 1926 Mad 1129 (1129).

11. ('26) AIR 1926 Mad 371 (372, 376).

12. ('30) AIR 1930 All 659 (661).

13. ('37) AIR 1937 Cal 468 (472, 473).

14. ('37) AIR 1937 Sind 94 (95): 30 Sind LR 467.

9. Legal representative need not be brought on the record in order to maintain an application under this Section. — To entitle a person to take a proceeding under Section 146 as a person claiming under a party to a litigation, it is not necessary that he should have been brought on the record as such.¹ Again, where *A*, *B*, *C* and *D* are entitled as persons claiming under *E* to make an application, and *A* alone presents the application within limitation, *B*, *C* and *D* being brought on the record subsequently, the presentation of the application by *A* alone is not invalid in view of this Section though it may be defective and the Court may not proceed with it.²

147. [New.] In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

[R. S. C., Order 16 Rule 21. See Order 32.]

Synopsis

1. Legislative changes.
2. Scope of the Section.
3. "Person under disability."
4. "As to any proceeding."
5. Leave must be express.

1. **Legislative changes.** — This Section is new. It is based on O. 16 R. 21 of the Rules of the Supreme Court. It has not made any substantive alteration in the law.

2. **Scope of the Section.** — Order 32 Rule 7 provides that a minor's guardian for suit or next friend *shall not enter* into any compromise or agreement with reference to the suit without the leave of the Court expressly recorded in the proceedings. The present Section enacts the *substantive rule* that a minor *shall be bound* by a compromise entered into by his guardian in the prescribed manner.

3. **"Person under disability."** — The Section applies to consent or agreement given or made on behalf of a person who is deemed incapable of prosecuting or defending a suit personally, such as a minor or a lunatic. See Order 32 and compare also Contract Act, Section 11.

4. **"As to any proceeding."** — The Section does not apply to an agreement *merely relating to the conduct of a suit*, e. g., an agreement that an issue in a suit (not the suit itself) should be determined by the oath of the defendant.¹ See the Indian Oaths Act, Section 11. Such an agreement entered into by a guardian or a next friend

Note 9

1. ('15) AIR 1915 Mad 1204 (1205): 38 Mad 442.
- (25) AIR 1925 Oudh 370 (371): 27 Oudh Cas 299.
2. ('27) AIR 1927 Bom 123 (124) : 51 Bom 143.

Section 147 — Note 4

1. ('27) AIR 1927 All 584 (584) : 49 All 842.
- ('89) 12 Mad 483 (485).
- (1900) 27 Cal 229 (231).

prescribed or allowed by the Code, it may be extended by the Court from time to time.¹ There are, however, two important exceptions to this general rule —

(1) Where the Court *ceases to have jurisdiction* over the matter, after the order granting the period is passed. Thus, where a Court orders a plaint to be returned under O. 7 R. 10 for presentation to the proper Court and in that order a period is fixed within which such presentation is to be made, the period cannot be extended, as, after the order for return, the Court has no *jurisdiction* over the matter.² Similarly, where the order fixing time finally disposes of the matter and the Court has no longer seisin of the matter, the time fixed cannot be enlarged.³ Thus, where an order provides that a suit dismissed for default should be restored to the file on condition that the plaintiff pays the costs of the opposite party on or before a particular date and directs that in case of default, the application for restoration is to stand dismissed, the time cannot be enlarged under this Section.⁴

(2) Where a period is fixed or granted by a *decree*.⁵

('10) 6 Ind Cas 723 (723) : 1910 Pun Re No. 44.

Note 2

1. ('14) AIR 1914 All 55 (56) : 36 All 77. (Order for setting aside ex parte decree on payment of a sum within a period fixed.)

('18) AIR 1918 Mad 638 (640) (Do).

('24) AIR 1924 Lah 222 (222) (Do).

('33) AIR 1933 All 261 (262). (Order remanding a suit for retrial provided a certain act is done within a fixed time—The time is not fixed by a decree as the order of remand is not a decree and hence it can be extended.)

('33) AIR 1933 All 262 (264) : 55 All 326 (F B). (Affirming A I R 1933 All 261 on L. P. Appeal.)

('32) AIR 1932 Lah 235 (236). (Order of remand directing payment of additional court-fee within time—Time can be extended.)

('34) AIR 1934 Nag 109 (111) : 30 Nag L R 258. (Application to extend before decree—Court must consider it—Omission to consider through mistake—Mistake must be rectified though decree has to be re-opened—Party should not suffer for Court's negligence.)

('26) AIR 1926 Nag 44 (48) : 21 Nag L R 111. (Order for restoration of suit on payment of costs within time.)

('26) AIR 1926 Pat 409 (411) : 5 Pat 306. (Order for withdrawal of suit with liberty—Condition as to payment of costs within certain time.)

('05) 8 Oudh Cas 241 (244). (Not a decree but an order for production of letters of administration.)

('36) AIR 1936 Pat 310 (311). (Court has under O. 7 R. 11 and S. 148 full discretion to extend time for payment of deficit court-fee.)

('38) AIR 1938 Mad 542 (543) : (Power to grant time for payment of deficit court-fee is discretionary.)

('36) AIR 1936 Cal 221 (223). (In view of S. 148 time granted to pay deficit court-fee can be enlarged from time to time.)

('36) AIR 1936 Oudh 56 (58) : 11 Luck 567. (Lease for running mill owned by company in liquidation — Money to be deposited by lessee within fixed period not deposited — Court can extend time.)

('36) AIR 1936 All 371 (372). (Time fixed for depositing decree amount as condition of applying for setting aside ex parte decree was held not to be an essential part of the order and it was held that it could be extended.)

See also Note 5 below.

[See ('32) AIR 1932 Bom 615 (617) : 56 Bom 281.. (The High Court of Bombay has framed R. 288, similar to this Section.)]

2. ('26) AIR 1926 Mad 133 (134).

3. (36) AIR 1936 Oudh 125 (127, 128) : 11 Luck 241. (Where an application for restoration of an appeal which was dismissed for non-appearance of the appellant is allowed by the Court on condition that the appellant pays a certain amount to the opposite party by a certain date and that otherwise it should stand dismissed, and the appellant fails to pay that amount on the due date, the Court has no power to restore the application or to set aside the order of dismissal.)

('39) AIR 1939 Cal 581 (581, 582) : 1 L R (1939) 1 Cal 468. (Application to set aside sale granted subject to applicant's depositing decretal amount within fixed period—Application to stand rejected on default—On applicant's failure to comply with order time cannot be extended.)

('39) AIR 1939 Cal 309 (309). (Application for setting aside sale granted subject to applicant's depositing amount within certain period—Application to stand dismissed on default—Upon applicant's failure to comply with order, Court has no jurisdiction to extend time for making deposit.)

('36) AIR 1936 All 477 (478, 479).

[See also ('35) 61 Cal L Jour 512 (514). (Appellate Court allowing amendment of plaint on payment of costs and providing that in case of default, appeal should stand dismissed — Payment of portion of costs only as per order of lower Court—Extension of time cannot be granted in absence of evidence to show that plaintiff was misled by order of trial Court.)]

4. (36) AIR 1936 All 477 (478).

5. See the next paragraph in the Notes.

The second exception above noted is based upon another general rule which is enacted in O. 20 R. 3, that when once a decree has been signed it shall not afterwards be altered or added to save as provided by Section 152 or on review. Section 148 cannot be allowed to operate so as to nullify this rule and it, therefore, follows that where a period is fixed or granted by a decree it cannot be extended by the Court,⁶ though the decree itself may be varied or reversed by the Appellate Court under O. 41 R. 32 by granting a different period to that fixed by the lower Court.⁷ There has been, however, a conflict of decisions on the point due to the general principle abovementioned not being always kept in view. It was held by the Patna High Court in the undermentioned case⁸ that where time is fixed for payment in a pre-emption decree, it could be

- (‘35) AIR 1935 Rang 341 (343). (The Court has, therefore, no power to extend the time for payment of an instalment of decretal amount.)
6. (‘15) AIR 1915 Oudh 197 (193). (Pre-emption decree.)
- (‘14) AIR 1914 Oudh 383 (388): 17 Oudh Cas 377. (Do.)
- (‘11) 8 Ind Cas 812 (813) (Lah). (Do.)
- (‘34) AIR 1934 Oudh 17 (18): 9 Luck 215. (Do.)
- (‘34) AIR 1934 Cal 21 (22).
- (‘34) AIR 1934 Oudh 44 (45): 9 Luck 387. (Mortgage suit—Compromise decree providing for payment by instalments—Default in payment—Time cannot be extended.)
- (‘13) 18 Ind Cas 600 (601) (Lah).
- (‘22) AIR 1922 Oudh 131 (132): 25 Oudh Cas 74.
- (‘18) AIR 1918 All 18 (14): 41 All 47.
- (‘21) AIR 1921 Lah 6 (7) (FB). (18 Ind Cas 86, Dissented from.)
- (‘12) 17 Ind Cas 912 (913) (All). (Payment of money into Court within a fixed time in pursuance of a decree is not an act prescribed or allowed by the Code within the meaning of S. 148.)
- (‘13) 19 Ind Cas 347 (347): 16 Oudh Cas 5. (Pre-emption decree—S. 148 relates to proceedings antecedent to the passing of final decree.)
- (‘13) 21 Ind Cas 585 (586): 35 All 582. (O. 20 R. 14 merely prescribes the form of the decree.)
- (‘23) AIR 1923 Nag 210 (211): 19 Nag L R 8. (Pre-emption decree.)
- (‘28) AIR 1928 Oudh 492 (493). (Only applies to proceedings antecedent to final decree.)
- (‘24) AIR 1924 Lah 359 (359). (Payment under pre-emption decree is not an act prescribed or allowed by the Code—Follows 35 All 582.)
- (‘23) AIR 1923 Lah 372 (373). (Pre-emption decree.)
- (‘09) 3 Ind Cas 497 (498) (All) (Do.)
- (‘20) AIR 1920 Oudh 25 (29): 23 Oudh Cas 254 (Do.)
- (‘96) 18 All 223 (227) (Do.)
- (‘23) AIR 1923 Lah 162 (163) (Do.)
- (‘18) AIR 1918 All 98 (99): 40 All 579. (Direction in decree to pay court-fee within a particular period—Dissents from A I R 1917 All 164.)
- (‘26) AIR 1926 Mad 1059 (1060). (Time for succession certificate granted in decree.)
- (‘23) AIR 1923 Cal 612 (614). (Time for additional court-fee.)
- (‘31) AIR 1931 All 318 (319).
- (‘28) AIR 1928 Mad 154 (156, 157). (Test is to see if the proceedings in which time was originally granted is still pending or has been disposed of

—Following A I R 1918 Mad 638.)

- (‘24) AIR 1924 Pat 663 (664): 3 Pat 337. (In the special circumstances of the case the Court was held to have power to re-instate the appeal after it had been rejected for failure to pay the required court-fee within the time allowed.)
- (‘20) AIR 1920 All 173 (174): 42 All 639. (Suit for possession for setting aside transfer—Decree on condition of payment of certain sum.)
- (‘15) AIR 1915 Oudh 226 (227): 18 Oudh Cas 58. (Decree in suit for possession of mortgaged property by puisne mortgagees against prior mortgagees.)
- (‘24) AIR 1924 Oudh 330 (331). (Suit for cancellation of instrument—Conditional decree.)
- (‘15) AIR 1915 Mad 69 (70). (Decree directing delivery of property to plaintiff on paying a certain sum within a certain time.)
- (‘32) AIR 1932 Mad 223 (223, 224).
- (‘12) 15 Ind Cas 941 (942): 1912 Pun Re No. 99. (Suit for cancellation of lease—Conditional decree.)
- (‘18) AIR 1918 Nag 66 (66): 15 Nag L R 39. (Decree for rent providing that on failure to pay within a certain time defendant should be ejected.)
- (‘24) AIR 1924 Oudh 179 (179). (The general provisions of S. 148, O. P. C., relate only to proceedings antecedent to the passing of a decree.)
- (‘14) AIR 1914 Mad 85 (86).
- (‘10) 7 Ind Cas 36 (38) (All).
- (‘10) 5 Ind Cas 443 (444): 13 Oudh Cas 38.
- (‘33) AIR 1933 All 497 (499, 501). (Judgment signed under O. 20 R. 3 directing plaintiff to pay deficiency in court-fee within certain time and adding that in default decree would be nullity—Court has no jurisdiction to extend period so fixed.)
- [See (‘33) AIR 1933 Cal 20 (21). (Appellate decree allowing amendment of plaint on condition of paying additional court-fee and costs of defendant—Time extended for both—Order is correct as to the former though it is not so as to the latter.)]
7. (‘28) AIR 1928 Oudh 32 (33): 2 Luck 425.
- (‘10) 6 Ind Cas 275 (276): 37 Cal 548 (550).
- (‘90) 13 Mad 524 (526).
- (‘21) AIR 1921 Lah 6 (7) (FB).
8. (‘16) AIR 1916 Pat 268 (269): 1 Pat L Jour 92. (It was also held by the Lahore High Court in earlier decisions (e. g., 8 Ind Cas 86 (Lah)) that a Court could extend the period fixed in a

extended by the Court. The decision was based simply on S. 148 without any reference to O. 20 R. 3. The correctness of the decision was, however, doubted in a later case⁹ of the same High Court. The High Courts of Madras,¹⁰ Calcutta¹¹ and Rangoon¹² have held that where a decree for *specific performance of a contract* is passed on condition of a party paying a certain sum by a certain date, the Court could extend the time. The decisions rest their view on the provisions of Section 35(c) of the Specific Relief Act, 1877, and on the view that a decree for specific performance of a contract on certain conditions is in the nature of a preliminary decree, the original Court keeping control over the action and having full powers to make any just and necessary orders therein including extension of the time fixed by the decree. The Patna High Court¹³ and the Oudh Chief Court¹⁴ hold that the time fixed, even in a decree for specific performance, cannot be extended by the Court under Section 148.

The rule that time granted by a *decree* cannot be extended by the Court has also got an exception and that is furnished by Order 34 Rules 2, 4 and 7 (as amended by Act XXI of 1929) of the Code. Under those provisions the time fixed by a *preliminary decree for sale, redemption or foreclosure* may, at any time, *before the passing of the final decree*, be extended by the Court from time to time. For another exception to the rule, see Note 3 below.

Where a plaintiff in whose favour a conditional decree is passed, neither fulfils the condition within the time allowed nor applies for extension of time, he cannot execute the decree.¹⁵

3. Extension of time fixed by consent decree. — Another exception to the rule that time fixed by a *decree* cannot be extended by the Court under Section 148 is furnished by *consent decrees*. It has been held in the undermentioned cases¹ that a Court can extend the time fixed in a consent decree for the doing of an act directed thereby, where time is not of the essence of the contract of compromise. The reason is that a consent decree cannot have greater validity than the compromise on which it is based, and hence, the Court can, in the exercise of its equitable jurisdiction, grant such *relief against forfeiture* as it might have granted if there had been no consent decree and a suit had been instituted to enforce the compromise. The Allahabad,² Lahore³ and Patna⁴ High Courts and the Oudh Chief Court⁵ have held that the general rule holds good even in the case of consent decrees and that, therefore, the time fixed by the decree could not be extended.

pre-emption decree for the payment of purchase money. But this view has not been followed in the later decisions. See cases cited in foot-note 3 above.)

9. ('30) AIR 1930 Pat 279 (280).

10. ('23) AIR 1923 Mad 284 (285) : 46 Mad 148. (Dissenting from AIR 1917 Mad 838.)

('26) AIR 1926 Mad 144 (145).

11. ('33) AIR 1933 Cal 580 (580).

12. ('27) AIR 1927 Rang 311 (312) : 5 Rang 615.

('16) AIR 1916 Low Bur 74 (74).

13. ('30) AIR 1930 Pat 279 (280).

14. ('23) AIR 1923 Oudh 16 (17).

15. ('24) AIR 1924 Rang 375 (376).

Note 3

1. ('21) AIR 1921 Cal 356 (358, 359).

('29) AIR 1929 Nag 164 (168, 169) : 25 Nag L R 110. (Distinguishing AIR 1926 Nag 280 which was a case of a mortgage decree fixing a period by consent and in which there was no question of equities or forfeiture.)

('19) AIR 1919 Cal 68 (69).

('24) AIR 1924 Mad 796 (796). (Extension cannot be granted where time is of the essence of the contract.)

('23) AIR 1923 Nag 88 (90).

2. ('29) AIR 1929 All 666 (666).

3. ('12) 15 Ind Cas 941 (942) : 1912 Pun Re No. 99.

4. ('30) AIR 1930 Pat 308 (310) : 9 Pat 332.

('33) AIR 1933 Pat 563 (564) : 13 Pat 1.

('33) AIR 1933 Pat 677 (678). (Compromise decree directing payment by instalments on fixed dates — Court has no power to grant extension of time for payment of instalments.)

[See also ('37) AIR 1937 Pat 542 (545) : 16 Pat 395. (Where time is of the essence of the contract, it cannot be extended.)]

[But see ('24) AIR 1924 Pat 387 (387) : 2 Pat 906.

('25) AIR 1925 Pat 691 (692).]

5. ('15) AIR 1915 Oudh 197 (198).

('15) AIR 1915 Oudh 226 (227) : 18 Oudh Cas 58.

As to the power of the Court to extend the time fixed for payment of the mortgage money under a compromise decree in a suit to enforce or redeem a mortgage, see Notes to Order 34 Rules 2, 4 and 7.

4. Extension of time fixed by award. — A valid award is final and conclusive as between the parties to it and a Court cannot interfere with any portion of it. Hence, the Court cannot extend the time fixed by an award.¹ It may also be noted that time fixed by an award is not time fixed by a Court and hence Section 148 does not apply to it. (See Note 1 above.)

5. "Act prescribed or allowed by this Code." — The Section applies only where time is fixed for doing an act prescribed or allowed by the Code.¹ Where a period is fixed by the Court to do a particular act under its inherent powers, it is an act allowed by Section 151 of this Code and therefore this Section will apply to such a case.² "Code" includes not only the *body* of the Code but also the Schedules and the Rules made under Section 122 or Section 125 [see Section 2 (18)]. See, for instance, the following provisions :—

- (1) *Section 55 (4)*. — Security for the production of the judgment-debtor within the time fixed by Court.³
- (2) *Section 143*. — Time for payment of postage.
- (3) *Order 6 Rule 18*. — Amendment of pleadings.
- (4) *Order 7 Rule 11 (b)*. — Correction of valuation of suit.
- (5) *Order 7 Rule 11 (c)*. — Supply of deficient stamp paper.⁴
- (6) *Order 8 Rule 9*. — Time for filing written statement or additional written statement.
- (7) *Order 9 Rule 9*.—Restoration of suit (dismissed for default) on applicant paying costs within a given time.
- (8) *Order 9 Rule 13*.—Setting aside *ex parte* decree on applicant paying costs within given time.
- (9) *Order 21 Rule 17*. — Amendment of application for execution.
- (10) *Order 23 Rule 1*. — Allowing suit to be withdrawn with leave to bring fresh suit on plaintiff paying costs within a given time.
- (11) *Order 25 Rule 1*. — Security for costs of suit.
- (12) *Order 41 Rule 3*. — Amendment of memorandum of appeal.
- (13) *Order 41 Rule 10*. — Security for costs of appeal.
- (14) *Order 41 Rule 19*. — Re-admission of appeal dismissed for default, on appellant paying costs within given time.
- (15) *Order 41 Rule 21*. — Re-hearing appeal decided *ex parte*, on respondent paying costs.
- (16) *Order 41 Rule 26*. — Objections to the finding returned by the lower Court on remand.
- (17) *Order 47 Rule 7 (2)*.—Restoration of application for review dismissed for default, on applicant paying costs within given time.

Note 4

1. ('18) AIR 1918 Cal 554 (555).

Note 5

1. ('39) AIR 1939 Cal 30 (31, 32). (Court under S. 148 has no power to extend time fixed for making deposit provided under S. 174 (5), Bengal Tenancy Act.)
2. ('33) AIR 1933 Mad 563 (564). (Order of stay

under inherent powers fixing a time for payment of certain sums of money.)

3. ('25) AIR 1925 Rang 135 (137): 2 Rang 567. [See also ('34) AIR 1934 Lah 424 (425). (Memorandum of appeal insufficiently stamped without any bona fide mistake — No extension of time granted.)]
4. ('09) 32 Mad 305 (311) (FB).

The Section does not apply when time is fixed for doing an act *not prescribed or allowed by the Code*.⁵

But in so far as the provisions of the Code are made applicable to proceedings under any other Act, the Section applies to steps to be taken under such Act. Thus, according to the High Courts of Madras, Lahore and Nagpur, an Insolvency Court can extend the time fixed for applying for discharge, even after the time originally fixed has expired,⁶ though the High Courts of Rangoon and Patna have taken a contrary view.⁷ Further, even without recourse to Section 148 it may be possible to construe a particular Section in such a way as to admit of an extension of the time fixed by the Court. Thus, it was held under the former Code that a Court could extend the time fixed for security for costs of appeal under S. 549 (now O. 41 R. 10),⁸ or for paying deficit court-fee under Section 54 (now O. 7 R. 11).⁹ On similar reasoning, it has been held that a Court can extend the time fixed for payment of deficit court-fee under the Court-fees Act, Section 10 clause (2)¹⁰ or Section 11,¹¹ or for deposit of one-fifth of the purchase-money in a suit for pre-emption under Section 22 (4) of the Punjab Pro-emption Act.¹² Paragraph 8 of Schedule II expressly confers on the Court the power to extend the time fixed for making an award, even after the expiry of the period originally fixed.¹³ Hence, there is no necessity for resort to Section 148 for extension of time in such a case.

See also the undermentioned case.¹⁴

6. Discretion of Court. — The power to enlarge time under this Section is discretionary.¹ The Appellate Court should not interfere with the discretion of a Court under Section 148 except on very strong grounds.² A Court passing orders for extension of time should be taken, on the record as it stands, to have exercised its discretion as

5. ('20) AIR 1920 Pat 111 (112). (Security under S. 17, Provincial Small Cause Courts Act.)

('16) AIR 1916 Mad 224 (227). (Payment of court-fee under S. 11, Court-fees Act.)

('25) AIR 1925 Pat 153 (154). (Remand — Appellant directed to pay costs within a given time as a condition—Payment is not act directed by the Code.)

('24) AIR 1924 All 818 (824) : 46 All 864.

('39) AIR 1939 Cal 30 (32). (Deposit under S. 174 (5) Bengal Tenancy Act.)

[But see ('11) 10 Ind Cas 268 (269) (Cal). (Where it was held that the language of S. 11 itself admitted of an extension of time.)]

6. ('24) AIR 1924 Mad 635 (637, 638). (Waller, J., dissenting.)

('30) AIR 1930 Mad 389 (392) : 53 Mad 288 (FB).

('25) AIR 1925 Lah 416 (416).

('39) AIR 1939 Nag 103 (104) : I L R (1939) Nag 478.

7. ('30) AIR 1930 Rang 166 (172) : 8 Rang 187.

('25) AIR 1925 Pat 355 (356) : 4 Pat 51. (No reference was, however, made to S. 148 of the Code.)

8. ('90) 17 Cal 512 (515) : 17 Ind App 1 (PC).

('90) 17 Cal 1 (3) (PC).

('97) 21 Bom 576 (579).

9. ('04) 31 Cal 75 (78).

('26) AIR 1926 Nag 312 (312).

('85) 7 All 79 (92, 93). (Observations of Mahmood, J.)

(The cases in this foot-note and foot-note (5) above have been cited only as instances of the language

of a Section empowering a Court to extend the time fixed by it. The acts in those cases were however acts prescribed or allowed by the "Code".)

See also cases cited in foot-notes (6) and (7) in Note 1, *supra*.

10. ('97) 19 All 240 (243).

11. ('11) 10 Ind Cas 268 (269) (Cal).

[But see ('16) AIR 1916 Mad 224 (227). (Where it was held that S. 148, C. P. C., did not apply to such a case as the act was not one allowed by the "Code".)]

12. ('23) AIR 1923 Lah 643 (645).

13. ('19) AIR 1919 Pat 93 (98) : 4 Pat L Jour 265.

('15) AIR 1915 Cal 101 (103).

('92) 15 Mad 384 (386).

('11) 12 Ind Cas 13 (14) : 38 Cal 522. (But where

an award has been actually made out of time the Court cannot extend the time — This case was doubted in AIR 1915 Cal 101—See also AIR 1919 Pat 93 where it was held that the parties were estopped from raising any objections as to the validity of the award.)

14. ('38) AIR 1938 Oudh 50 (51) : 13 Luck 666.

(U. P. Temporary Regulation of Execution Act S. 7—Court can enlarge period fixed by it but not exceeding 30 days.)

Note 6

1. ('38) AIR 1938 Mad 542 (543, 544).

2. ('25) AIR 1925 Pat 299 (302) : 4 Pat 190.

('34) AIR 1934 Mad 82 (84).

prosecution,⁹ or is withdrawn,¹⁰ or summarily dismissed under O. 41 R. 11,¹¹ there is no decree of the Appellate Court in which the lower Court's decree may be said to have merged, and hence the period fixed does not get a fresh start from the decree of the Appellate Court.

Where a decree awarding future *mesne profits* is confirmed in appeal, the three years' period under O. 20 R. 12 runs from the *appellate* decree.¹² The reason is that the term "decree" in O. 20 R. 12 refers to the *executable* decree in a case, and where an appeal is preferred against a decree, the only *executable* decree is that of the Appellate Court, whether it affirms, reverses or modifies the lower Court's decree. See also Note 5 to O. 34 R. 3, *infra*.

10. Court to which application for extension should be made. — Where an appeal has been preferred from a decree, the only Court that can extend the time fixed by it, assuming that the case is one in which time can be extended, is the Appellate Court.¹ *A fortiori* the lower Court has no jurisdiction to extend the time fixed in an appellate decree.² But it has been held by the Rangoon High Court that where an appeal has been dismissed, the trial Court has power to enlarge the time fixed by the order appealed from.³ See also the undermentioned case.⁴

11. Appeal. — No appeal lies from an order under this Section as it is neither a decree nor an appealable order under Section 104.¹

After a *final* decree, the Court cannot extend the time fixed by it under S. 148. Hence, if the Court does extend the time it should be deemed to be acting not under Section 148 but under Section 47, and its order is therefore appealable as a *decree*.²

12. Revision. — An order under this Section is not appealable but is open to revision provided the conditions of Section 115 are satisfied.¹ See Note 11 above. But

9. ('96) 18 All 101 (103) (FB). (Order of dismissal under O. 41 R. 10 for non-payment of security for costs.)

('17) AIR 1917 All 892 (893) : 39 All 893. (Dismissal of appeal for default.)

('17) AIR 1917 Cal 728 (730) : 44 Cal 954. (Dismissal for default.)

('14) AIR 1914 P O 65 (66) : 36 All 284 : 41 Ind App 104 (P O). (Dismissal of appeal for non-prosecution.)

('14) AIR 1914 P O 66 (67) : 36 All 350 (P O). (Do.)

10. ('91) 15 Bom 370 (374).

('92) 16 Bom 243 (248).

11. ('24) AIR 1924 Bom 98 (99) : 47 Bom 956. (But some cases have held that dismissal of appeal under O. 41 R. 11 (1) is a decree: see for instance AIR 1926 Cal 368 and the cases cited therein.)

('97) 21 Bom 548 (551). (Do.)

12. ('01) 23 All 152 (158) : 27 Ind App 209 (PO).

Note 10

1. ('10) 37 Cal 548 (550).

2. ('11) 12 Ind Cas 139 (139) (Mad).

('33) AIR 1933 Cal 83 (85). (Remand order of Appellate Court fixing time for doing an act — Lower Court cannot extend time.)

3. ('35) AIR 1935 Rang 500 (501).

4. ('38) AIR 1938 All 497 (499). (Subordinate Judge passing preliminary decree and directing

decree-holder to pay deficiency in court-fee within certain time adding that in default decree would be nullity—Munsif merely in charge of routine duties of Subordinate Judge has no jurisdiction to extend time so fixed for payment of court-fee.)

Note 11

1. ('29) AIR 1929 All 666 (667).

('20) AIR 1920 Pat 281 (282). (Order granting time under S. 148 cannot be questioned in appeal.)

('16) AIR 1916 Mad 694 (695) : 39 Mad 876.

('13) 21 Ind Cas 585 (586) : 35 All 582. (Reversing 17 Ind Cas 912 and distinguishing 14 All 520.)

('24) AIR 1924 Oudh 330 (331). (Order refusing to extend time not appealable.)

('23) AIR 1923 Lah 162 (163).

('35) AIR 1935 Rang 500 (501). (Executing Court granting extension of time for payment of money — Decree-holders fruitlessly appealing — Execution Court again granting extension of time — Such order is not appealable.)

2. ('24) AIR 1924 Oudh 179 (179). (It was held in this case that even under S. 47 the Court cannot extend the time fixed by the decree though for the purpose of appeal, the order must be deemed to have been passed under S. 47.)

Note 12

1. ('34) AIR 1934 Lah 537 (538). (Court refusing to extend time for payment of deficient court-fee on ground of want of power, fails to exercise.

the High Court will not interfere in revision unless it is necessary in the interest of justice to do so.²

149. [New.] Where the whole or any part of any fee⁶ prescribed for any document⁴ by the law for deficiency of court-fees. the time being in force relating to court-fees has not been paid, the Court may, in its discretion,⁵ at any stage,⁷ allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

[1882, *cf.* S. 582A.]

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope of the Section. 3. Payment of court-fees after the period of limitation. 4. "Any document." 4a. "For the time being in force." 5. "Discretion of Court." 6. Whole or any part of any fee. 7. "At any stage." 8. Power of Appellate or Revisional Court to interfere with the discretion of the lower Court. | <ol style="list-style-type: none"> 9. Plaints and memoranda of appeals. 10. Application for leave to sue or appeal as pauper. 10a. Power to call for court-fees after judgment is pronounced. 11. Conversion of proceedings. 12. Extension of time by admission Court. 13. Appeal. 14. Revision. 15. Review. |
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Other Topics (miscellaneous)

Levy of the stamp duty. See Notes 5 and 9.

Presumption when court-fee paid and accepted by Court. See Note 8.
Section 149 and Order 7 Rule 11. See Note 9.

1. Legislative changes. — This Section corresponds to Section 582A introduced into the old Code by Act IV of 1892. The material changes in the present Section are the following —

- (1) Section 582A applied only to *appeals* and *applications for review*. The present Section applies to *all documents* chargeable with court-fees. See Note 4.
- (2) The insufficiency of the stamp must under Section 582A have been caused by mistake on the part of the appellant or applicant for review as to the amount of the requisite stamp. There is no such restriction in the present Section. See Note 5.

2. Scope of the Section. — It is provided under the Court-fees Act, 1870, Sections 4 and 5, that no document chargeable with court-fee under that Act shall be filed, or recorded in any Court of Justice, unless the court-fee payable in respect thereof is paid. The institution of a suit or other proceeding or the presentation of a

discretion within the meaning of S. 115.)

2. ('30) AIR 1930 Pat 279 (280).

('26) AIR 1926 Mad 1059 (1060).

('33) AIR 1933 Cal 20 (21). (Even if the order of the lower Court is erroneous.)

('25) AIR 1925 Pat 153 (154).

5. "Discretion of Court." — There are certain cases in which the Court is bound to give some time for making up the deficient court-fee. Thus under O. 7 R. 11 (c) where a *plaint* is insufficiently stamped, the Court is bound to grant some time to supply the deficient court-fee.¹ In all other cases the Court has a *discretion* under the Section to allow the court-fee to be paid at any stage. The High Courts of Calcutta,² Lahore³ and Patna⁴ and the Nagpur Judicial Commissioner's Court⁵ have held that this discretion cannot be exercised in favour of a party who has not been *bona fide*, that is, who is not under any honest mistake or doubt or who has not made an honest attempt to comply with the law. Mere poverty or ignorance is not a ground for indulgence under the Section.⁶ The reason is that where an appeal is not filed in time with a proper court-fee, the appeal becomes barred and the respondent gets a valuable right. The Court should not, therefore, exercise its discretion under this Section to his prejudice except where sufficient grounds exist for the non-payment of

Note 5

1. See note 9 below.

2. ('15) AIR 1915 Cal 193 (194).

('14) AIR 1914 Cal 735 (736): 41 Cal 1092.

('19) 21 Ind Cas 866 (867) (Cal). (Delay excused where non-payment was due to mistake.)

('32) AIR 1932 Cal 482 (484, 485): 59 Cal 388. (Court-fee stamp of one rupee in appeal memo to avoid limitation.)

3. ('26) AIR 1926 Lah 689 (690).

('34) AIR 1934 Lah 424 (426). (Counsel presenting appeal with insufficient stamp — Mistake pointed out but counsel persisting that court-fee paid was adequate — Question being simple one, mistake is not bona fide and extension of time cannot be granted.)

('33) AIR 1933 Lah 264 (265). (Honest belief of appellant regarding adequacy of court-fee — Delay in giving adequate court-fee may be condoned.)

('27) AIR 1927 Lah 884 (895). (Gross negligence on the part of the appellant's counsel, cannot be condoned.)

('24) AIR 1924 Lah 325 (327). (Insufficiency brought to notice of appellant's pleader — Deliberate refusal — No extension to be allowed.)

('32) 33 Pun L R 187 (188). (Do.)

('31) AIR 1931 Lah 343 (343). (Do.)

('28) AIR 1928 Lah 274 (275). (Shortage of court-fee stamp in treasury, valid ground.)

('21) AIR 1921 Lah 371 (372). (Appellant disputing order for more court-fee.)

('23) AIR 1923 Lah 309 (309). (Disputing demand for more court-fee — Party not entitled to indulgence.)

('21) AIR 1921 Lah 43 (44). (Ignorance of law and poverty, no excuse.)

('19) AIR 1919 Lah 252 (253).

('29) AIR 1929 Lah 748 (748). (Court-fee paid according to the old practice, following 17 Ind Cas 764.)

('30) AIR 1930 Lah 24 (26).

('25) AIR 1925 Lah 381 (383): 6 Lah 233.

('23) AIR 1923 Lah 185 (187). (Debatable point — Bona fide mistake made — Delay may be excused.)

('13) 19 Ind Cas 788 (788): 1913 Pun Re No. 55. (Reasonable diligence in the prosecution of appeal, necessary.)

('23) AIR 1923 Lah 629 (630). (Bona fide mistake — Delay may be excused.)

('22) AIR 1922 Lah 440 (441). (In absence of bona fide mistake Court should not resort to Section 149.)

('26) AIR 1926 Lah 509 (510).

('21) 67 Ind Cas 130 (130) (Lah).

('25) AIR 1925 Lah 246 (246).

('19) AIR 1919 Lah 280 (281): 1919 Pun Re No. 10.

('20) AIR 1920 Lah 92 (93): 1 Lah 234.

('19) AIR 1919 Lah 65 (65): 1 Lah 220.

('09) 4 Ind Cas 554 (555) (Lah).

('21) AIR 1921 Lah 371 (372).

('36) AIR 1936 Lah 935 (936). (Error of counsel not bona fide — Extension of time not granted.)

4. ('20) AIR 1920 Pat 818 (820).

('24) AIR 1924 Pat 663 (664): 3 Pat 337. (Time of grace expired during the vacation — After the vacation the stamp could not be procured as the stamp vendor had none.)

('17) AIR 1917 Pat 26 (27): 3 Pat L Jour 74. (Deliberately and to suit their convenience the appellants had paid deficient court-fee.)

('29) AIR 1929 Pat 731 (732): 8 Pat 906.

('18) AIR 1918 Pat 336 (338): 3 Pat L Jour 484.

(Failure of the plaintiff to affix sufficient stamp was due to gross negligence of his legal advisers.)

('25) AIR 1925 Pat 435 (439): 4 Pat 180. (Deficit amount paid to pleader — Pleader's clerk misappropriating it — Suit rejected in consequence — Suit can be restored subsequently.)

5. ('29) AIR 1929 Nag 294 (295).

('08) 4 Nag L R 168 (176).

6. ('19) AIR 1919 Lah 252 (253).

('34) AIR 1934 Cal 659 (661): 61 Cal 663. (Inability to raise money is not sufficient ground for permitting payment of deficit court-fee.)

('21) AIR 1921 Lah 43 (44).

('35) AIR 1935 Rang 336 (339): 13 Rang 50. (Mere inability to pay funds is not sufficient ground for Court exercising discretion.)

('36) 40 Cal W N 1294 (1295). (But where it is shown that the party lives in a district where an acute famine prevails and that in consequence he was unable to procure the necessary funds, an exception should be made to the rule, and the Court in such a case will exercise its discretion in his favour under S. 149.)

the full court-fee in the first instance. The Bombay High Court⁷ has, on the other hand, held that the discretion is not limited to cases where the party is under a *bona fide* misunderstanding of the law as to valuation. This view is based on the fact that the present Section omits the provision which occurred in Section 582A of the old Code restricting the exercise of discretion to cases where the insufficiency of the stamp is caused by *mistake* on the part of the appellant or applicant. It has been held in a recent Full Bench decision of the Lahore High Court that the discretion conferred on the Court by this Section is normally expected to be exercised *in favour* of the litigant except in cases of contumacy or positive *mala fides* or reasons of a similar kind.⁸ The Peshawar Judicial Commissioner's Court⁹ also has held that where the failure to pay the requisite court-fee is due to a *bona fide* mistake, the Court can allow the deficiency to be made up under this Section.

Where a party has been contesting with some show of justification the correctness of the order requiring him to pay an enhanced court-fee, he should be allowed reasonable time in which to pay the deficiency on an adverse order being finally passed against him.¹⁰

6. Whole or any part of any fee. — The discretion under Section 149 applies not only where the court-fee paid is not sufficient but also where no court-fee has been paid at all.¹ It has been held by the Madras High Court that Section 149 contemplates cases in which payment of duty is insufficient *ab initio*. Hence, it does not apply where a plaintiff is allowed to sue on the basis of a *tentative* valuation, as in suits for accounts or mesne profits, and, on a decree for a higher amount being passed, is required under Court-fees Act, Section 11, to pay additional court-fees.² It is however open to a Court on the construction of the Court-fees Act, Section 11, itself to enlarge the period fixed for payment of additional court-fee under that Section.³

As to the right of an appellant in an insufficiently stamped appeal to be heard on the proportionate part of his claim in appeal, see the undermentioned cases.⁴

- [See ('38) AIR 1938 Nag 322 (323). (Substantial portion of court-fee paid—Poverty pleaded—Time can be extended.)]
7. ('14) AIR 1914 Bom 249 (251); 21 Ind Cas 337 (338); 38 Bom 41.
8. ('38) AIR 1938 Lah 361 (365) (FB). (The question of *bona fides* in this connexion should be construed in the sense that the word is used in the General Clauses Act and not as used in the Limitation Act.)
- [See also ('35) AIR 1935 Lah 448 (450): 17 Lah 122. (Appeals presented without proper court-fee accepted by office without objection—Question of court-fee payable not free from doubt—Appellants not guilty of deliberate attempt to avoid payment of proper court-fee—They are entitled to grant of time for payment of proper court-fee.)]
- ('36) 38 Pun L R 262 (263). (Where the mistake is *bona fide*, Court should allow deficiency to be made up.)
- ('37) AIR 1937 Lah 276 (276). (Court-fee on objections to award not paid through inadvertence, owing to *bona fide* mistake of party's counsel—Requisite court-fee paid at earliest opportunity—Court should accept it under S. 149.)
- ('37) AIR 1937 Lah 688 (688). (Appeal filed within time on insufficient stamp on basis of valuation of suit—Appellant making good deficiency within time allowed but after limitation—Appeal is not barred—Delay can be condoned under S. 149.)]
9. ('37) AIR 1937 Pesh 3 (4). ('37) AIR 1937 Pesh 31 (32).
10. ('38) AIR 1938 Mad 921 (922).
- Note 6**
1. ('29) AIR 1929 P O 147 (148); 56 Ind App 232: 10 Lah 737 (P O).
- ('17) AIR 1917 Low Bur 179 (180). (Court-fees Act, S. 12 (ii) which does not apply when no fee at all has been paid.)
- ('35) AIR 1935 Pat 110 (111). (The Court is not precluded from considering the question of set-off even if the written statement does not bear the requisite court-fee at the time it is filed.)
- ('34) AIR 1934 Lah 701 (703). (Memorandum of Letters Patent appeal.)
- [But see ('33) AIR 1933 Cal 796 (797).]
2. ('16) AIR 1916 Mad 224 (227). [See also ('33) AIR 1933 Mad 330 (331, 332): 56 Mad 705.]
3. ('11) 10 Ind Cas 268 (269) (Cal).
4. ('26) AIR 1926 Lah 558 (559). (Appeal not to be dismissed but to be heard to the extent of court-fee paid.)
- ('31) AIR 1931 Lah 297 (233) (Do—Pre-emption suit.)

7. "At any stage." — Under the former Code it was held by the High Courts of Bombay,¹ Calcutta² and Madras,³ the Chief Courts of the Punjab⁴ and Lower Burma⁵ that where the deficiency in court-fee is supplied after the period of limitation but within the time allowed by the Court, the suit or appeal was not barred by limitation. The reason given was that the suit or appeal should be deemed to be instituted on the date of the original presentation of the plaint or memorandum of appeal and not on the date on which the deficit court-fee was made up. The Allahabad High Court did not accept this view.⁶ According to that Court, the presentation of an insufficiently stamped plaint or memorandum of appeal was not a valid presentation, and the suit or appeal could be deemed to be instituted only when the full court-fee was paid. But, as has been seen in Note 1 above, in the case of appeals and applications for review a different rule was provided by Section 582A which was introduced into the Code by Act IV of 1892.⁷ The Section superseded the undermentioned decisions which held that a Court could not allow deficient court-fee on an appeal⁸ or an application for review⁹ to be made good after the expiry of limitation unless the memorandum of appeal or application for review had been received through the mistake of the Court or of an officer thereof. The principle embodied in the Section was extended to *plaints* in the Full Bench case of *Hari Ram v. Akbar Hussain*.¹⁰ The learned Judges in that case relied upon Section 28 of the Court-fees Act which enables deficit court-fees to be made up where insufficiently stamped documents have been received or filed through mistake or inadvertence. Their Lordships interpreted the expression "mistake or inadvertence" in Section 28 so as to include the mistake not only of the Court or its officers but also of the party. The present Section gives legislative effect to this view and enables a defective document to be retrospectively validated at any stage if the insufficiency of the stamp is subsequently made up within the time allowed by the Court.¹¹

Note 7

1. (1883) 27 Bom 330 (332).
2. (1882) 19 Cal 739 (753). (Dissenting from 2 All 241 (P C).)
3. (1883) 20 Cal 41 (43).
4. (1890) 27 Cal 814 (815). (Following 20 Cal 41 and 17 Cal 750.)
5. (1891) 31 Cal 75 (77).
6. (1882) 19 Cal 747 (749).
7. (1892) 25 Mad 335 (333).
8. (1899) 32 Mad 505 (311) (F B).
9. (1899) 32 Mad 491 (303).
10. (1892) 15 Mad 23 (24). (Following 1 All 230.)
11. (1892) 15 Mad 79 (79). (Following the principle laid down in 2 All 241 (P C).)
12. (1897) 29 Mad 319 (321). (A different note was struck in this case but the case was not followed in other decisions.)
13. (1897) 1897 Pun Re No. 123, page 600.
14. (1898) 1898 Pun Re No. 74, page 302.
15. (1894) 6 N W P H C B 132 (141). (No time fixed—Payment of deficiency within reasonable time held sufficient.)
16. (1891) 3 N W P H C B 202 (203).
17. (1890) 1 Low Bur Pol 32 (33).
18. (1891) 23 All 423 (423).
19. (1891) 27 All 411 (414).
20. (1892) 23 All 310 (312).
21. (1892) 24 All 213 (220).
22. (1892) 13 All 65 (74).

23. (1892) 1902 All W N 153 (153).
24. (1897) 23 All 619 (620).
25. (1899) 12 All 129 (143).
26. (1899) 12 All 57 (59).
27. (1897) 23 All 749 (764, 765) (F B).
28. (1899) AIR 1929 P C 147 (148); 10 Luck 737:55 Ind App 232 (P C).
29. (1894) AIR 1924 All 740 (765).
30. (1894) AIR 1924 All 160 (160).
31. (1899) 2 Ind Cas 1 (3) (Cal).
32. (1893) 20 Ind Cas 767 (767) (Mad).
33. (1892) AIR 1922 Lah 225 (225); 3 Lah 35.
34. (1892) AIR 1922 Nag 156 (157).
35. (1899) 3 Ind Cas 425 (426) (Mad).
36. (1899) 3 Ind Cas 557 (558) (All).
37. (1893) 21 Ind Cas 666 (667) (Cal).
38. (1894) AIR 1914 All 216 (216).
39. (1895) AIR 1915 Mad 426 (427).
40. (1896) AIR 1916 Pat 136 (137, 138); 1 Pat LJ 420.
41. (1896) AIR 1916 Cal 616 (616).
42. (1892) AIR 1922 All 533 (533); 45 All 519.
43. (1896) AIR 1926 Lah 346 (347).
44. (1899) 32 Mad 505 (311).
45. (1899) 3 Ind Cas 532 (535); 37 Cal 339.
46. (1896) AIR 1926 Oudh 340 (354).
47. (1895) AIR 1925 Oudh 231 (232); 10 Luck 362.
48. (1895) AIR 1925 Pat 261 (261).
49. (1897) AIR 1927 Pat 550 (551); 16 Pat 57.
50. (1896) AIR 1926 All 539 (540); 1 L

POWER TO MAKE UP DEFICIENCY OF COURT-FEES

The Court can also enlarge the time even after the lapse of the period originally by it.¹² (See Section 148.)

Deficit court-fees on a plaint may be allowed to be made good even in appeal.¹³ it is desirable that in such cases the matter is disposed of at the earliest possible moment after the deficit is discovered.¹⁴

As to the power of a Court to extend time for payment of court-fees fixed by own decree, see Note 2 to Section 148.

Where no time is fixed in the decree for the payment of the court-fee which is payable under it, the executing Court can allow time for such payment.¹⁵ Where a decree is passed on condition that a certain court-fee is deposited and the decree-holder deposits the same after three years and the Court accepts it, it cannot be said that execution is barred by limitation inasmuch as the decree is complete only when the court-fee is deposited and limitation cannot begin to run under Article 182 of the Limitation Act until there is a decree capable of execution.¹⁶

8. Power of Appellate or Revisional Court to interfere with discretion of the lower Court.—An Appellate Court should not interfere with discretion of the lower Court under the Section except on very strong grounds.¹ Where a Judge has allowed deficient court-fee to be made up under this Section, he must taken, on the record as it stands, to have exercised his discretion in the matter it is not open to the Appellate Court to go into the question as to whether he exercised his discretion.² Nor is it open even for the Judge while granting time for the payment of extension of time is made.)

848. (Decree conditional on payment of court-fee—Acceptance of court-fee though after three years from the date of the order directing the payment of the necessary court-fee, is quite valid and time for execution of the decree begins to run only after the date when the court-fee was paid.)

(‘38) AIR 1938 Mad 560 (562). (Deficiency of court-fee ordered to be made good—Court rejecting plaint under O. 7 R. 11—Plaintiff filing restoration application after making good deficient court-fee—Court can treat such application as fresh plaint under O. 7 R. 13 and can allow court-fee paid on rejected plaint to be counted towards court-fee on fresh plaint under Ss. 149 and 151, C. P. C.)

12. (‘10) 6 Ind Cas 424 (425) (Cal).
(‘09) 2 Ind Cas 1 (3) (Cal).
(‘19) AIR 1919 Cal 261 (261).
(‘94) 1894 Pun Re No. 113, page 435.
(‘26) AIR 1926 Mad 676 (678).
(‘87) 9 All 252 (253).
(‘76) 1876 Pun Re No. 84, page 169.
(‘35) AIR 1935 Pat 201 (201).
(‘38) AIR 1938 Mad 560 (562).

[See also (‘36) AIR 1936 Cal 245 (246). (Where the Appellate Court orders the plaintiff in a suit to put in additional court-fee within a particular time and directs that in case of failure to do so on his part the suit is to stand dismissed, and the plaintiff applies for extension of time for putting in the deficit court-fee before expiry of the period, the Appellate Court has jurisdiction under S. 149 to extend the time as an appeal is not finally disposed of before the

13. (‘36) AIR 1936 Cal 245 (246).
(‘38) 40 Pun L R 33 (35). (Trial Court finds value of suit—Appellate Court finds insufficient—Time should be given for deficit Court-fee.)

14. (‘21) AIR 1921 Pat 88 (89); 6 Pat 1
15. (‘37) AIR 1937 Lah 720 (720). (Time for execution of that decree if time is not therefore barred by limitation, if it was paid within the period fixed by the executing Court.)

16. (‘38) AIR 1938 All 539 (540): All 848.

Note 8

1. (‘26) AIR 1926 Nag 156 (157).
(‘25) AIR 1925 Pat 299 (302): 4.
(‘14) AIR 1914 Cal 735 (736): 4.
(‘14) AIR 1914 All 216 (216).
(‘20) AIR 1920 Pat 281 (282).
(‘36) 38 Pun L R 262 (263).
(‘38) AIR 1938 Mad 560 (562).
2. (‘16) AIR 1916 Cal 616 (616)
(‘38) AIR 1938 Mad 542 (542).
Court should presume that exercise of discretion by the plaintiff is *esse acta.*)

[See (‘38) AIR 1938 Nag 31 (32). (Where the question whether there was failure to pay the court-fee within the proper time but within a reasonable time was raised, the Court held that the failure was unreasonable in allowing

of deficit court-fee to leave open the question of limitation.³ But where a Judge *refuses* to allow a party to make up deficient court-fee under this Section, there must be something to show that he did exercise his discretion in the matter.⁴ In a recent Special Bench decision of the Patna High Court⁵ it has been held that where the lower Court has exercised its discretion under this Section in an outrageous fashion, the aggrieved party must immediately move the High Court in revision and if he does not do so, he cannot afterwards impeach the order of the Court in the appeal from the final decision. (It may, however, be noted that there is a conflict of decisions as to the power of the High Court to interfere in revision with interlocutory orders: see Section 115 Note 5.)

9. Complaints and memoranda of appeals. — A person is not entitled, as a matter of right, to make up deficient court-fee under this Section. It is entirely left to the discretion of the Court to allow him to do so or not. But in a case of a plaint insufficiently stamped, the Court is bound under O. 7 R. 11 to allow some time to make up the deficiency, provided the plaint has been presented within the period of limitation.¹ Does the same rule apply to appeals? On this point there is a conflict of decisions. See Note 6 to O. 7 R. 11 for a full discussion of the subject.

10. Application for leave to sue or appeal as pauper. — (1) Where an application for leave to sue or appeal as a pauper is rejected, can the Court allow the court-fees to be paid under the present Section so as to treat the suit or appeal as filed on the date of the filing of the pauper application and not on the date on which the court-fee is paid?

(2) Has the Court power to convert an application for leave to sue or appeal as a pauper into a suit or appeal and by allowing time for the payment of court-fees on such suit or appeal under this Section treat the same as filed on the date on which the application for leave was made?

For a discussion of these questions, see Notes to O. 33 R. 7 and O. 44 R. 1.

10a. Power to call for court-fees after judgment is pronounced. — A Court has no power to call for deficient court-fee after it has pronounced its decision.¹ The reason is that thereafter it parts with the seisin of the case and becomes *functus officio*.

11. Conversion of proceedings. — When an application is made under Section 95 of the Code, the Court may allow it to be converted into a suit on payment of the requisite court-fee. In such a case, the suit will be deemed to be instituted when the application was made and not when the court-fee is paid.¹

3. ('33) AIR 1933 Lah 598 (599) : 14 Lah 312.

4. ('29) AIR 1923 All 349 (349).

5. ('37) AIR 1937 Pat 550 (552) : 16 Pat 600 (SB).

Note 9

1. ('15) AIR 1915 Mad 426 (427).

('69) 11 Suth W R 541 (542). (Court bound to allow time in case of plaint even at the appellate stage.)

('73) 19 Suth W R 159 (159).

('17) AIR 1917 Lah 377 (378) : 1917 Pun Re No. 27.

('22) AIR 1922 Pat 56 (56).

('26) AIR 1926 Mad 676 (677).

('03) 27 Bom 330 (332).

('38) AIR 1938 Mad 542 (543). (But when once

the time is fixed, plaintiff cannot demand extension as of right.)

('37) AIR 1937 Pat 550 (553) : 16 Pat 600 (SB).

[But see ('88) AIR 1938 Lah 361 (364) (FB). (Per Din Mohammad and Coldstream, JJ. in Order of Reference—AIR 1917 Lah 377, Dissented from.)

Note 10a.

1. ('33) AIR 1933 Mad 321 (321).

('33) AIR 1933 Lah 208 (208). (Following AIR 1919 Cal 194.)

('32) AIR 1932 Pat 228 (231) : 11 Pat 532.

('32) AIR 1932 All 316 (317).

Note 11.

1. ('12) 16 Ind Cas 443 (444) (Cal).

its order when it has been obtained by false pretences in the absence of the opposite party.¹ See also the undermentioned cases.²

150. [New.] Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

Synopsis

1. "Save as otherwise provided."
2. "Where the business of any Court is transferred to any other Court."
3. Abolition of Court.
4. Powers and duties of Court to which business is transferred.

1. "Save as otherwise provided." — The mere fact that the Court by which a certain power is to be exercised, is specified does not preclude any Court to which the business of the former Court is "transferred," from exercising the power under Section 150, unless it is expressly or impliedly provided that no Court other than the one specified can exercise the power. The following are some of the cases bearing upon this question —

Execution proceedings. — Section 38 provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. Section 37 defines what a "Court which passed the decree" includes. A decree is passed by a Court A. The business of Court A is transferred to Court B within the meaning of Section 150. But Court B does not come within any of the categories mentioned in Sections 37 and 38. Nevertheless Court B can execute the decree passed by Court A. The reason is that there is no express or implied exclusion of the competency of any Court not mentioned in Sections 37 and 38 to execute the decree.¹ As to whether a particular area concerned in a suit is transferred to another Court, see Note 5 to Section 37 and also Note 2 below.

Application to set aside ex parte decree. — Order 9 Rule 13 provides that an application to set aside an *ex parte* decree may be made to the Court by which the decree was passed. This does not mean that no other Court can set aside the *ex parte* decree. Hence, a Court to which the business of another Court is transferred under Section 150 can set aside the *ex parte* decree passed by the latter Court.²

Power to punish for disobedience of temporary injunction. — O. 39 R. 2 (2) empowers the "Court granting an injunction" to punish persons for disobeying the

Note 15

1. ('37) AIR 1937 Nag 87 (88) : I L R (1938) Nag 359.
 2. ('39) AIR 1939 All 452 (454). (Court has jurisdiction to accept the court-fee and restore the plaint rejected as being insufficiently stamped if deficiency in court-fee could not be paid within time allowed due to illness of plaintiff.)
- (('39) 69 Cal L Jour 379 (380). (If without an application for review, a Court sets aside its

own previous order rejecting a plaint for non-payment of deficit court-fees and gives a further extension of time under S. 149, C. P. C., its subsequent order is not a nullity but remains a perfectly good order until it is set aside by a superior Court or in proper proceedings.)

Section 150 — Note 1

1. ('20) AIR 1920 Cal 532 (533) : 47 Cal 1100.
2. ('22) AIR 1922 Mad 10 (11, 12) : 46 Mad 1.

as transfer of all the business, pending or otherwise, in that area to the transferee Court.⁵ Some of them also hold that the Court in which the suit or proceeding was instituted would at the same time continue to have jurisdiction thereon.⁶ This is an impossible position. As has been seen already, where a business is *transferred* from Court A to Court B, Court A has no longer *that business* before it and has no power to deal with it. If, on the other hand, Court A *continues* to have power over a particular business it cannot be said to have been transferred from it to another Court. For all the above reasons the decisions taking the second of the two views set forth above are not correct and have been overruled by a Full Bench of the Madras High Court in the undermentioned case.⁷ The Allahabad High Court has held in the undermentioned case⁸ that the Section cannot be invoked in a case where there has only been a transfer of jurisdiction as to future business subject to an express reservation as regards pending cases. Thus, a Court in which a suit was pending at the time of the transfer has exclusive jurisdiction to entertain an application for restitution arising out of such a suit.

There is a conflict of decisions as to whether an assignment of business by the District Judge under the Civil Courts Act is a *transfer of business* within the meaning of Section 150. The Calcutta⁹ and Patna¹⁰ High Courts hold that it is not. The High Court of Madras¹¹ has, on the other hand, held dissenting from the Calcutta decision, that the word "transfer" is not inapplicable to a case where the District Judge fixes the jurisdiction of the Court under the Civil Courts Act, and transfers the whole of the business within the area to it.

3. Abolition of Court. — Where a Court is abolished, its proceedings can be continued by the Court which would have jurisdiction to entertain the suit if it was instituted at the time when the proceedings are sought to be continued.¹ (See Section 37 of the Code.) If a new Court is established in the place with the same jurisdiction as the old one, it can continue the proceedings² unless they have been transferred to some

('27) AIR 1927 Mad 627 (628, 629) : 50 Mad 882.
(It has power to entertain execution application and transmit it to the Court having territorial jurisdiction to execute it.)

('68) 5 Bom H C R A C 26 (28, 29).

('24) AIR 1924 Mad 697 (700).

('10) 7 Ind Cas 864 (864) (Mad). (Point left open.)

('29) AIR 1929 Mad 852 (854, 856). (In this case the question was left open.)

[See also ('24) AIR 1924 Mad 82 (32).

('36) AIR 1936 Pat 546 (547) : 15 Pat 704.
(Transfer of local area to jurisdiction of another Court — Former Court ceases to have jurisdiction to pass decree.)]

5. ('14) AIR 1914 Mad 162 (167) : 37 Mad 462.

('15) AIR 1915 Mad 1075 (1075).

('15) AIR 1915 Mad 362 (363) : 37 Mad 477.

('24) AIR 1924 Mad 697 (700).

6. ('20) AIR 1920 Mad 427 (433) : 42 Mad 821
(F B). (The point was however discussed obiter.)

('10) 7 Ind Cas 864 (864) (Mad). (Point left open.)

7. ('32) AIR 1932 Mad 418 (420, 421) : 55 Mad 801 (S B).

8. ('37) AIR 1937 All 515 (522) : I L R (1937) All 670.

9. ('22) AIR 1922 Cal 41 (42).

('38) AIR 1938 Cal 193 (194).

[See also ('98) 25 Cal 315 (317, 319).

('36) 163 Ind Cas 622 (623) (Cal). (S. 150 refers to the change of the territorial limits of a Court's jurisdiction by notification or by special order and not to a mere distribution of work among Courts exercising the same jurisdiction—Hence where a temporary injunction in a suit filed in the Court of the Central Munsif is granted by that Court, and subsequently in the usual course of practice, the suit is allocated to the Court of the third Munsif, the latter Court has no jurisdiction to punish for breach of the injunction, as that is not "the Court granting the injunction," within the meaning of O. 39 R. 2 (3), C. P. C.—The Central Munsif's Court alone has jurisdiction to deal with the breach.)]

10. ('21) AIR 1921 Pat 152 (155) : 6 Pat L Jour 364. (Transfer of business must be proved for the Section to apply.)

11. ('23) AIR 1923 Mad 92 (94) : 46 Mad 83.

('92) AIR 1932 Mad 260 (262).

Note 3

1. ('06) 4 Cal L Jour 473 (474).

('04) 31 Cal 1057 (1063).

('12) 13 Ind Cas 542 (543, 544) (Cal).

('15) AIR 1915 All 219 (220) : 37 All 450.

('20) AIR 1920 Cal 532 (532) : 47 Cal 1100.

2. ('26) AIR 1926 Pat 209 (210) : 4 Pat 688.

question and to reserve another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorise a Judge to do what in this matter was justice and for the advantage of the parties; to remand a suit in a case to which neither Section 562 nor Section 566 (1882) applies; to stay the drawing up of the Court's own orders or to suspend their operation, if the necessities of justice so require : to stay, apart from the question whether the case falls within Section 545, the carrying out of a preliminary order pending appeal; to stay proceedings in a lower Court pending appeal and to appoint temporary guardian of a minor upon such stay; to apply the principles of *res judicata* to cases not falling within Sections 13 and 14 of the Code (1882) and so forth."

In *Nandkishore v. Ramgolum*,¹¹ further instances were added, *viz.* —

"Punishing for contempt of Court committed when the Court is not sitting: deciding questions of jurisdiction though the Court is ultimately found not to have jurisdiction over the suit: directing a party who has applied for leave to appeal to His Majesty in Council to pay costs on the dismissal of his application: amending decrees or orders: granting restitution in cases of reversal of execution sales and orders in execution proceedings: restraining by injunction a person from proceeding with a suit in the Small Cause Court: staying proceedings pursuant to its own order in view of an intended appeal; and treating an application for revision as an appeal and *vice versa*."

The Court has an inherent power under such circumstances to act according to justice, equity and good conscience¹² especially in India, where every Court is a Court of Equity as well as of Law.¹³

This Section does not confer any new powers on the Courts but only *saves* their inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.¹⁴ The object of enacting the Section is to show that the powers expressly conferred by the Code apply only so far as they go, but cannot restrict the scope of the Court's inherent powers to do complete and substantial justice¹⁵ for the administration of which alone Courts exist.¹⁶

11. ('13) 40 Cal 955 (959, 960).

12. ('84) 6 All 351 (355, 357).

('67) 4 Bom H C R O C 1 (27).

('25) AIR 1925 All 280 (281, 282) : 47 All 538.

(Inherent power to strike off defence for failure to obey order of Court.)

('32) AIR 1932 Mad 263 (264). (Do.)

('28) AIR 1928 Oudh 262 (263). (Do.)

[See also ('35) AIR 1935 Cal 39 (72). (Every Court has an inherent power to make order *ex debito justitiae*, with a view to the shortening of litigation, preventing duplication of proceedings and saving the parties from harassment and expense.)]

13. ('14) AIR 1914 Cal 129 (131) : 41 Cal 137.

('84) 6 All 370 (373).

('24) AIR 1924 Bom 231 (231) : 47 Bom 593.

(Section applies to Courts and not to a commissioner appointed by Court for examining accounts — No inherent power to review.)

('25) AIR 1925 Oudh 264 (265).

('30) AIR 1930 Mad 618 (621) : 53 Mad 533.

(Court or officer exercising quasi-judicial functions has inherent jurisdiction.)

('36) AIR 1936 Bom 250 (255) : 60 Bom 645.

(With the limitation that though these powers are wide and undefinable the Court cannot use them to override the express provisions of law.)

[See however ('30) AIR 1930 Lah 657 (658). (Section 151 is not one of the Sections open to commissioner under Workmen's Compensation Act.)]

14. ('13) 35 All 331 (336, 337) : 40 Ind App 151 : 16 Oudh Cas 194 (P C).

('12) 16 Ind Cas 966 (966) (Cal).

('13) 18 Ind Cas 207 (203) : 40 Cal 955.

('18) AIR 1918 Cal 850 (857) : 44 Cal 804.

('17) AIR 1917 Mad 159 (161).

('25) AIR 1925 Cal 420 (421).

('26) AIR 1926 All 212 (213) : 48 All 356.

('31) AIR 1931 All 427 (423).

('14) AIR 1914 Sind 61 (62) : 8 Sind L R 327.

('18) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

(Though Section 151 does not confer any new jurisdiction yet the result has been to widen the exercise of power of Civil Courts.)

('20) AIR 1920 Lah 246 (247).

('09) 2 Ind Cas 874 (912) (Bom). (It can take evidence in camera.)

('21) AIR 1921 Pat 409 (410). (Court can suo motu raise attachment which becomes invalid by operation of law.)

('35) AIR 1935 Cal 707 (709).

('36) AIR 1936 All 555 (557).

('35) AIR 1935 All 27 (28).

('35) AIR 1935 All 599 (599) : 57 All 977 (F B).

('36) AIR 1936 Rang 203 (210) : 14 Rang 173 (F B).

15. ('06) 3 Cal L Jour 29 (31).

('33) AIR 1933 All 295 (297) : 56 All 216.

('07) 34 Cal 860 (862). (Legal order can be executed though no provision exists.)

('26) AIR 1926 All 212 (213) : 48 All 356.

('28) AIR 1928 All 103 (110) : 50 All 335.

16. ('09) 1 Ind Cas 677 (681) (Cal).

('10) 7 Ind Cas 19 (20, 21) (Cal).

The inherent powers of the Court being very wide and indefinable¹⁷ the *limits* of such jurisdiction should be carefully guarded and its exercise in an arbitrary and capricious manner effectively prevented.¹⁸ It has been seen that the inherent power of a Court is recognized only to meet those cases for which no provision is made by the Code. It follows, therefore, that where there are *express provisions* of law applicable to a particular case, there is no inherent power in the Court to override them.¹⁹ The words "nothing in this Code shall be deemed to limit or otherwise affect" do not mean that the Code stands repealed where a Court decides to exercise its inherent powers, for the inherent powers can be exercised *only where there is no express provision of the Code*.²⁰ Another limitation on the exercise of such power by the Court is that it must be consistent with sound general principles of law, and with the intention of the Legislature.²¹

The inherent powers of a Court under Section 151 can be exercised, as the Section itself indicates, only —

- (1) for the *ends of justice*, or
- (2) to prevent the abuse of the process of the Court.²²

2. Court cannot override express provisions of law. — It has been seen in Note 1 above that the inherent power of a Court exists only where there is *no* express provision of law applicable to the case.¹ Thus, where there is a specific *prohibition* of a

(24) AIR 1924 Oudh 403 (410).

17. ('24) AIR 1924 Oudh 11 (13). (It is dangerous to attempt definition of the inherent powers of the Court.)

18. ('20) AIR 1920 Pat 56 (59).

(13) 18 Ind Cas 207 (208) : 40 Cal 955.

(36) AIR 1936 Rang 208 (210) : 14 Rang 173 (FB).

[See ('20) AIR 1920 Oudh 84 (85). (Hard cases must not be allowed to make bad law.)]

[See also ('33) AIR 1933 Rang 96 (98). (Not to nullify principles of law of limitation.)]

(32) AIR 1932 All 524 (526). (Order for production of defendant for medical examination — Defendant, woman — Her consent not got — Order of arrest on default — Illegal.)

(39) AIR 1939 All 497 (497) : 1939 All L Jour 398 (400). (S. 151 does not confer an unlimited jurisdiction on the Courts to do what they please.)]

19. ('14) AIR 1914 All 314 (316) : 36 All 354. (Exercise irregular and uncalled for — Condemned.)

(06) 33 Cal 927 (931).

(34) AIR 1934 Mad 199 (200, 201) : 57 Mad 635.

(32) AIR 1932 Lah 238 (239).

(32) AIR 1932 Lah 443 (443). (Remand under O. 41 R. 25 available — Remand under S. 151 not justified since appeal is thereby denied.)

(33) AIR 1933 Sind 29 (31) : 26 Sind L R 395.

(35) AIR 1935 Cal 707 (709). (By the exercise of inherent power, the Court cannot exonerate a litigant from an obligation imposed upon him by the statute.)

(36) AIR 1936 Bom 250 (255) : 60 Bom 645.

(39) AIR 1939 Sind 137 (142) : I L R (1939) Kar 330. (New plea allowed to be argued without amendment of pleading and raising proper issue — Order cannot be allowed to stand.)

[See also ('31) AIR 1931 All 443 (447) : 53 All 804.

(No inherent power in Courts to make complaints apart from Ss. 195 and 476, Cr. P. C.)]

20. ('12) 15 Ind Cas 53 (53) (Cal).

(29) AIR 1929 Lah 694 (695).

(25) AIR 1925 Mad 42 (44) : 48 Mad 494.

(27) AIR 1927 Cal 657 (658). (Section applies only when remedies in the Code are not ample or sufficient.)

(16) AIR 1916 Lah 350 (351).

(34) AIR 1934 Pat 582 (582). (Compromise signed by only one of two plaintiffs who was the manager of the family — Procedure under O. 23 R. 3, and not under S. 151.)

(34) AIR 1934 All 624 (625).

[See ('35) AIR 1935 Bom 222 (225) : 59 Bom 430. (Courts should not, as far as possible, travel beyond the provisions of the Code.)]

21. ('06) 33 Cal 927 (931).

(10) 5 Ind Cas 532 (534, 535) : 37 Cal 399.

(27) AIR 1927 Cal 420 (420).

(36) AIR 1936 Rang 208 (210) : 14 Rang 173 (FB).

[See also ('33) AIR 1933 Pat 196 (202, 203) : 12 Pat 216. (Interest on equitable grounds not available in the face of Interest Act.)]

22. ('28) AIR 1928 Mad 522 (523).

(18) AIR 1918 Oudh 163 (166).

(22) AIR 1922 Sind 6 (9) : 16 Sind L R 79.

(15) AIR 1915 All 172 (173) : 37 All 380.

[See also ('33) AIR 1933 Bom 200 (202). (Decree in wrong name owing to misdescription — Real person can be brought on record in execution proceedings.)]

Note 2

1. ('76) 2 Cal 233 (261) : 4 Ind App 23 (P C).

(29) AIR 1929 Cal 17 (19).

(28) AIR 1928 Cal 179 (180).

(18) AIR 1918 Oudh 311 (312).

(12) 17 Ind Cas 583 (584) (Mad).

adopted in a particular case or a class of cases is provided for by the Code, and a case in which the inherent powers are invoked falls within the intendment of such provision, there is no inherent power to act except under the conditions specified by such provision.¹² The reason is that the provision must be deemed to be *exhaustive of the matters dealt with by it*.¹³ Thus, a Court cannot, under its inherent powers, refuse to be bound by the periods of limitation prescribed by the Limitation Act, 1908.¹⁴

12. ('76) 2 Cal 233 (261) : 4 Ind App 23 (PC).
('32) AIR 1932 Lah 537 (537, 538). (O. 21 R. 18 exhaustive.)
('19) AIR 1919 Cal 44 (45). (Contempt outside Court premises cannot be punished summarily under Section 151.)
('23) AIR 1923 Mad 331 (331).
('20) AIR 1920 Upp Bur 37 (37) : 3 Upp Bur Rul 198.
('21) AIR 1921 Oudh 46 (46) : 24 Oudh Cas 215.
('30) AIR 1930 Lah 789 (790).
('30) AIR 1930 Lah 26 (31, 32) : 11 Lah 342. (Modification of award in contravention of Sch. II Para. 12.)
('12) 16 Ind Cas 521 (521) : 1912 Pun Re No. 8. (No inherent power to force witness to sign deposition in the face of O. 18 R. 5.)
('16) AIR 1916 Lah 95 (96) : 1917 Pun Re. No. 11. (Cannot wholly ignore the provisions of S. 22, C. P. Code.)
('32) AIR 1932 Lah 238 (239). (No inherent power to disregard default in deposit of five per cent. under O. 21 R. 89.)
('18) AIR 1918 Lah 368 (368) : 1918 Pun Re No. 58. (Court cannot entertain claims against attachment contrary to the terms of O. 21 R. 58.)
('16) AIR 1916 Cal 371 (372). (Section 73, C. P. Code—Execution petition after realisation of asset—No rateable distribution.)
('11) 12 Ind Cas 719 (720) (Mad). (Order 11 R. 21 exhaustive—No inherent power.)
('24) AIR 1924 Cal 1054 (1055).
('25) AIR 1925 Cal 274 (275).
('26) AIR 1926 Cal 897 (898).
('24) AIR 1924 Cal 251 (256) : 50 Cal 853.
('26) AIR 1926 Cal 957 (958).
('27) AIR 1927 Cal 158 (159).
('27) AIR 1927 Cal 850 (853) : 55 Cal 219.
('11) 9 Ind Cas 246 (247) (Cal).
('09) 2 Ind Cas 173 (178) 34 Bom 72.
('29) AIR 1929 Sind 110 (111). (An inquiry into pauperism under O. 21 R. 40 cannot be made until the conditions in the rules are satisfied — No inherent power.)
('37) AIR 1937 All 141 (142) (FB). (Court cannot revoke its order of reference to arbitration in the exercise of its inherent power under S. 151, C. P. C.—Such power does not exist apart from the provisions contained in Sch. II, C. P. Code). [See ('23) AIR 1923 Lah 514 (515).]
[See also ('33) AIR 1933 Pat 582 (583). (Inherent power only when powers expressly conferred are exhausted.)]
13. ('06) 33 Cal 927 (931).
('02) 29 Cal 707 (715) : 29 Ind App 196 (PC).
('24) AIR 1924 Mad 114 (115, 116) : 47 Mad 171.
14. ('24) AIR 1924 All 668 (669) : 46 All 631. (AIR 1924 All 446, Followed.)
('33) AIR 1933 Pat 132 (133, 134).
('15) AIR 1915 Cal 530 (531). (No mesne profits for more than three years.)
('20) AIR 1920 Lah 261 (262).
('20) AIR 1920 Lah 309 (310) : 1 Lah 363.
('22) AIR 1922 Lah 266 (266).
('25) AIR 1925 Lah 321 (321).
('26) AIR 1926 Lah 135 (135).
('22) AIR 1922 Pat 479 (480) : 1 Pat 277. (Petition under O. 9 R. 13 after time.)
('10) 6 Ind Cas 901 (902) (Bom). (Do.)
('28) AIR 1928 Nag 91 (92) : 23 Nag L R 183. (Petition under O. 9 R. 9 after time.)
('31) AIR 1931 Cal 319 (320). (Do.)
('26) AIR 1926 Mad 980 (984) : 50 Mad 67.
('17) AIR 1917 Mad 176 (177). (No valid deposit under O. 21 R. 89 after time.)
('22) AIR 1922 Mad 417 (421).
('20) AIR 1920 Lah 346 (347).
('32) AIR 1932 Oudh 220 (222).
('33) AIR 1933 Mad 258 (258, 259).
('33) AIR 1933 Rang 96 (98). (S. 5, Limitation Act, not to be nullified by powers under this Section.)
('34) AIR 1934 Nag 43 (44). (Time for deposit to set aside *ex parte* decree in small cause suit not to be extended.)
('37) AIR 1937 Oudh 426 (427) : 13 Luck 425. (Application for re-admission of appeal under O. 41 R. 19, C. P. C., made after 30 days of order of dismissal—Application is time-barred under Art. 163, Limitation Act even if it is assumed to be one made under S. 151.)
('35) AIR 1935 Rang 466 (471) : 13 Rang 595. (S. 151 only declares nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court.)
('35) AIR 1935 Pesh 146 (147). (Court has no inherent power to enlarge period of limitation laid down by statutory law.)
('39) AIR 1939 Cal 310 (312) : 1 L R (1939) 1 Cal 452. (An application under O. 21 R. 91, C. P. C., made more than 30 days from the date of the sale cannot be treated as an application under S. 151.)
('35) AIR 1935 Lah 60 (61).
('36) AIR 1936 Pat 270 (273) : 15 Pat 422. (Certification of payment—Art. 174, Limitation Act, cannot be overridden.)
('36) AIR 1936 Lah 495 (496). (Application for restoration of suit dismissed for default — Art. 163, Limitation Act, applies—Having recourse to S. 151, C. P. C., cannot help limitation.)
[See also ('33) AIR 1933 Mad 418 (420, 424) : 56 Mad 490 (FB).]
('33) AIR 1933 Mad 315 (319) : 56 Mad 453. (Decree already barred by limitation cannot

Where, however, there is a doubt or difficulty as to which provision will apply to a particular case, the inherent powers may be invoked.¹⁶

It may be useful to refer to certain classes of cases in which the question of the inherent powers of the Court to act has been discussed —

1. Setting aside ex parte decisions and restoration of suits dismissed for default.

— It has been held by the High Courts of Allahabad,¹⁶ Calcutta,¹⁷ Lahore,¹⁸ Madras,¹⁹ Patna²⁰ and Rangoon²¹ and the Judicial Commissioner's Courts of Nagpur, Oudh and Sind²² that there is no inherent power to set aside an *ex parte* decree or to restore a suit dismissed for default, except under the circumstances and conditions mentioned in O. 9 R. 13 and R. 9 respectively. Where a case is outside the scope of O. 9 R. 13, as where a person, *not a party to the suit* applies to set aside an *ex parte* decree under peculiar circumstances, the Rangoon High Court has held that it can set the decree

be revived for execution by subsequent amendment.)

(36) AIR 1936 Pesh 191 (192). (Restoration of execution application consigned to record room — No power to restore on ground that fresh application would be barred by time.)

(33) AIR 1933 Mad 258 (259). (Court has no inherent power to restore an application to restore a suit after that application was itself time-barred.)

15. ('25) AIR 1925 Pat 435 (437) : 4 Pat 180.

16. ('25) AIR 1925 All 610 (614) : 48 All 175 (FB).

(22) AIR 1922 All 441 (441).

(31) AIR 1931 All 294 (296) : 53 All 612 (FB).

[See also ('33) AIR 1933 All 41 (42).]

[But see ('12) 14 Ind Cas 187 (188) : 34 All 426.

(29) AIR 1929 All 811 (812). (Court wrongly dismissing suit under O. 9 R. 8 even when pleader for party is present—Error can be rectified and suit restored under Section 151.)

(12) 16 Ind Cas 677 (678) : 34 All 518.

(17) AIR 1917 All 125 (127).

(29) AIR 1929 All 721 (721) : 51 All 901.

The Full Bench decision was not referred to — The decisions, it is submitted, are not good law.]

17. ('30) AIR 1930 Cal 387 (388).

(30) AIR 1930 Cal 488 (489).

(29) AIR 1929 Cal 158 (159).

(35) 39 Cal WN 894 (895). (Suit cannot be restored under S. 151 after finding that sufficient cause for non-appearance was not proved.)

[But see ('19) AIR 1919 Cal 979 (980). (Appellate Court restored a suit under S. 151 — Held not without jurisdiction.)

(32) AIR 1932 Cal 770 (771) : 59 Cal 1834.

(28) AIR 1928 Cal 772 (774) : 55 Cal 473. (High Court on the original side — O. 9 R. 13 not strictly applicable—Inherent power to set aside lies.)

(05) 32 Cal 253 (256) (FB). (Under Section 89 of T. P. Act—Before the Code of 1908.)

(08) 35 Cal 767 (772, 773). (Under S. 90, Transfer of Property Act—Before Code of 1908.)

18. ('27) AIR 1927 Lah 622 (624, 625).

(23) AIR 1923 Lah 147 (147).

(25) AIR 1925 Lah 321 (321).

[But see ('28) AIR 1928 Lah 534 (535). (Case under O. 9 Rr. 3 and 4.)

(19) AIR 1919 Lah 105 (106) : 1919 Pun Re No. 53. (Case under O. 41 R. 19.)]

19. ('20) AIR 1920 Mad 640 (642, 643) : 42 Mad 94 (FB). (23 Mad 445 ; 26 Mad 599 and 14 Ind Cas 823 cannot be considered now to be good law.)

(25) AIR 1925 Mad 209 (211). (O. 9 R. 9.)

(24) 20 Mad L W 490 (490). (O. 9 R. 13.)

(13) 18 Ind Cas 360 (362) (Mad). (Do.)

(26) 97 Ind Cas 936 (936) (Mad). (Do.)

(34) AIR 1934 Mad 428 (429) : 57 Mad 1063.

20. ('27) AIR 1927 Pat 369 (369). (Dismissal under O. 9 R. 3—Not restored under O. 9 R. 4 but under Sec. 151 by Munsif — Held it could not be done so.)

(22) AIR 1922 Pat 479 (480) : 1 Pat 277.

[But see ('24) AIR 1924 Pat 274 (275). (Refusing to restore under O. 9 R. 4— Held, Court can, under inherent powers.)

(24) AIR 1924 Pat 698 (700) : 5 Pat L Jour 567.

(21) AIR 1921 Pat 491 (493).

(30) 122 Ind Cas 585 (585) (Pat.)]

21. ('30) AIR 1930 Rang 65 (67).

[But see ('12) 15 Ind Cas 358 (359) (Low Bur).

(09) 4 Ind Cas 816 (816) (Upp Bur).

(20) AIR 1920 Low Bur 35 (36).

(24) AIR 1924 Rang 274 (275).

(26) AIR 1926 Rang 109 (110) : 4 Rang 18.

(27) AIR 1927 Rang 58 (58).]

22. ('30) AIR 1930 Nag 48 (49) : 26 Nag L R 30.

(11) 11 Ind Cas 344 (345) : 14 Oudh Cas 111.

(14) AIR 1914 Sind 92 (93) : 8 Sind L R 241. (Restoration of appeal.)

(20) AIR 1920 Sind 34 (36) : 14 Sind L R 239 : 60 Ind Cas 948 (950, 951).

(21) AIR 1921 Sind 38 (41) : 15 Sind L R 61.

(26) AIR 1926 Sind 249 (250) : 20 Sind L R 266.

(27) AIR 1927 Sind 223 (224) : 22 Sind L R 192.

[See also ('37) AIR 1937 Oudh 364 (364) : 13 Luck 263. (In this case it was held by the Oudh Chief Court that a suit dismissed for non-payment of additional court-fee cannot be restored to hearing on an application under S. 151.)]

[But see ('26) AIR 1926 Nag 409 (409, 410).

(31) AIR 1931 Sind 153 (153). (Dismissal of appeal for non-payment of paper book charges — Restoration under S. 151.)]

2. *Interim injunctions and appointment of receivers.* — In cases falling within the scope of Section 94 and O. 39 R. 1 and Order 40, there is, according to the general rule, no inherent power to grant an injunction or to appoint a receiver.²⁹ But in cases *outside* the scope of those rules, *e. g.*, arbitration proceedings, the Court can grant such reliefs under its inherent powers.³⁰

3. *Amendments.* — See Section 152, *infra*.

4. *Remand.* — All the High Courts except the High Court of Allahabad are agreed that an Appellate Court has an inherent power of remand in cases not covered by O. 41 R. 23.³¹ See Note 10 to Order 41 Rule 23.

5. *Restitution.* — "It is inherent in the general jurisdiction of the Court to act rightly and fairly according to circumstances towards all parties involved."³² Hence if,

29. ('26) AIR 1926 Mad 258 (258).
 ('33) AIR 1933 Mad 500 (501) : 56 Mad 563.
 ('27) AIR 1927 Mad 687 (688).
 ('24) AIR 1924 Mad 797 (798) : 47 Mad 700.
 ('38) AIR 1938 Mad 190 (192).
30. ('25) AIR 1925 Sind 102 (102) : 18 Sind L R 303. (Appointment of receiver in arbitration proceedings.)
 ('34) AIR 1934 Lah 79 (80).
 ('33) AIR 1933 Lah 73 (74). (Injunction.)
 ('15) AIR 1915 Cal 565 (567). (Temporary injunction in probate proceedings.)
 ('25) AIR 1925 Lah 242 (243). (Temporary injunction by High Court.)
 ('26) AIR 1926 Mad 1126 (1127). (High Court has power to stay execution in another suit.)
 ('25) AIR 1925 Lah 618 (618). (Non-chartered High Court cannot restrain executing Court from executing a decree.)
 ('27) AIR 1927 Mad 210 (211, 212). (Temporary mandatory injunction.)
 ('09) 4 Ind Cas 609 (610) : 3 Sind L R 128. (Arbitration proceedings—Injunction.)
 ('20) AIR 1920 Lah 436 (437). (Injunction to restrain a person from proceeding with arbitration proceedings.)
 ('31) AIR 1931 Cal 279 (280, 281) : 57 Cal 1280. (Injunction by a High Court against a person living within jurisdiction of another Indian High Court.)
 ('32) AIR 1932 Mad 180 (181). (High Court can grant injunction independent of O. P. Code.)
 ('27) AIR 1927 Lah 833 (834). (Strong prima facie case needed for grant of temporary injunction under inherent power.)
 [See ('36) AIR 1936 Lah 567 (568). (Applicant not coming to Court with clean hands—Equitable relief by way of injunction not granted.)]
 [See also ('33) AIR 1933 Lah 437 (439) : 14 Lah 68.
 ('37) AIR 1937 Sind 315 (316). (Interim injunction can be ordered even in execution proceedings.)
 ('35) AIR 1935 Pesh 182 (184). (Injunction cannot be addressed by one Court to another—O. R. No. 57 of 1926 Reversed and AIR 1921 Pat 92, Approved.)]
31. ('30) AIR 1930 Lah 224 (225).
 ('33) AIR 1933 Pat 706 (707).
- ('33) AIR 1933 Sind 327 (328) : 27 Sind L R 194.
 ('28) AIR 1928 Cal 812 (814).
 ('13) 18 Ind Cas 207 (209) : 40 Cal 955.
 ('27) AIR 1927 Oudh 629 (630).
 ('28) AIR 1928 Mad 991 (992, 994).
 ('32) AIR 1932 Lah 311 (311).
 ('32) AIR 1932 Lah 443 (443). (Findings on all issues given by trial Court—Still remand—O. 41, R. 25 or S. 151 — Not O. 41 R. 23 — Inherent powers under exceptional circumstances — No remand after adverse finding.)
 ('28) AIR 1928 Lah 116 (116).
 ('33) AIR 1933 Lah 157 (158).
 ('34) AIR 1934 Pat 234 (237). (Order of remand can be made under this Section only on its finding that the trial Court has not tried the case properly and not otherwise.)
 ('30) AIR 1930 Lah 441 (442).
 ('31) AIR 1931 Lah 299 (299).
 ('31) AIR 1931 Lah 302 (302).
 ('30) AIR 1930 Mad 72 (73).
 ('35) AIR 1935 Bom 216 (217, 218). (But it has no power to remand disregarding method of procedure enjoined by Code—Where it so acts, High Court can interfere in revision.)
 ('36) AIR 1936 Pat 491 (492).
 ('36) AIR 1936 Nag 140 (141) : I L R (1936) Nag 188.
 ('35) AIR 1935 Pat 68 (68). (Appellate Court should not without sufficient cause order retrial where it can effectively deal with matter under O. 41 R. 25 — S. 151 can be resorted to only when specific provisions are exhausted.)
 ('35) AIR 1935 Mad 715 (716). (But merely because it finds that the lower Court has fallen into errors here and there, is no ground for remanding under inherent powers.)
 [See also ('33) AIR 1933 Pat 220 (222). (Inherent powers to remand for particular purpose alone. Whole matter not re-opened.)]
 [See however ('31) AIR 1931 Mad 791 (791). (Held no inherent power to remand where there is express provision in O. 41 Rr. 25 and 27.)]
32. ('22) AIR 1922 P C 269 (271) : 2 Pat 10 : 49 Ind App 351 (PC).
 (1871) L R 3 P C 465 (475), *Rodger v. The Comptoir D'escompte de Paris*.
 ('32) AIR 1932 Cal 29 (31) : 58 Cal 1070.
 ('31) AIR 1931 Cal 42 (44).

away.⁴¹ Thus, it can stay the execution of a decree on an application for leave to appeal to the Privy Council⁴² or on special leave thereto.⁴³

Apart from execution proceedings a Court has also inherent powers to stay a suit pending the decision in a connected proceeding, apart from Section 10 of the Code.⁴⁴ An Appellate or Revision Court has similarly inherent power to stay further proceedings in the suit in the lower Court apart from O. 41 R. 5 of the Code.⁴⁵ There is a difference of opinion as to whether, where an appeal has been preferred to the Privy Council, the High Court can, under its inherent powers, stay further proceedings in the trial Court apart from O. 45 R. 13. According to the High Courts of Calcutta and Lahore it can.⁴⁶ According to the High Court of Allahabad it has no jurisdiction to do so.⁴⁷ See also the undermentioned cases.⁴⁸

('27) AIR 1927 Cal 37 (38).

('23) AIR 1923 Lah 490 (491).

41. ('27) AIR 1927 Cal 581 (585).

('34) AIR 1934 Pat 637 (637).

('23) AIR 1923 Lah 514 (515). (To stay execution on the ground that the *ex parte* decree was obtained by fraud.)

('24) AIR 1924 Lah 602 (603). (After appeal filed lower Court cannot under inherent power stay execution, for its jurisdiction is taken away by filing the appeal.)

('01) 5 Cal W N 781 (796).

('10) 1910 Pun Re No. 82, p. 239. (Staying execution not only pending suit but even appeal.)

('34) AIR 1934 Pat 637 (637). (But if stay is ordered without putting the unsuccessful claimant to terms, High Court will interfere in revision and set aside the order.)

[See also ('33) AIR 1933 Mad 563 (564). (Order of stay of delivery of possession conditional on payment of kist and rent by certain date is one under S. 151 and S. 148 applies to such order.)

('87) 9 All 36 (42).]

42. ('25) AIR 1925 Sind 216 (217).

('33) AIR 1933 All 18 (18).

('31) AIR 1931 Cal 79 (81). (Pending appeal before Privy Council—High Court granted stay of proceedings in the suit.)

43. ('13) 18 Ind Cas 207 (210) : 40 Cal 955.

44. ('29) AIR 1929 Lah 12 (14).

('33) AIR 1933 Lah 50 (50, 51).

('15) AIR 1915 Mad 608 (611). (Staying a suit, suit being an abuse of process of Court.)

('24) AIR 1924 Cal 757 (760). (To postpone hearing of a suit pending decision of selected action.)

('24) AIR 1924 Bom 90 (93).

('29) AIR 1929 Oudh 341 (346) : 4 Luck 573.

('30) 123 Ind Cas 50 (50) (Oudh).

('30) AIR 1930 Lah 527 (528).

('31) AIR 1931 Oudh 313 (314). (Inherent power assumed — But sufficient grounds held not to exist.)

('30) AIR 1930 Lah 525 (525, 526). (Do.)

('17) AIR 1917 Sind 95 (96) : 10 Sind L R 1. (Pending an arbitration out of Court.)

('35) AIR 1935 Rang 355 (356). (Suit for possession to be stayed pending decision of suit for declaration of title to same property by opposite party.)

('36) AIR 1936 Pat 408 (409).

[See also ('38) 1938 Nag L Jour 120 (121).

(The High Court has ample jurisdiction under S. 151, C. P. Code, to stay the proceedings in connected suits.)]

45. ('04) 31 Cal 722 (724) (F B). (Further proceedings on a decree under O. 20 R. 16.)

('32) AIR 1932 All 655 (656). (Appeal from order confirming a sale—Stay of proceedings for delivery of possession to auction-purchaser.)

('34) AIR 1934 Lah 909 (910). (Revision against decree pending—High Court can stay execution.)

('21) AIR 1921 Pat 328 (329, 330). (Taking accounts on a decree for partition under appeal.)

('32) AIR 1932 All 238 (238) : 54 All 344. (Staying execution of final decree in a mortgage suit pending the appeal from preliminary decree.)

('31) AIR 1931 Bom 384 (384) : 55 Bom 801. (Arbitration Act — Refusal to set aside award—Appeal to High Court — Execution of award stayed pending appeal.)

('28) AIR 1928 Lah 912 (912). (Appeal under Guardians and Wards Act—Stay of proceedings in lower Court.)

('34) AIR 1934 Lah 909 (910). (Under S. 151 High Court has ample power to stay execution of decrees which form the subject-matter of petitions for revision.)

[See ('37) AIR 1937 Oudh 359 (360) : 13 Luck 581. (Chief Court of Oudh has no power either under S. 151 or under O. 41 R. 5, C. P. C., to stay the proceedings under Ss. 18 and 35 of the U. P. Encumbered Estates Act pending an appeal filed before it against the decree of the Special Judge under S. 14 (7) of that Act. The proper procedure is to move the Collector to stay proceedings until the decision of the appeal filed in the Chief Court.)]

46. ('34) AIR 1934 Cal 823 (824).

('34) AIR 1934 Lah 238 (238, 239).

('39) AIR 1939 Cal 308 (309).

47. ('34) AIR 1934 All 585 (586) : 56 All 907.

48. ('39) AIR 1939 Mad 204 (208). (Administration suit — Creditor obtaining preliminary decree is entitled to order, against another decree-holder attaching property of deceased judgment-debtor staying all proceedings taken by him and restraining him from executing his decree — Court is entitled to pass appropriate orders to safeguard interests of all creditors—Such orders cannot be

In exercising inherent powers in cases not provided for, the Courts may apply

- ('25) AIR 1925 Mad 42 (43) : 48 Mad 491. (To grant time to surety before actual arrest of judgment-debtor—Compare O. 21 R. 40.)
- ('07) 34 Cal 860 (862). (To order costs on dismissal of application for leave to appeal to Privy Council.)
- ('25) AIR 1925 All 280 (282) : 47 All 538. (Striking off defence for default in payment of adjournment costs before date fixed.)
- ('29) AIR 1929 All 123 (124). (To set aside an order striking off objection of judgment-debtor for default.)
- ('33) AIR 1933 Nag 176 (176) : 29 Nag L R 176 (Do.).
- ('32) AIR 1932 Cal 569 (570). (Do.)
- ('37) AIR 1937 Cal 199 (201) : I L R (1937) 2 Cal 48. (S. 51 of the Code contemplates sale without attachment and so even if a share of debt be not attachable under O. 21 R. 46 or under any other rule prescribed, a Court can pass prohibitory orders similar to one under O. 21 R. 46 under its inherent powers for the ends of justice.)
- ('36) AIR 1936 All 97 (101) : 58 All 538. (Court has inherent power to amend scheme passed under S. 92.)
- ('33) AIR 1933 All 49 (49). (Court has inherent jurisdiction to set aside its own order passed under a misunderstanding of the case and signed inadvertently—Court can re-hear the case.)
- ('35) AIR 1935 All 281 (282). (Two out of three arbitrators related to one of parties—Court has inherent power to supersede reference.)
- ('36) AIR 1936 Pat 506 (508). (Adjustment of decrees effected by next friend of minor decree-holder, during execution proceedings, without sanction of Court sought to be set aside—S. 47 bars fresh suit—Proper remedy is by application for review or by invoking inherent jurisdiction of Court.)
- ('38) AIR 1938 Cal 287 (290) : I L R (1938) 1 Cal 53. (Plaintiff in interpleader suit can apply on completion of pleadings that he should be removed from proceedings—Court can grant such relief under S. 151.)
- ('38) AIR 1938 Bom 510 (512) : ILR (1938) Bom 743. (High Court has inherent power to order security for costs from applicant for revision.)
- ('36) AIR 1936 Cal 342 (343). (Inherent power to treat suit as application.)
- ('36) AIR 1936 Cal 751 (752) : I L R (1937) 1 Cal 573. (Decree in suit for partition making no provision for maintenance of some members of family—Appeal directed to question of maintenance only—Certified copy of portion of decree relating to allotment of property need not be filed—Appeal filed without such copy is in proper form—Court can also admit appeal as being in proper form in exercise of its inherent powers.)
- ('36) AIR 1936 Cal 409 (412) : I L R (1937) 1 Cal 57. (Executing Court can entertain and give effect to a claim to set-off even in case which does not come strictly under O. 21 R. 19, C. P. Code.)
- ('35) AIR 1935 Cal 231 (234) : 62 Cal 223. (On premature threat from Bench, pleader agreeing to settlement of case—Counsel *held* intimidated and Court had inherent power to set aside settlement.)
- ('35) AIR 1935 Lah 956 (957). (Executive order of interlocutory nature—Government not made party—Order *held* revisable under inherent powers read with S. 107, Government of India Act of 1915.)
- ('39) AIR 1939 Lah 380 (382). (*P* attaching property of *K* in execution of decree against *K*—*M* subsequently purchasing that property at auction sale in another execution proceedings against *K* contending that property is not liable to sale in execution of *P*'s decree—Application purporting to be under O. 21 R. 58—Execution Court *held* could inquire into title of *M* under S. 151 even if S. 47 did not apply, to prevent unnecessary complications which would otherwise result from a second sale.)
- ('35) AIR 1935 Mad 349 (350). (Court has inherent power to revoke reference, if arbitration is grossly irregular and defective.)
- ('33) AIR 1933 Oudh 229 (231) : 8 Luck 496. (Preliminary decree passed—Judgment-debtors' failure to pay—Application for final decree—Dismissal under O. 9 R. 3—Legality of—Application to set aside order—Inherent power of Court—Relief can be granted though applicant be negligent.)
- ('37) AIR 1937 Oudh 106 (107) : 12 Luck 739. (Collector passing order under S. 6, U. P. Encumbered Estates Act—Civil Court not staying execution proceedings but passing decree subsequent to Collector's order—Decree *held* could be set aside under S. 151.)
- ('35) AIR 1935 Pat 439 (444) : 14 Pat 356. (Where a Court passes a decree on the basis of a compromise without a formal order for recording the compromise, the decree is irregularly passed and such a decree can be set aside on an application under S. 151.)
- ('39) AIR 1939 All 452 (454) : 1939 All L Jour 335 (337). (Though a plaint is rejected under O. 7 R. 13 a Judge has jurisdiction under S. 151, C. P. Code, to restore the suit.)
- ('35) AIR 1935 All 985 (986). (Deficiency of court-fees ordered to be made good—Court rejecting plaint under O. 7 R. 11—Plaintiff filing restoration application after making good deficient court-fee—Court can treat such application as fresh plaint under O. 7 R. 13 and can allow court-fee paid on rejected plaint to be counted towards court-fee on fresh plaint under Ss. 149 and 151, C. P. Code.)
- ('36) AIR 1936 Pat 93 (94) : 15 Pat 51. (Mortgage suit—Application for final decree beyond time—Similar previous application made in time dismissed for failure to comply with some steps concerning service of notice on judgment-debtors—Though application was beyond time Court *held* could restore previous application for ends of justice.)

*analogous provisions of the Code nearest in point to the circumstances before it.*⁵⁴

3. Court cannot override general principles of law. — No inherent power can be exercised so as to conflict with sound general principles of law.¹ Thus, a Court has no inherent power to recall an order previously made by it, or entertain an application raising questions which had already been heard and finally decided by it, and which are consequently barred by the general principles of *res judicata*.³ Similarly it cannot under its inherent powers deal with matters over which it has no *jurisdiction*³ though it has always jurisdiction to determine *whether it has jurisdiction*.⁴ The

54. ('21) AIR 1921 Mad 599 (605) : 44 Mad 919 (FB). (For example assignee of portion of decree comes under O. 21 Rr. 15 and 16.)

('10) 6 Ind Cas 386 (387) (Cal). (Execution against Commissioner for recovery of excess fees.)

('24) AIR 1924 All 122 (123). (Execution in favour of Commissioner.)

('29) AIR 1929 All 211 (212). (Execution of orders not provided for.)

('07) 34 Cal 860 (862). (Do.)

('18) AIR 1918 Cal 133 (134). (Do.)

('26) AIR 1926 Mad 1005 (1006). (Enforcement of surety bond in execution, on the analogy of S. 145.)

('80) 5 Cal 819 (820). (To defend in *forma pauperis*.)

('29) AIR 1929 Mad 828 (829) : 53 Mad 43. (To continue suit in *forma pauperis*.)

('20) AIR 1920 Mad 230 (231). (Appeal to be continued in *forma pauperis*.)

('11) 12 Ind Cas 692 (693) (Mad). (Refund of amounts deposited as security.)

('10) 6 Ind Cas 120 (120, 121) (Cal). (Resistance outside O. 21 Rr. 97 to 99.)

('23) AIR 1928 Pat 187 (188). (Directing successful respondent to furnish security for restitution.)

('32) AIR 1932 Sind 33 (34) : 26 Sind L R 21 (Security for costs—Case outside O. 25.)

('93) 15 All 84 (95) (FB). (Dismissal of execution petition for default.)

('96) 20 Bom 541 (542). (Do.)

('31) AIR 1931 Mad 303 (306, 312). (Applicability of O. 22 Rr. 2 and 3 to execution applications.)

('38) AIR 1938 Bom 510 (512) : I L R (1938) Bom 743. (Revisional applications under S. 115, C. P. C., or S. 75 of the Provincial Insolvency Act—Under S. 151, C. P. Code, High Court can require security for costs from applicant on analogy of O. 25 R. 1 or O. 41 R. 10.)

[But see ('30) AIR 1930 Rang 280 (281) : 8 Rang 423. (No inherent power to grant application for review in *forma pauperis* of order in appeal.)]

Note 3

1. ('04) 26 All 407 (427) (FB).

('10) 7 Ind Cas 19 (20) (Cal).

('13) 20 Ind Cas 3 (5) (Lah). (Superior Court's decision cannot be upset.)

('22) AIR 1922 Cal 1 (1). (No inherent power to introduce a new form of procedure.)

('37) AIR 1937 All 18 (19). (Recourse should not be had to a general Section of the nature of

S. 151, C. P. Code, for a remedy which does not come under some positive rule of law—Court auction purchaser not entitled to refund of purchase money if subsequently a third party obtains a decree for possession.)

('37) AIR 1937 Pat 647 (650) : 16 Pat 729. (Court has no power under the Section to give compensation to a decree-holder, who after purchasing property in execution in satisfaction of his decree loses part of that property as the result of another suit.)

[See ('33) AIR 1933 All 343 (344). (Held that the circumstances of the case did not warrant the overriding of S. 115, by an application of the inherent powers of the Court.)]

2. ('27) AIR 1927 Cal 57 (60).

('22) AIR 1922 Pat 204 (205).

('24) AIR 1924 Cal 830 (831) : 51 Cal 715. (Successor Judge should not condemn predecessor's order in strong words.)

('17) AIR 1917 Lah 306 (307) : 1917 Pun Re No. 14.

('24) AIR 1924 Mad 489 (489). (No inherent power to restore a suit once disposed of.)

('35) AIR 1935 Lah 60 (61).

('38) AIR 1938 Pat 593 (594). (Order passed by Court having jurisdiction to pass it cannot be recalled.)

[See ('38) AIR 1938 Oudh 103 (105). (Where a presiding officer of a Court has passed an order, his successor cannot and should not go behind that order and hold that order to be *ultra vires*.)]

[See also ('36) AIR 1936 Rang 77 (80) : 13 Rang 722.]

[But see ('23) AIR 1928 Lah 244 (245).

('17) AIR 1917 All 477 (479) : 39 All 8.

('30) AIR 1930 All 644 (645, 646) : 52 All 924.]

3. ('26) AIR 1926 Mad 631 (632). (Order in respect of suit not pending before it.)

('19) AIR 1919 Pat 240 (241). (No pending suit.)

('22) AIR 1922 Bom 444 (445, 446) : 47 Bom 250. (Summoning a witness before a private person.)

('26) AIR 1926 Lah 284 (284). (Injunction against Government Officers not subordinate to Court.)

('09) 4 Ind Cas 103 (116) : 34 Bom 467. (Caste questions.)

('18) AIR 1918 Mad 580 (584) : 40 Mad 1069 (FB). (No jurisdiction to send decrees to foreign Courts for execution—See S. 45, C. P. Code.)

('16) AIR 1916 Mad 554 (554). (Consent confers no jurisdiction.)

('25) AIR 1925 Oudh 142 (142). (No inherent power for Judges to find on facts and legal relations outside pleadings.)

4. ('15) AIR 1915 Cal 49 (51).

(1862) 1862 Marsh 99.

power of a Court to hear an appeal or to review a previous judgment exists *only if it is given by statute* and therefore when there is no such right given by statute, a Court cannot, under its inherent powers, hear an appeal or review its previous order⁵ or transfer a case.⁶ [But the Court has always power to rectify its own mistakes and where a previous order has been passed under a *mistake* the Court can rectify such mistake. See Note 6 *infra*.] Similarly, the High Court has no *inherent* power of revision over proceedings in subordinate Courts, because the power of revision is a creature of the statute and does not exist if it is not provided for by statute.⁷

4. Ends of justice. — The inherent powers saved by the Section are to be used only to secure the ends of justice or to prevent the abuse of process of the Court.¹ The following broad rules may be taken as a guide to determine what constitute the “ends of justice” :

(1) *It is in the ends of justice that an injury should be remedied and needless expense and inconvenience to parties avoided.*² Thus, a Court will remedy an obvious

5. ('19) AIR 1919 Mad 244 (246). (Religious Endowments Act—No provision therein for review—No inherent power.)

('33) A I R 1933 Lah 169 (171).

('26) AIR 1926 All 50 (55) : 48 All 160.

('18) AIR 1918 Cal 925 (927) : 45 Cal 519.

('27) AIR 1927 Cal 920 (921). (Review.)

('29) 1929 Mad W N 140 (141). (Do).

('29) AIR 1929 Cal 162 (162).

('39) AIR 1939 Sind 137 (140) : ILR (1939) Kar 330.

[See ('31) AIR 1931 Pat 409 (409) (Review).]

[See also ('18) AIR 1918 Bom 157 (157) : 42 Bom 363. (No inherent power for revision apart from S. 115.)

('34) AIR 1934 Pat 229 (231) : 13 Pat 165. (Review can only be granted on grounds set out in O. 47.)]

[Compare ('27) AIR 1927 Cal 534 (536) : 54 Cal 405. — Dismissal of application for restoration—Inherent power to review—Followed in A I R 1929 Cal 17 .]]

[See however ('29) AIR 1929 Nag 185 (189, 190).]

[But see ('36) AIR 1936 Pesh 213 (214). (Order fixing court-fees — Trial Court has inherent power to review).]

6. ('05) 32 Cal 875 (881).

('34) AIR 1934 All 677 (679). (S. 151, C. P. Code cannot be invoked so as to treat an appeal filed on behalf of one party as the appeal of another, simply because it should have been filed on behalf of the other and it was the intention of the pleader filing it to appeal on behalf of the other.)

[But see ('24) AIR 1924 Lah 306 (310). (Inherent power of the High Court to transfer).]

('31) 133 Ind Cas 876 (876) (Lah).]

7. ('38) AIR 1938 F C 1 (3). (Court by the exercise of any inherent powers cannot extend its appellate jurisdiction or increase its revisional authority over other Courts.)

('35) AIR 1935 All 599 (600) : 57 All 977 (FB).

Note 4

1. ('21) AIR 1921 P C 80 (84) : 48 Ind App 76 : 48 Cal 481 (PC).

(1908) 1 Ch 471 (479, 487) Norton v. Norton.

('33) AIR 1933 Pat 84 (87) : 12 Pat 163. (Annulment without provision for protecting creditors—Insolvency Court can pass supplementary order under Provincial Insolvency Act (1920), S. 5 (1).)

('09) 4 Ind Cas 595 (595) : 34 Bom 135.

('22) AIR 1922 Pal 409 (411) : 1 Pat 149. (Execution application — Overstating amount — Amendment under S. 151.)

('29) AIR 1929 All 421 (428) : 51 All 780. (High Court refused to be bound by finding in a remand order even though neither party could question it.)

('17) AIR 1917 All 474 (475) : 39 All 147. (Obvious miscarriage of justice can be prevented.)

('30) AIR 1930 Bom 294 (295) : 55 Bom 368. (Interlocutory order by Judge in Chambers—Corrected to prevent injustice though review did not strictly lie.)

('32) AIR 1932 Lah 295 (296). (Lease by judgment-debtor after sale and before confirmation — Prohibitory order issued to lessee in the interests of justice.)

('38) AIR 1938 Bom 199 (205) (SB).

('38) AIR 1938 Rang 241 (241) : 1939 Rang L R 14. (Ends of justice — Objection that pleader engaged by opposite party should not be allowed to appear—Objection accepted in lower Court—Order is in accord with ends of justice.)

2. See the cases in footnotes 3 to 16 below.

('23) AIR 1923 Bom 419 (419). (Suit for maintenance—Quantum to be fixed in suit itself and not to be left to be decided in separate suit.)

('32) AIR 1932 Lah 295 (296). (Subsequent to court sale and before confirmation the judgment-debtor leasing the premises sold — Court can issue prohibitory order against the tenant and judgment-debtor under S. 151.)

('34) AIR 1934 Pat 683 (685). (Objection to execution — Objectors mentioning by mistake that they were in possession—Objection upheld but no order as to possession passed—Court should under S. 151 restore possession to objectors.)

[See also ('12) 17 Ind Cas 987 (988) (Mad). (Suit for ejectment by vendor—Conditional decree on refund of purchase money could be passed.)

when that decree is subsequently restored.⁹ It can also, according to the Allahabad High Court, restore a suit, the decree in which has been set aside in a separate suit on the ground that the minor defendant was not properly represented.¹⁰ In order to avoid multiplicity of proceedings and needless expenses and inconvenience, it can re-hear a matter before final orders are passed in it¹¹ and consolidate suits,¹² appeals¹³ or other proceedings¹⁴ and can take notice of subsequent events¹⁵ or of

('32) AIR 1932 Pat 3 (5). (Omission of name of vakil in vakalatnama—Defect condoned.)

('27) AIR 1927 P C 264 (265) (P O). (Dismissal of appeal for technical defect in security bond under O. 41 R. 10, without giving opportunity for rectification—Dismissal reversed.)

('22) AIR 1922 Pat 368 (369).

('27) AIR 1927 Oudh 455 (456) : 2 Luck 731. (Fundamental defect undetected and not raised in grounds of appeal.)

('13) 20 Ind Cas 294 (294) (Cal). (High Court can consider an admitted document though not printed.)

('32) AIR 1932 Lah 267 (268). (An unregistered document becoming inadmissible, because of a Privy Council ruling—Court ought to receive the document on registration notwithstanding prior order of rejection.)

[See ('35) AIR 1935 All 391 (394).]

[But see ('11) 11 Ind Cas 77 (78) : 5 Sind L R 68. (Application cannot be construed as something essentially different from what it is.)]

9. ('30) AIR 1930 All 100 (100).

('20) AIR 1920 Cal 999 (400). (Appeal left undecided on parties agreeing to settle matter in dispute by separate suit—Separate suit not tenable—Appellate Court has power to restore appeal and determine the question.)

10. ('17) AIR 1917 All 477 (479) : 39 All 8. (Followed in 1928 Mad W N 275.)

('30) AIR 1930 All 644 (645, 646) : 52 All 924.

[See also ('31) AIR 1931 Cal 168 (169). (Case of a lunatic defendant.)]

('37) AIR 1937 All 552 (556).]

11. ('10) 37 Cal 259 (262).

('18) AIR 1918 Cal 173 (175).

('29) AIR 1929 All 403 (404). (Irregularity in Court Rules, Chap. VII R. 3, irregularity merely—No rehearing.)

(1837-41) 2 Moo Ind App 181 (216) (P O). (Re-hearing of an appeal before the Privy Council.)

('32) AIR 1932 All 656 (657). (There is no rule of law except S. 151, O. P. Code which can authorise a Court to revise its own order superseding a reference to arbitration.)

[See also ('33) AIR 1933 Lah 266 (266, 267).]

12. ('71) 15 Suth W R 110 (111).

('84) 10 Cal 58 (60).

('95) 22 Cal 511 (517).

('11) 11 Ind Cas 161 (163) (Cal).

('12) 15 Ind Cas 897 (898) (Cal).

(1841) 1 Cr. & Ph. 161 (181, 182), Rawson v. Samuel.

('17) AIR 1917 All 336 (337). (Even without the consent of parties.)

('22) AIR 1922 Pat 566 (566) : 1 Pat 669. (Do.)

('15) AIR 1915 Bom 146 (148) : 39 Bom 604 (FB).

(However High Court has no jurisdiction for

consolidation of suits pending before a District Court.)

('37) AIR 1937 Nag 132 (133) : I L R (1937) Nag 6. (Consolidation is the exception and not the rule, and Courts should be slow to presume its existence when there is no express order to that effect, especially as the Code does not allow consolidation in express terms.)

('39) AIR 1939 Pat 30 (31). (In deciding whether two suits should be consolidated or not, the whole question is whether or not in the long run, it will be expeditious and advantageous to all concerned to have the two suits tried together as analogous cases.)

[See also ('24) AIR 1924 Nag 196 (198).]

13. ('18) AIR 1918 Mad 368 (369).

('28) AIR 1928 Mad 463 (463).

('23) AIR 1923 All 490 (491) : 45 All 506 (FB). (Two cross-appeals—One final decree.)

('25) AIR 1925 Pat 765 (769) : 4 Pat 448. (Order of consolidation must be express.)

('18) AIR 1918 Pat 196 (197) : 3 Pat L Jour 446. (Consolidation by High Court of Privy Council appeals—Compare O. 45 R. 4.)

[See ('30) AIR 1930 Mad 376 (379, 381) : 53 Mad 248 (FB). (Overruling AIR 1928 Mad 463 on the question of number of vakalats to be filed in consolidated appeals.)]

('36) AIR 1936 All 832 (833) : I L R (1937) All 105. (Ordinarily inherent powers exist as regards matter relating exclusively to the proceedings in Court which exercises such powers. The High Court has no inherent power to pass orders under O. 45 R. 4 directing consolidation of appeals pending before their Lordships of the Privy Council, when there is no specific provision to that effect in O. 45 R. 4, and, when O. 45 R. 4 is confined to particular cases—AIR 1918 Pat 196, Not followed.)]

14. ('18) AIR 1918 Pat 415 (416). (Application to set aside *ex parte* decree—Another to set aside sale thereunder—Fraud—Joint trial.)

[See ('30) AIR 1930 Mad 381 (382) : 53 Mad 262 (F B). (Several revisions against common respondent cannot be consolidated for purposes of vakalat and process fee.)]

15. ('17) AIR 1917 Cal 716 (719) : 44 Cal 47. (Taking notice of events subsequent to date of suit to do complete justice.)

('12) 13 Ind Cas 377 (381) (Cal). (Do.)

('15) AIR 1915 Cal 103 (104). (Do.)

('17) AIR 1917 Cal 822 (822). (Do.)

('21) AIR 1921 Cal 792 (795). (Do.)

('25) AIR 1925 Cal 561 (564). (Do.)

('23) AIR 1923 Lah 24 (25). (Do.)

('25) AIR 1925 Nag 104 (107). (Do.)

('24) AIR 1924 Nag 188 (189). (Do.)

('24) AIR 1924 Nag 204 (207). (Do.)

O. 9 R. 9 by the heir of the plaintiff the suit was restored. On revision the Judicial Commissioner reversed the order of restoration on the ground that the original dismissal was rightly made on default. On appeal to the Privy Council, Lord Shaw, after stating that the rules and orders applicable to a defaulter could not be applied to a dead man and quoting the words of Section 151, observed "in their Lordships' opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from Section 151 any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But Section 151 could never be invoked in a case clearer than the present." It follows from this ruling that where a Court employed a procedure in doing something which it never intended to do and there is miscarriage of justice, there is an abuse of the process of the Court.² The injustice so done must be remedied on the principle *actus curiæ neminem gravabit*—an act of the Court shall prejudice no person.³ Such an abuse by the Court may arise *either (a) by the default or mistake of the Court itself*⁴

2. ('29) AIR 1929 All 147 (148): 50 All 859. (Property other than the judgment-debtor's included in judgment, decree and map by accident.)
 ('09) 1 Ind Cas 913 (918): 36 Cal 193.
 ('17) AIR 1917 Pat 495 (497): 2 Pat L Jour 361.
 ('35) AIR 1935 All 27 (28). (Decree-holder being driven to the necessity of making fresh application for execution, which is barred by limitation—Order passed by oversight.)
 ('38) 32 Sind L R 215 (219). (Court can set aside its own order which is null and void and ought never to have been made—Power not confined to cases of fraud or deception practised upon the Court.)
3. ('20) AIR 1920 Cal 399 (400).
 ('26) AIR 1926 Nag 331 (331).
 ('09) 1 Ind Cas 913 (918): 36 Cal 193.
 ('14) AIR 1914 Sind 61 (62): 8 Sind L R 327.
 ('38) AIR 1938 All 8 (11): 1 L R (1938) All 71. (A Court has inherent jurisdiction to recall and cancel its invalid orders.)
 ('39) AIR 1939 Bom 51 (52): 1 L R (1939) Bom 27. (Court can vacate a prior wrong order made by it.)
 ('36) AIR 1936 Cal 343 (346): 63 Cal 1079. (This principle ought to be applied even when for relieving a party from such injury the Court has to consider the question of time and Court can grant extension of time though case not covered by S. 5, Limitation Act—Correctness of this view is questionable.)
 ('37) AIR 1937 Mad 150 (151). (Inherent power of restitution.)
 ('35) AIR 1935 Sind 214 (215): 29 Sind L R 251. ("The act of the Court" means not merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case: A I R 1922 P C 269, Relied on.)
4. ('16) AIR 1916 Cal 241 (244): 43 Cal 269. (Adverse order without notice—"Audi alteram partem".)
 ('16) AIR 1916 P C 85 (85) (PC). (Do.)
 ('12) 16 Ind Cas 677 (678): 34 All 518. (Do.)
 ('70) 13 Suth W R 232 (232). (Do.)
 ('06) 3 Cal L Jour 276 (279). (Do.)
 ('12) 16 Ind Cas 567 (569) (Cal). (Do.)
 ('17) AIR 1917 Cal 633 (634): 44 Cal 454. (Do.)
 ('17) AIR 1917 Cal 728 (731): 44 Cal 954. (Do.)
 ('27) AIR 1927 Cal 76 (77): 53 Cal 844. (Do.)
 ('17) AIR 1917 Mad 945 (946). (Do.)
 ('19) AIR 1919 Mad 14 (15). (Do.)
 ('21) AIR 1921 Mad 286 (291). (Do.)
 ('22) AIR 1922 Mad 485 (485, 486). (Do.)
 ('17) AIR 1917 Pat 672 (672): 1 Pat L Jour 245. (Do.)
 ('21) AIR 1921 Pat 293 (295). (Do.)
 ('23) AIR 1923 Pat 180 (183). (Do.)
 ('23) AIR 1923 Pat 597 (599). (Do.)
 ('33) AIR 1933 Oudh 229 (230, 231): 8 Luck 496. (Dismissal of final decree application for default—Application for restoration and for final decree—To be allowed though decree-holder negligent.)
 ('33) AIR 1933 Pat 135 (138).
 ('34) AIR 1934 Mad 506 (507): 58 Mad 84. (Disposal of appeal without full hearing owing to mistake—Re-heard.)
 ('20) AIR 1920 Cal 434 (435) (FB). (Dismissal of a petition under misapprehension.)
 ('68) 9 Suth W R 283 (284). (Case struck off under a misapprehension that the parties had settled it.)
 ('12) 13 Ind Cas 264 (266): 5 Sind L R 184. (Order based on erroneous assumption by Court.)
 ('28) AIR 1928 All 108 (110): 50 All 335. (Failure to enquire under O. 32 R. 15.)
 ('29) AIR 1929 All 147 (148): 50 All 859. (Judgment including property of person other than judgment-debtor owing to accidental slip.)
 ('24) AIR 1924 Mad 100 (101). (Sale ignoring injunction.)
 ('25) AIR 1925 All 622 (623): 47 All 546. (Application for final decree—Applicants' default—Dismissal of suit itself.)
 ('29) AIR 1929 Rang 158 (160): 7 Rang 88. (Error in drafting the decree.)
 ('31) AIR 1931 Oudh 346 (348). (Court omitting to include mesne profits in decree by mistake.)
 ('32) AIR 1932 Nag 31 (31): 27 Nag L R 341. (Decree directing partition in impossible manner.)
 ('27) AIR 1927 Oudh 276 (277). (Change of date and hasty procedure in the Munsif's Court.)

- or its officers⁵ or (b) as the result of misrepresentation by or fraud of a party.⁶ But, where the fraud alleged in a petition under this Section for setting aside a decree
- ('23) AIR 1923 Oudh 16 (17). (Execution granted to defaulting plaintiff.)
- ('22) AIR 1922 Bom 210 (211). (Error in procedure on the part of the trial Court.)
- ('32) AIR 1932 Cal 569 (571). (Improper dismissal of an application.)
- ('21) AIR 1921 Pat 491 (493). (Ex parte decree under O. 34 R. 6 passed by oversight against a person who is not mortgagor.)
- ('29) AIR 1929 Oudh 385 (387); 4 Luck 562 (FB). (Passing decree on a compromise not signed by a party or his authorized agent.)
- ('10) 7 Ind Cas 91 (92) (Cal). (Only one lot sold—Sale certificate comprising all lots.)
- ('08) 12 Cal W N 1027 (1029).
- ('10) 6 Ind Cas 208 (209) (Cal). (Dismissal of suit for default under misrepresentation and by mistake.)
- ('28) AIR 1928 All 301 (301). (Application for setting aside sale—Dismissal for default when no default.)
- ('28) AIR 1928 Lah 534 (535) (Do.)
- ('17) AIR 1917 Mad 157 (157).
- ('24) AIR 1924 Nag 58 (59).
- ('27) AIR 1927 Cal 636 (642) : 54 Cal 836.
- ('26) AIR 1926 Pat 218 (226, 231) : 5 Pat 361 (FB). (Wrong order for payment of court-fee, and wrong dismissal on default of payment.)
- ('25) AIR 1925 Oudh 418 (419).
- ('19) AIR 1919 Cal 261 (263). (Refusal of Court to make a proper order.)
- ('17) AIR 1917 Lah 209 (209).
- ('23) AIR 1923 Mad 58 (59).
- ('10) 5 Ind Cas 909 (910) (Mad).
- ('17) AIR 1917 Mad 223 (224). (Expunging objectionable or unnecessary matter from judgments—Power of High Court—Compare Government of India Act, S. 107.)
- ('19) AIR 1919 Mad 655 (655). (Do.)
- ('85) 11 Cal 544 (545) (Do.)
- ('24) AIR 1924 All 724 (726). (Do.)
- ('21) AIR 1921 Bom 394 (395) : 45 Bom 1127. (Do.)
- ('35) AIR 1935 Mad 420 (421). (Wrong survey number entered in sale certificate—Court can amend it as well as the decree if the mistake occurs in the decree also.)
- ('37) AIR 1937 Mad 95 (96). (Court paying to wrong person by mistake is bound to restore it to right person.)
- ('38) AIR 1938 Lah 472 (473). (Error patent on face of record and previous order made by Court *suo motu* through oversight—Held, Court had inherent power to review.)
- ('36) AIR 1936 Lah 759 (760). (A Court has inherent jurisdiction to restore a suit, which has been dismissed in default owing to a mistake of the Court itself: AIR 1928 Lah 534 and 6 Ind Cas 208, Applied.)
- ('37) AIR 1937 Lah 204 (205). (Court failing to pass personal decree under O. 34 R. 6 through oversight—Court can correct mistake.)
- ('34) AIR 1934 Nag 234 (235) : 31 Nag L R 53. (Amendment of errors in judgment.)
- ('38) AIR 1938 Pat 468 (469, 470). (Property wrongly taken away in execution against another under erroneous order of Court—Court is bound to make restitution on establishment of title.)
- ('36) AIR 1936 Cal 343 (346) : 63 Cal 1079. (Where rights of third parties have not intervened, it is not only in the power, but it is the duty of the Court to relieve a party of the injury done to him by it, by reason of its mistakes and defaults or mistakes or defaults of its officers inadvertently committed.)
- ('34) AIR 1934 Mad 506 (507) : 58 Mad 84. (Court discovering that judgment has been pronounced under mistaken belief that both parties have been fully heard—Duty of Court to remedy mistake by its inherent powers.)
- [See also ('14) AIR 1914 Oudh 171 (173).]
- [See however ('19) AIR 1919 Cal 673 (674).]
5. ('14) AIR 1914 Sind 61 (62) : 8 Sind L R 327. (Failure of Court officer to notify date of hearing.)
- ('29) AIR 1929 Pat 391 (392). (Delivery of wrong property by plaintiff.)
- ('24) AIR 1924 All 818 (824) : 46 All 864. (Wrongful acts of the Court permitted or performed by its own officials.)
- ('25) AIR 1925 Mad 1212 (1212, 1213). (Dishonesty of officer of Court in execution.)
- ('31) AIR 1931 Lah 344 (344) : 12 Lah 602. (Sale ordered free of, but sale conducted subject to a mortgage.)
- ('35) AIR 1935 Sind 214 (216) : 29 Sind L R 251. (Where the act of the Nazir and of the executing Court in parting with the money without safeguards caused prejudice to a person, it is within the competence of the Court in the exercise of its inherent powers to prevent its act causing injury and to see that the money was duly restored.)
- ('36) AIR 1936 Pat 176 (177). (Application under O. 21 R. 53—Court requiring application to be put up on date fixed for hearing execution proceedings and also ordering information to be sent to decree-holder—Officers of Court not informing him—Order passed in absence of decree-holder—Court has inherent jurisdiction to recall such order.)
- ('36) AIR 1936 Cal 343 (346) : 63 Cal 1079.
- [But see ('27) AIR 1927 Lah 372 (372). (Ex parte decree on the basis of return of summons in a different suit.)]
6. ('06) 28 All 671 (673).
- ('68) 9 Suth W R 394 (395).
- ('32) AIR 1932 Lah 120 (121).
- ('34) AIR 1934 Pat 229 (231) : 13 Pat 165. (Fraud upon Court in a compromise.)
- ('34) AIR 1934 Pat 41 (42). (Fraud in compromise.)
- ('70) 13 Suth W R 256 (257).
- ('05) 2 Cal L Jour 306 (309).
- ('07) 6 Cal L Jour 662 (666).
- ('23) AIR 1923 Mad 635 (636) : 46 Mad 583. (Court misled in granting leave to bid and fixing upset price.)
- ('11) 9 Ind Cas 918 (921) (Cal). (Sale of property not previously attached.)

is fraud on the *party* and not fraud on the *Court*, the decree cannot be set aside under this Section.⁷

Abuse by a party. — A party to a litigation may be guilty of an abuse of the process of the Court in any of the following cases —

- (a) Gaining an unfair advantage by the use of a rule of procedure.⁸
- (b) Contempt of the authority of the Court by a party or stranger.⁹
- (c) Fraud or collusion in Court proceedings as between parties.¹⁰
- (d) Retention of a benefit wrongly received.¹¹
- (e) Resorting to and encouraging multiplicity of proceedings.¹²

('28) AIR 1928 Mad 610 (611). (Getting an order by misleading the Court.)

('31) AIR 1931 Sind 111 (111). (Order obtained by misrepresentation of facts.)

('26) AIR 1926 Mad 119 (120). (Guardian of minor plaintiff withdraws claim against one defendant without leave under O. 32 R. 7.)

('15) AIR 1915 Cal 49 (51). (Appointment of guardian—Fact of majority suppressed.)

('04) 8 Cal WN 468 (470). (Ex parte adjudication in insolvency—Fraud.)

('05) 7 Bom L R 961 (963). (Suppression of facts.)

('15) AIR 1915 Cal 622 (624). (Compromise—Suppression of service of summons—False vakalatnama—Fraudulent consent.)

('15) AIR 1915 Mad 281 (282). (Satisfaction recorded by fraud in Court.)

('14) AIR 1914 Bom 123 (124) : 38 Bom 638. (Arbitration—No differences between parties.)

('10) 5 Ind Cas 968 (969) : 34 Bom 403. (Pleader not engaged—Consenting to decree.)

('26) AIR 1926 Oudh 315 (315) : 1 Luck 341. (Compromise decree — Compromise signed by pleader not authorized.)

('23) AIR 1923 Pat 483 (486, 487) : 2 Pat 731. (Fraudulent alteration of terms of compromise.)

('27) AIR 1927 Pat 354 (363) : 6 Pat 108. (Do.)

('24) AIR 1924 Oudh 408 (409). (Error in decree due to fraudulent inclusion of a property in plaint.)

('37) AIR 1937 Sind 101 (103) : 31 Sind L R 32. (Court has power under S. 151 to vacate an order obtained by misleading and practising fraud upon Court.)

('37) AIR 1937 Lah 29 (31). (Restoration of property wrongfully attached.)

('37) AIR 1937 Lah 631 (631). (A Court whether acting in its ordinary jurisdiction or under its special jurisdiction in insolvency, has got inherent power to set aside an ex parte order obtained by fraud or misrepresentation or to rectify a mistake inadvertently made.)

7. ('35) AIR 1935 Pat 439 (444) : 14 Pat 356.

('39) 69 Cal L Jour 533 (538). (Consent decree, setting aside of, on ground of consent of a party having been obtained by other by fraud—Remedy is by suit and not application under this Section because there is no fraud practised upon the Court which would justify it in exercising its inherent power.)

8. ('28) AIR 1928 Nag 106 (107, 108).

('24) AIR 1924 Oudh 230 (231). (Attempt to

ignore terms of compromise.)

('13) 18 Ind Cas 994 (996) (Lah).

('28) AIR 1928 Oudh 260 (261). (Valuation under S. 7, cl. iv (c) and (d) of Court-fees Act outrageously low—Court can interfere.)

9. ('84) 10 Cal 109 (131, 132) (PC). (Power to punish summarily for a contempt by the publication of a libel out of Court when the Court is not sitting—High Court—Common law.)

('25) AIR 1925 All 280 (282) : 47 All 538. (Disobedience of order as to costs.)

('18) AIR 1918 Pat 100 (103) : 4 Pat L Jour 20. (Suit against receiver without sanction.)

('29) AIR 1929 Sind 136 (136). (An application to sue in forma pauperis rejected for vexatious delay in impleading legal representative of a deceased respondent.)

('11) 9 Ind Cas 121 (121) (Cal). (Application for declaration of insolvency dismissed — Fresh application without leave of Court under R. 11, Sind Insolvency Rules.)

[See also ('26) AIR 1926 Rang 188 (189, 190) : 4 Rang 257.

('79) 4 Cal 655 (659).]

[But see ('19) AIR 1919 Cal 44 (45).]

10. ('79) 2 Mad 264 (267, 268). (Fraud between auction-purchaser and decree-holder.)

('82) 6 Bom 148 (150). (Fraudulent adjustment of decree.)

('27) AIR 1927 Mad 813 (815).

('15) AIR 1915 Mad 281 (282). (Fraud in procuring order.)

('10) 34 Bom 403 (410).

('27) AIR 1927 Pat 354 (363) : 6 Pat 108.

('15) AIR 1915 Cal 622 (623).

[See also ('26) AIR 1926 Oudh 315 (315) : 1 Luck 341.

[But see ('23) AIR 1923 Pat 483 (486) : 2 Pat 731. (Consent decree—Fraud upon Court — Court can summarily investigate question of fraud but not fraud in obtaining consent.)]

11. ('24) AIR 1924 Rang 181 (181) : 1 Rang 770. (Improper appointment of receiver — Refund from plaintiff of salary paid by defendant to receiver.)

('16) AIR 1916 Cal 241 (244) : 43 Cal 269. (Refund of money wrongly paid out.)

('18) AIR 1918 Pat 418 (419). (Sale set aside—Auction-purchaser withdraws sale-price — Sale confirmed on appeal — Refund by auction-purchaser.)

('17) AIR 1917 Pat 495 (497) : 2 Pat L Jour 361. (Do.)

12. ('24) AIR 1924 All 818 (824) : 46 All 864.

- (f) Circumventing of the law by indirect means.¹³
- (g) Presence of witness during examination of previous witness.¹⁴
- (h) Instituting vexatious, obstructive or dilatory actions.¹⁵
- (i) Introduction of scandalous or objectionable matter in proceedings.¹⁶
- (j) Executing a decree manifestly at variance with its purpose and intent.¹⁷

But no act done or proceeding taken as of right and in due course of law, is an abuse of the process of the Court simply because such act or proceeding is likely to embarrass another.¹⁸ A person who brings himself within the terms of a statute is not to be deprived of a right conferred by that statute on "so treacherous a ground of decision as an abuse of the process of the Court."¹⁹ Nor is the failure to conform to a mere rule of practice, an abuse of process in every case; the Court must find in each case what exactly the abuse is.²⁰ It has been held in the undermentioned case²¹ that the expression "*abuse of the process*" refers only to some process of the Court such as a writ of attachment, taken maliciously to the injury of another. It is submitted that this view is too narrow and is not in accord with the general trend of judicial decisions referred to above.

7. Criminal cases. — Where a Court issues notice to a party to show cause why he should not be proceeded against under Section 476, Criminal Procedure Code, for producing a forged receipt, and the question of forgery is before the High Court on appeal from the proceeding wherein the document was held to be a forgery, the High Court has inherent power to stay the proceedings under Section 476 pending disposal of the appeal.¹ See also the undermentioned cases.²

- ('26) AIR 1926 All 212 (214) : 48 All 356.
- ('29) AIR 1929 Lad 317 (318).
- ('12) 15 Ind Cas 845 (846) (Lah).
- ('10) 7 Ind Cas 94 (96) (Cal).
- ('26) AIR 1926 Pat 171 (173).
- [See also ('34) AIR 1934 Mad 82 (84).
- 13. ('84) 10 Cal 757 (760). (Decree-holder purchasing in the name of another on Court refusing permission to bid.)
- ('09) 32 Mad 242 (245, 252). (Decree-holder permitted to bid but a minimum amount fixed for him—He purchasing in the name of another for less amount.)
- ('18) AIR 1918 Cal 598 (599). (Litigation conducted through another — Real person ordered to pay costs.)
- 14. ('34) AIR 1934 All 840 (841). (Court can refuse to take his evidence.)
- 15. ('05) 28 Mad 560 (564, 565). (Dismissing vexatious suits without proof.)
- ('09) 4 Ind Cas 797 (799) (Nag). (Summoning witness with vexatious desire to obstruct.)
- ('05) 28 Mad 28 (32). (Do.)
- ('09) 31 All 116 (122) (P C). (Witness — Citing opponent as.)
- ('10) 32 All 104 (109) (P C). (Do.)
- ('13) 21 Ind Cas 737 (738) (Mad). (Do.)
- ('98) 25 Cal 203 (206). (Vexatious delay or default.)
- ('32) AIR 1932 Mad 263 (264). (Repeated disobedience of Court orders—Defence struck off.)
- [See also ('93) 15 All 84 (90) (F B).]
- [See however ('13) 21 Ind Cas 781 (781) (Mad). (Practice of citing opponent as witness is not illegal.)
- ('24) AIR 1924 Bom 90 (93). (Stay of vexatious and oppressive suit.)]
- 16. ('80) 5 Cal 707 (710).
- ('99) 22 Mad 155 (158).
- 17. ('18) AIR 1918 Pat 352 (354); 3 Pat L Jour 435.
- 18. ('10) 8 Ind Cas 474 (475) (Upp Bur). (Applicant under O. 33 R. 5 a real pauper—Solvent co-heirs putting him forward to get a decision of their rights also, is no abuse of the process of the Court.)
- ('15) AIR 1915 Mad 608 (612). (Choice of *forum* no abuse though defendant suffers.)
- ('15) AIR 1915 Mad 461 (463). (Second suit against same party for same relief on same cause of action pending first suit, is no abuse because first may fail on some technicality.)
- 19. ('16) AIR 1916 P C 64 (65) : 44 Cal 535 : 44 Ind App 11 (P C).
- ('15) AIR 1915 Mad 461 (463). (Second suit on same cause of action for same relief and against same party is not abuse of process of Court when first suit is not disposed of.)
- 20. ('28) AIR 1928 Mad 522 (523). (Rule 24 of the Madras Rules of Practice.)
- [See also ('29) AIR 1929 Nag 251 (254) : 27 Nag L R 102 (F B).]
- 21. ('09) 32 Mad 242 (250). (Per Abdur Rahim, J.)

Note 7

- 1. ('25) AIR 1925 Lah 323 (323).
- 2. ('32) AIR 1932 Nag 86 (87, 88).
- ('32) AIR 1932 Ondh 31 (32). (Stay of criminal proceedings pending civil litigation in respect of the same matter.)

7a. Contempt of Court, proceedings for. — The High Court as a Superior Court of Record has an inherent power to punish for contempt of Court and that power is not affected in any way by the Codes of Civil or Criminal Procedure.¹ The High Court can also *enforce* its orders but does not possess the power to arrest for contempt a person outside its general jurisdiction.² It has been held that the High Court has jurisdiction to award costs in a criminal prosecution for contempt of Court and has inherent jurisdiction to order its recovery on the lines on which decrees are executed by the Civil Court.³

8. Insolvency Court. — As has already been observed in Note 1, *every* Court will, in the absence of express provision in respect of any matter, be deemed to possess, as inherent in its very constitution, all such powers as are necessary to do the right and undo a wrong in the course of the administration of justice.¹ An Insolvency Court has, therefore, inherent powers to pass just and necessary orders in cases not provided for by the Insolvency Act.² This is made clear by Section 5 of the Provincial Insolvency Act, 1920, read with Section 151 of the Civil Procedure Code. An Insolvency Court has thus power to grant *ad interim* protection before adjudication³ or to rectify mistakes in its proceedings,⁴ or to set aside an *ex parte* order obtained by fraud or misrepresentation.⁵ It has, however, no power to stay an execution sale going on in another Court⁶ though the *latter Court* may, on a claim by the Official Receiver under Section 51 or Section 52 of the Insolvency Act, stay the execution under its inherent powers.⁷

Where an applicant is entitled to an order of adjudication as of right under the Insolvency Act, there is no inherent power in the Courts to refuse adjudication on the ground that it is an abuse of the process of the Court.⁸

8a. General Clauses Act (1897), Section 21. — Under Section 21 of the General Clauses Act, 1897, where by Act of the Governor-General in Council a power to issue orders is conferred, that power includes, subject to like conditions, a power to add to, amend, vary or rescind any orders so issued. It has been held by the Chief Court of Oudh that the High Court has inherent jurisdiction to reinstate legal practitioners who have been dismissed from their profession.¹

See also Note 8b below.

8b. Legal Practitioners Act, cases under. — It has been held that although there is no express provision for a review of an order made under the Legal Practitioners Act, the High Court has inherent power to restore a pleader whose name has been struck off the rolls.¹

See also Note 8a above.

Note 7a

1. ('36) 40 Cal W N 1285 (1289, 1292).
2. ('36) 40 Cal W N 1285 (1289, 1292).
3. ('35) AIR 1935 All 1013 (1014) : 58 All 374. (The High Court has jurisdiction to award costs in a criminal prosecution for contempt of Court and has inherent jurisdiction to order its recovery on the lines on which decrees are executed by the Civil Court.)

Note 8

1. See foot-note (7) Note 1.
2. ('33) AIR 1933 Pat 84 (87) : 12 Pat 163.
3. ('10) 6 Ind Cas 95 (97) (Cal).
4. ('34) AIR 1934 Lah 177 (178). (Cancelling prior order passed without hearing objections.)
5. ('34) AIR 1934 Mad 31 (31).

('33) AIR 1933 Mad 345 (346).

('32) AIR 1932 Lah 84 (84). (A I R 1920 Lah 361, Followed.)

('37) AIR 1937 Lah 631 (631, 632).

[See also ('19) AIR 1919 All 264 (264).]

5. ('37) AIR 1937 Lah 631 (631, 632).

6. ('17) AIR 1917 Mad 945 (946).

7. ('24) AIR 1924 Sind 69 (71). (Claim under S. 52.)

8. ('16) AIR 1916 P C 64 (65) : 44 Ind App 11 : 44 Cal 535 (P C).

('10) 7 Ind Cas 39 (41) : 32 All 645.

Note 8a

1. ('34) AIR 1934 Oudh 140 (142) (S B).

Note 8b

1. ('35) AIR 1935 All 321 (322) (F B).

9. Appeal. — An order under Section 151 is not an appealable order under Section 104 and no appeal, therefore, lies as an appeal from an order.¹ But if such an order amounts to a *decree* within the definition of Section 2 sub-section (2), an appeal will lie under Section 96.² Thus an order of remand under Section 151 which amounts to an adjudication under Section 2 (2) is appealable as a decree under Section 96.³ Where an order is made in execution under Section 151 and such order falls within Section 47, an appeal and a second appeal will lie therefrom.⁴ An order under Section 151 can also be challenged under Section 105 if it affects the decision of the case on the merits but not otherwise.⁵

Note 9

1. ('27) AIR 1927 Cal 567 (568).
- ('32) AIR 1932 Nag 101 (102) : 25 Nag L R 83.
- ('33) AIR 1933 Lah 73 (74). (Injunction under inherent powers.)
- ('33) AIR 1933 Lah 135 (135).
- ('33) AIR 1933 Pat 561 (566).
- ('34) AIR 1934 Lah 79 (80).
- ('34) AIR 1934 Pat 41 (42). (Fraudulent compromise set aside under S. 151—No appeal.)
- ('34) AIR 1934 Lah 177 (178).
- ('34) AIR 1934 Lah 319 (350).
- ('28) AIR 1928 Lah 802 (803).
- ('30) AIR 1930 Lah 759 (760).
- ('23) AIR 1923 Oudh 177 (179) : 26 Oudh Cas 10.
- ('24) AIR 1924 Lah 487 (487).
- ('18) AIR 1918 Pat 505 (505) : 3 Pat L Jour 253.
- ('22) AIR 1922 Pat 479 (480) : 1 Pat 277.
- ('28) AIR 1928 Lah 114 (418).
- ('23) AIR 1923 Cal 450 (451).
- ('25) AIR 1925 Cal 181 (186).
- ('29) AIR 1929 Lah 884 (885).
- ('30) AIR 1930 Lah 496 (496).
- ('30) AIR 1930 Nag 193 (200) : 26 Nag L R 157.
- ('31) AIR 1931 Lah 311 (311) : 12 Lah 602.
- ('29) AIR 1929 Lah 245 (215). (Remand under Section 151.)
- ('20) AIR 1920 Mad 759 (760) : 60 Ind Cas 609 (609). (Do.)
- ('25) AIR 1925 Mad 229 (229) : 48 Mad 713. (Do.)
- ('27) AIR 1927 Mad 335 (336). (Do.)
- ('27) AIR 1927 Mad 859 (860). (Do.)
- ('27) AIR 1927 Mad 1190 (1190). (Do.)
- ('29) AIR 1929 Pat 232 (233). (Do.)
- ('24) AIR 1924 Rang 177 (177) : 1 Rang 656. (Do.)
- ('25) AIR 1925 Pat 336 (336). (Erroneous order of remand — Even though no appeal lay in this case the High Court intervened in the exercise of inherent powers.)
- ('35) 37 Pun L R 674 (676). (An order passed by a Court reviewing a prior order in exercise of the Court's inherent powers under S. 151, C. P. Code is not open to appeal.)
- ('36) AIR 1936 Lah 212 (213).
- ('37) AIR 1937 Cal 152 (155) : I L R (1937) 1 Cal 637.
- ('39) AIR 1939 All 28 (29).
- ('35) 158 Ind Cas 998 (999) (Nag).
- ('38) AIR 1938 Pesh 81 (82). (Order passed on

- appeal is without jurisdiction and open to further appeal or revision.)
- ('36) AIR 1936 Sind 166 (167) : 30 Sind L R 170. (Order in exercise of inherent jurisdiction in execution — No appeal lies.)
- ('37) AIR 1937 Cal 152 (156) : I L R (1937) 1 Cal 637.
- ('35) AIR 1935 Mad 420 (421).
- ('35) AIR 1935 All 27 (28).
- ('38) AIR 1938 Pat 447 (448). (Third party claimant establishing title to property sold in execution — Order of Court directing decree-holder to restore purchase money to auction-purchaser comes not under S. 144 but under S. 151 and is therefore not appealable.)
- ('36) AIR 1936 Pat 491 (492). (Where the appellate Court remands the case to be begun *de novo*, the remand is under S. 151 and not under O. 41 R. 23 and no appeal lies from such order of remand.)
- ('36) AIR 1936 Pesh 79 (80). (Order of remand by Appellate Court under S. 151, is not decree and hence not appealable.)
2. ('36) AIR 1936 Lah 212 (213).
[See ('39) 49 Cal W N 1028 (1029). (Held in this case that the order did not amount to a decree.)]
3. ('26) AIR 1926 Pat 457 (459) : 6 Pat 160.
('27) AIR 1927 Pat 296 (297) : 6 Pat 880.
('23) AIR 1923 Cal 606 (607). (The view that the remand order in this case amounted to a decree is unsustainable. Per Mookerjee, J.)
- ('28) AIR 1928 Cal 218 (219).
- ('24) AIR 1924 Mad 778 (779). (Order falling under S. 47.)
- ('35) AIR 1935 Pat 49 (51). (Order of remand not amounting to decree — Not appealable.)
[See also ('30) AIR 1930 Lah 468 (469).]
- ('18) AIR 1918 Mad 545 (547).]
4. ('33) AIR 1933 Mad 399 (400).
('37) AIR 1937 Cal 152 (156) : I L R (1937) 1 Cal 637.
- ('36) AIR 1936 Lah 725 (727). (In considering whether an application is under S. 47 or not a Court must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by the applicant.)
- ('36) AIR 1936 Mad 636 (638).
- ('35) AIR 1935 All 27 (28).
5. ('34) AIR 1934 Lah 312 (312).

1. Legislative changes.—The third paragraph of Section 206 of the old Code ran as follows —

"If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error: provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment."

The present Section differs from the above provision in the following respects —

- (1) It does not provide for amendment where the decree is found to be at variance with the judgment. An application to amend the decree, so as to bring it into conformity with the judgment, should, under the present Code, be made to the Court in the exercise of its inherent power which is saved by Section 151.
- (2) The provision as to errors arising from any accidental slip or omission is new. Section 206 of the former Code referred only to clerical or arithmetical errors and errors due to discrepancy between the judgment and decree.
- (3) The present Section has omitted the proviso as to notice being given of the proposed amendment.

2. Amendment of judgments, decrees or orders. — It will be seen from O. 20 R. 3 that a judgment, once signed, cannot be afterwards altered or added to, save as otherwise provided by Section 152 or on review.¹ O. 20 R. 6 provides that the decree shall be drawn up so as to agree with the judgment. Reading this Section with O. 20 Rules 3 and 6, it is clear that as a general rule, a judgment, decree or final order, once drawn up and signed, cannot subsequently be altered, varied or amended in any manner even with the consent of the parties.² The only exceptions to the general rule are the following —

- (1) Under Section 152 a *clerical or arithmetical mistake or an error arising from an accidental slip or omission* may be corrected by the Court,³ even though the decree is in conformity with the judgment.⁴

Section 152 — Note 2

1. ('33) AIR 1933 Oudh 385 (386).

[See also ('33) AIR 1933 Lah 423 (424). (Conclusion arrived at by Judge should not be reversed by his successor unless by review or under S. 152.)]

2. ('01) 24 Mad 1 (10) : 27 Ind App 197 (PC).

('88) 15 Cal 211 (214). (Decree for specific performance is in the nature of preliminary decree—Decree-holder can ask Court under certain circumstances to enter up alternative relief claimed.)

('27) AIR 1927 Rang 311 (312) : 5 Rang 615. (Decree for specific performance being anomalous decree, time fixed can be extended.)

3. ('04) 14 Mad L Jour 359 (367).

('17) AIR 1917 Cal 184 (185) : 44 Cal 28.

('23) AIR 1923 Pat 354 (355) : 2 Pat 504.

('12) 17 Ind Cas 418 (418) : 1913 Pun Re No. 47.

('13) 20 Ind Cas 3 (5) (Lah).

('23) AIR 1923 Nag 109 (110).

('24) AIR 1924 Nag 325 (326). (Such mistakes may be corrected at any time.)

('24) AIR 1924 Bom 166 (167).

('22) AIR 1922 Mad 192 (192).

('95) 1895 All W N 237 (238).

('01) 24 Mad 1 (10) : 27 Ind App 197 (PC).

('80) 2 All 497 (506).

('23) AIR 1923 Mad 663 (664).

('28) AIR 1928 Lah 636 (637).

('68) 9 Suth W R 301 (304). (Clerical mistake.)

('18) AIR 1918 Mad 422 (424). (Wrong name added owing to clerical error.)

('23) AIR 1923 Lah 147 (148, 149). (Accidental slip or omission.)

('26) AIR 1926 P C 29 (30) : 4 Rang 513 (P C). (Mis-statement of fact due to accidental slip or omission—Judgment may be amended—If committed by High Court then it can be corrected by High Court and not by Privy Council.)

('29) AIR 1929 All 337 (337) : 51 All 672. (Accidental slip in judgment—May be done at any time and in any situation.)

('27) AIR 1927 Pat 25 (27). (Accidental omission of direction in judgment.)

('15) AIR 1915 All 188 (189) : 37 All 323. (Accidental omission of important thing in judgment.)

('17) AIR 1917 Lah 216 (216).

('20) AIR 1920 Nag 157 (157). (Application to correct the decree in the matter of costs.)

('35) AIR 1935 Cal 619 (620) : 63 Cal 181.

('35) AIR 1935 Oudh 92 (93) : 10 Luck 496.

4. ('27) AIR 1927 Mad 435 (436).

- (2) Under the inherent powers of the Court (Section 151) a decree which is *at variance with the judgment* can be amended so as to agree with the judgment.⁵
- (3) A decree or order may be varied or amended in *any other case* by a review of judgment or by an appeal from the decree.⁶

Without correcting the *decree itself*, the Court may, under O. 20 R. 11, order that the payment under a money decree may be made in instalments. A decree if made *ex parte* may also be *set aside* by a proceeding under O. 9 R. 13 or a suit in certain circumstances, or in appeal or revision.

Where the Court *can* amend a decree passed by it, the proper course is to apply for amendment and not to appeal.⁷ But neglect to apply for amendment does not preclude a party from obtaining the same result in appeal.⁸ But an amendment should not be made if it will have the effect of making the decree differ from the judgment. If the same mistakes are made in both the judgment and decree, both should be amended and not the decree alone.⁹

A decree may be amended though the applicant's pleader may have signed the decree.¹⁰

As to the powers of the Court to extend the time fixed by a decree, there is a conflict of opinion. See Section 148, Notes 2 and 3.

In an application to *amend* a decree or order under this Section, the Court has no power to *annul* the decree or order itself.¹¹

See also Notes to Order 20 Rule 6.

3. Clerical or arithmetical mistakes and errors arising from accidental slip or omission. — As has been seen in Note 2 above, a Court can always correct clerical or arithmetical mistakes and errors arising from accidental slip or omission even though the decree agrees with the judgment. Thus, where a direction as to costs,¹ or interest,² or leave to bring a fresh suit,³ or a provision fixing the period for payment in a redemption decree,⁴ or a relief asked by the plaintiff,⁵ is *inadvertently* omitted, the decree may be amended by adding the direction or provision.

5. See Note 3, below.

6. ('80) 2 All 497 (506).

('22) AIR 1922 Mad 192 (192).

('01) 24 Mad 1 (10) : 27 Ind App 197 (PC).

('27) AIR 1927 Mad 720 (722).

('71) 15 Suth W R 411 (414). (An omission to award costs—Review.)

7. ('70) 2 N W P H C R 184 (184).

('76) 25 Suth W R 63 (64).

('69) 1 N W P H C R 168 (170).

('81) 1881 All W N 60 (61).

('74) 21 Suth W R 41 (41).

('35) AIR 1935 Cal 619 (620) : 63 Cal 181. (Omission to appeal does not bar an application for amendment.)

8. ('85) 7 All 606 (611) (FB).

9. ('15) AIR 1915 Mad 939 (940).

('11) 11 Ind Cas 896 (897) (All).

('07) 31 Bom 447 (449).

('71) 15 Suth W R 4 (5).

'39) 41 Pun L R 119 (120). (The Court should not refuse to correct the error on the ground that since the mistake appears in the judgment,

the error in the decree is not accidental.)

10. ('25) AIR 1925 Oudh 373 (373).

11. ('19) AIR 1919 Low Bur 151 (153) : 9 Low Bur Rul 263.

Note 3

1. ('20) AIR 1920 Pat 180 (180).

('28) AIR 1928 Lah 800 (801).

2. ('10) 37 Cal 623 (625) : 37 Ind App 133 (PC). (Privy Council allowed amendment granting subsequent interest to plaintiff in appeal by defendant even though there was no cross appeal by former.)

('26) AIR 1926 Oudh 223 (224).

3. ('73) 20 Suth W R 401 (401).

4. ('17) AIR 1917 Oudh 141 (143).

5. ('30) AIR 1930 Lah 210 (211).

('37) AIR 1937 Oudh 191 (192) : 12 Luck 759. (Suit for possession and mesne profits—Court accepting oral request to determine mesne profits in execution — No mention as to mesne profits in judgment and decree — Amendment can be granted.)

2 The following are some instances of accidental slips that may be corrected by the Court under this Section —

- (1) Inadvertently passing a decree for foreclosure instead of one for sale.⁶
- (2) Inadvertently recording an order of dismissal, instead of an order decreeing the suit or appeal.⁷
- (3) Inadvertently misdescribing the property covered by the decree or judgment.³
- (4) Judgment accidentally including the property of a stranger.⁹
- (5) Passing a *personal* decree against the legal representatives of a party.¹⁰
- (6) Accidentally entering the name of a deceased party instead of his legal representatives who had been brought on the record.¹¹
- (7) Passing an erroneous order as to costs by oversight.¹²

See also the undermentioned cases.¹³

Where by an oversight or accidental slip the name of a wrong person is inserted in the decree as the guardian of a minor party, the Patna High Court has held that the mistake may be corrected under this Section.¹⁴ But where it is not a case of mere misdescription but a case of real non-representation of the minors by the proper guardian, it is a defect of substance and hence the Madras High Court has held¹⁵ that such a defect cannot be cured by substituting the name of the proper guardian under this Section.

Section 152 does not apply where there is no question of clerical or arithmetical mistakes or errors arising from accidental slips and omissions,¹⁶ even though the order

6. ('14) 22 Ind Cas 935 (936) : 7 Low Bur Rul 81.

7. ('15) AIR 1915 All 323 (324).

('24) AIR 1924 Oudh 144 (144).

8. ('15) AIR 1915 Cal 586 (586).

('18) AIR 1918 All 78 (78).

9. ('29) AIR 1929 All 147 (147) : 50 All 859.

10. ('23) AIR 1923 Bom 414 (415). (It may be amended though the application is made at a later stage.)

('24) AIR 1924 Lah 621 (622).

('39) 43 Cal W N 490 (492, 493).

11. ('30) AIR 1930 Sind 96 (96) : 26 Sind L R 150.

12. ('01) 1901 All W N 94 (95).

('26) AIR 1926 Lah 664 (665). (Order under this Section is not appealable.)

('12) 15 Ind Cas 910 (910) (Cal).

(1893) 1893 App Cas 638 (641), *Milson v. Carter*.

('39) AIR 1939 Lah 255 (256). (Suit for accounts — Final decree including only costs between preliminary and final decrees — Decree can be amended so as to include costs prior to preliminary decree.)

('35) AIR 1935 Oudh 369 (371) : 11 Luck 150.

('36) AIR 1936 Pesh 196 (197). (An application for amendment of a decree is maintainable under S. 152, where the question of award of costs is not in dispute but only the method of assessment or any item awarded is in controversy.)

('38) AIR 1938 Oudh 7 (8). (Full pleader's fee awarded against an admitting defendant contrary to rules.)

[See also ('35) AIR 1935 Cal 619 (620) : 63 Cal 181. (If judgment includes costs it means costs allowed by rules — If costs which are not permissible are included in decree, Court should

correct decree so as to make it in conformity with the judgment.)]

13. ('33) AIR 1933 All 102 (103). (Mortgage suit. — Omission to specify property in decree — Court has power to amend decree.)

('33) AIR 1933 All 608 (609). (Decree passed on basis of compromise — Defect not detected by any one — Court has inherent power to correct mistake.)

('38) AIR 1938 Mad 573 (575). (Appellate Court dismissing suit in toto instead of dismissing it only against appealing defendant — Mistake can be corrected under S. 152.)

('37) 169 Ind cas 226 (227) (Oudh). (Ex parte decree — Judge mentioning O. 17 R. 3 instead of O. 17 R. 2 in decree — Accidental slip can be corrected.)

('37) 1937 Mad W N 1013 (1013). (Suit to enforce charge — Judgment and decree not in terms of O. 34 R. 4 read with O. 34 R. 15 — Judgment and decree can be amended.)

14. ('26) AIR 1926 Pat 564 (565).

15. ('28) AIR 1928 Mad 1057 (1059).

16. ('26) AIR 1926 Oudh 223 (224). (The test is whether the order represents the intention of the Court at the time.)

('09) 33 Bom 216 (218).

('15) AIR 1915 All 102 (104).

('31) AIR 1931 All 427 (428). (Provision for sale in final decree under O. 34 R. 8, cannot be annulled by amendment on the ground that the preliminary decree does not contain it.)

('39) AIR 1939 All 96 (96, 97). (Amending decree by reducing decretal amount in light of accounts newly filed is not justified under the Section.)

correcting what is really a mistake of its ministerial officers by whom the decree or order was drawn up. In *In Re Swire, Mellor v. Swire*,³ Lindley, L. J., said:

"There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order, as passed and entered does not express the real order of the Court,"

the Court has ample jurisdiction to set that right. And Bowen, L. J., said:

"Every Court has inherent power over its own records so long as those records are within its power and it can set right any mistake in them. It seems to me that it would be perfectly snacking if the Court could not rectify an error which is really the error of its own minister. An order, as it seems to me, even when passed and entered, may be amended by the Court as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice, or on terms which preclude injustice."

Thus, where *P* sues *Q* and *R* for a certain sum and judgment is given in favour of *P* 'as prayed' but the decree as drawn up makes the amount payable by *Q* alone, the Court can amend the decree so as to bring it in conformity with the judgment.⁴ Similarly, where the judgment gives a mortgage decree in favour of the plaintiff but the decree is wrongly drafted so as to give the decree-holder only a charge on the property, the decree may be amended so as to agree with the judgment.⁵

Where an order which had been dictated but which had been intended to be reconsidered was signed inadvertently, the High Court of Allahabad set aside the order under its inherent powers.⁶

But where the decree as drafted is in accordance with the intention of the judgment and there is no clerical or arithmetical mistake or accidental slip or omission, the Court has no power, either under Section 152 or under its inherent jurisdiction, to amend it⁷ and this is so even if the judgment itself is erroneous in law⁸ and the error is apparent on the face of the judgment.⁹ Thus, where a judgment is passed against *G* and the decree agrees with the judgment, it cannot be amended so as to convert it into a decree against *G* and another person.¹⁰

(13) 19 Ind Cas 916 (917) (Cal). (Following (1852) 7 App Cas 34, *Lawrie v. Lees*, and (1892) App Cas 560, *Hutton v. Harris*.)

(18) AIR 1918 Mad 1287 (1293); 40 Mad 259 (FB.)

3. ('85) 30 Ch D 239 (216), *In re Swire, Mellor v. Swire*.

[See also ('26) AIR 1926 P C 136 (143) (PO). ((1855) 30 Ch D 239 (216), *In re Swire, Mellor v. Swire*; observation of Bowen, L. J. quoted with approval.)]

4. ('92) 15 Mad 403 (401). (And the matter becomes res judicata.)

5. ('16) AIR 1916 Mad 520 (521).

6. ('33) AIR 1933 All 49 (49).

7. ('27) AIR 1927 Pat 405 (405).

(30) AIR 1930 Lah 589 (591).

(27) AIR 1927 Lah 403 (401).

(26) AIR 1926 Cal 1100 (1101).

(27) AIR 1927 Cal 203 (206). (Arithmetical mistake in Commissioner's report crept into judgment and decree—No remedy by way of amendment but by review or appeal.)

(04) 8 Cal W N 473 (474). (Only remedy is by an application for review.)

(10) 6 Ind Cas 979 (931); 13 Oudh Cas 114.

(13) 24 Ind Cas 831 (831); 7 Sind L R 186.

(25) 103 Ind Cas 737 (738) (Lah).

(09) 2 Ind Cas 551 (551) (All).

(25) AIR 1925 Pat 47 (47, 48); 3 Pat 654.

(86) 8 All 377 (380).

(99) 22 Mad 361 (367).

(93) 15 All 121 (123). (Interest not granted by decree or judgment—Decree cannot be amended by award of interest.)

(98) 20 All 337 (339).

(82) 1882 All W N 72 (73).

(39) AIR 1939 Lah 312 (313).

(38) AIR 1938 Cal 187 (187, 188).

(36) AIR 1936 Oudh 81 (83). (Preliminary mortgage decree providing that the plaintiff was entitled to apply for personal decree in case of deficiency of the sale proceeds of the mortgaged property—If the decree is allowed to stand and is not appealed against, it cannot be amended by the omission of the provision for the personal decree because such provision amounts to an adjudication on the rights of the parties.)

(38) AIR 1933 Lah 331 (332, 333).

8. ('17) AIR 1917 Mad 290 (291, 292).

9. ('24) AIR 1924 Mad 225 (226).

(17) AIR 1917 Mad 290 (290, 291).

10. ('17) AIR 1917 All 166 (167).

(16) AIR 1916 Pat 45 (46).

7. "May be corrected." — The amendment of accidental mistakes under this Section cannot be claimed by any party *as of right*. The matter is left to the discretion of the Court to be exercised in view of the peculiar facts of each case.¹ But the Calcutta High Court has, in the undermentioned case,² held that the word "may" in Section 152 does not make it discretionary with the Court to order the correction but merely enlarges the powers of the Court by providing that such correction can be done at any time. It was, however, conceded in that case that the amendment may be refused when it offended against the principles of equity, for instance, where the interest of a *bona fide* purchaser for value without notice may be jeopardised. In a later case of the same High Court,³ Suhrawardy, J., adhered to the view taken in the case and further held that where the decree was not in conformity with the judgment owing to an error of the Court, it was *incumbent* on the Court to order its amendment without regard to any laches on the part of the parties. Graham, J., on the other hand, held that the matter is one of *discretion* to be exercised in view of the particular facts of each case. In a still later case,⁴ the same High Court held that a decree could be brought into conformity with the judgment even after the lapse of years and that the only limitation is that the Court may deem it inexpedient or inequitable to exercise its power where third parties have acquired rights *bona fide*, under the erroneous decree.

8. "At any time." — It is a general principle that rules of limitation are applicable to acts to be performed by *litigants* and not to acts which the Court may or has to perform *suo motu*.¹ An amendment under this Section falls within the latter class of acts and there is consequently no limitation for an application for amendment under this Section.² The amendment can be made *at any time*.³ But where satisfaction of a decree has been entered up the Court is *functus officio* and has no power to amend the decree. An order for amendment in such a case is a mere

Note 7

1. ('23) AIR 1923 Mad 57 (57).
('33) AIR 1933 Oudh 425 (425).
('33) AIR 1933 Oudh 466 (468) : 9 Luck 90.
('33) AIR 1933 Oudh 529 (530) : 9 Luck 162.
('33) 142 Ind Cas 880 (882) (Nag).
('25) AIR 1925 All 187 (188) : 47 All 44.
('25) AIR 1925 All 556 (556).
('35) AIR 1935 Oudh 369 (371) : 11 Luck 150.
('38) AIR 1938 Lah 4 (6).
('37) AIR 1937 Lah 894 (895).
2. ('24) AIR 1924 Cal 895 (897).
3. ('32) AIR 1932 Cal 563 (564, 566, 567).
4. ('33) AIR 1933 Cal 627 (629) : 60 Cal 753.

Note 8

1. ('86) 8 All 519 (533, 534). (The mere fact that one of the parties has made an application under this Section, will not render the act of the Court subject to the rule of limitation.)
('87) 11 Bom 284 (285).
('13) 21 Ind Cas 540 (541) : 7 Sind L R 53.
2. ('29) AIR 1929 Oudh 385 (388) : 4 Luck 562 (FB).
('21) AIR 1921 Pat 491 (494).
('24) AIR 1924 Oudh 408 (409).
('24) AIR 1924 Oudh 144 (144).
('24) AIR 1924 Cal 895 (899).
('82) 4 Mad 172 (173).

- ('97) 1897 Pun Re No. 12.
- ('87) 10 Mad 51 (52).
- ('08) 11 Oudh Cas 208 (211).
- ('87) 9 All 364 (365).
- ('69) 12 Suth W R 65 (66). (90 days' rule does not apply.)
- ('94) 21 Cal 259 (261).
- ('37) AIR 1937 Lah 894 (895).
- ('37) 41 Cal W N 1330 (1331).
3. ('21) AIR 1921 Oudh 190 (190).
- ('29) AIR 1929 All 337 (337) : 51 All 672.
- (1892) 1892 App Cas 547 (564), *Hatton v. Harris*. (Decree amended after 39 years.)
- ('88) 12 Bom 174 (183). (Decree amended after 10 years.)
- ('91) 14 Mad 150 (152). (Amendment after execution.)
- ('24) AIR 1924 All 690 (690).
- ('23) AIR 1923 Bom 414 (415). (Late stage of the proceeding.)
- ('27) AIR 1927 Rang 57 (57) : 4 Rang 347. (Omission to appeal does not bar application.)
- ('25) AIR 1925 Oudh 418 (419).
- ('11) 12 Ind Cas 151 (154) : 39 Cal 265.
- ('94) 17 Mad 67 (69).
- ('14) AIR 1914 Sind 40 (41) : 8 Sind L R 28.
- ('16) AIR 1916 Mad 908 (908). (Pending second appeal.)
- ('37) AIR 1937 Lah 894 (895).
- ('39) AIR 1939 Bom 389 (390) : 41 Bom L R 800 (802).

nullity unless steps are taken to set aside the order recording satisfaction.⁴

Similarly, where third parties have acquired rights under the erroneous decree, for valuable consideration and in ignorance of the error in the decree, no amendment should be allowed so as to prejudice their rights.⁵ The reason is that it would be inequitable to allow amendment of the decree in such a case.⁶ Laches may also, in the particular circumstances of a case, disentitle a party to relief by way of amendment of a decree.⁷

See also Note 7 above.

9. Court by which amendment can be made. — Unless and until a decree is superseded in appeal or revision, the Court which passed it is entitled to amend it under this Section.¹ Where an appeal or revision has been preferred from the decree, the power of the Court of first instance to amend the decree depends on the question whether the decree has been superseded by the appellate decree or is left intact. Where the decree of the lower Court is *confirmed, reversed or varied*, it is superseded by the decree of the Appellate Court, and the only Court that can amend the decree thereafter is the Appellate Court.² But where the decree of the lower Court is left

('39) 43 Cal W N 490 (192).

4. ('25) AIR 1925 All 556 (556).

('29) AIR 1929 Mad 830 (832).

('26) AIR 1926 Mad 516 (517).

('02) 12 Mad L Jour 96 (97).

5. ('23) AIR 1923 Mad 57 (57).

('24) AIR 1924 Cal 895 (897).

('25) AIR 1925 Bom 389 (390).

('11) 12 Ind Cas 151 (155) : 39 Cal 265. (But this principle has no application in cases of assignments of decrees.)

('24) AIR 1924 Oudh 408 (410).

('39) AIR 1939 Bom 389 (391) : 41 Bom L R 800 (804, 805).

('37) 41 Cal W N 1330 (1331).

6. ('24) AIR 1924 Cal 895 (897).

[See also ('37) AIR 1937 Oudh 217 (220) : 13 Luck 101 (FB). (Decree subsequently amended cannot be allowed to operate retrospectively so as to affect rights of purchaser for value without notice.)]

7. ('25) AIR 1925 All 187 (188) : 47 All 44.

('28) AIR 1928 Nag 149 (149).

('29) AIR 1929 Cal 676 (679) : 57 Cal 549.

('15) AIR 1915 Lah 213 (214).

('32) 36 Cal W N 97 (103, 104, 105).

('37) AIR 1937 Cal 96 (99). (Applicant not appearing in appeal which resulted in decree and hence having no knowledge of discrepancy between judgment and decree—Delay in making application for amendment—Delay held not fatal to granting of application.)

('37) 41 Cal W N 1330 (1331). (Under the circumstances of the case it was held that the applicant was under no obligation to satisfy the Court that there were no laches on his part.)

('35) 37 Pun L R 623 (623). (Application to correct clerical error as to costs refused on ground of laches.)

Note 9

1. ('85) 1885 All W N 325 (326). (Execution Court cannot add to or alter decree.)

(1864) 1 Suth W R Misc 8 (8).

('70) 13 Suth W R 330 (330).

('91) 13 All 124 (126).

('22) AIR 1922 Mad 186 (186). (Transfer of application for amendment to another Court is not proper.)

2. ('10) 32 All 295 (300) : 37 Ind App 70 (PC).

('93) 6 C P L R 142 (143).

('93-1900) 1893-1900 Low Bur Rul 449.

('10) 5 Ind Cas 304 (304) (Cal).

('10) 5 Ind Cas 261 (262) (Cal).

('89) 11 All 314 (318) (FB).

('14) AIR 1914 Mad 99 (100).

('14) AIR 1914 Oudh 332 (333).

('96) 1896 Pun Re No 32, page 89.

('18) AIR 1918 Cal 133 (134).

('17) AIR 1917 All 417 (418).

('13) 21 Ind Cas 540 (541) : 7 Sind L R 53.

('17) AIR 1917 Mad 589 (589).

('16) AIR 1916 Mad 1202 (1202).

('11) 12 Ind Cas 139 (139) (Mad).

('11) 12 Ind Cas 669 (672) (Cal).

('15) AIR 1915 Mad 1068 (1068).

('25) AIR 1925 Mad 735 (735).

('27) AIR 1927 Rang 57 (58) : 4 Rang 347.

('21) AIR 1921 Upp Bur 5 (6) : 4 Upp Bur Rul 1.

('29) AIR 1929 Rang 153 (159) : 7 Rang 88.

('31) AIR 1931 Rang 153 (154) : 9 Rang 186.

('30) AIR 1930 Nag 138 (138).

('29) AIR 1929 Mad 830 (831).

('21) AIR 1921 All 130 (130, 131).

(1900) 1900 Pun Re No. 59, page 231.

('92) 15 Mad 170 (174).

('95) 18 Mad 214 (216) (FB). (Overruling 9 Mad.

354.)

intact, as for instance, where an appeal or revision is dismissed *in limine*,² or for default,⁴ or where the amendment relates to a portion of the decree which is outside the scope of the appeal⁷ or where the appeal is withdrawn,³ the lower Court is entitled to amend the decree. It was held by the High Court of Allahabad in the undermentioned case⁷ that the words "at any time" have a special significance and provide for amendment by the lower Court even where its decree has merged in the decree of the Appellate Court.

There is a conflict of opinion as to the effect of a dismissal of an appeal under O. 41 R. 11 of the Code and as to whether after such dismissal the decree can be amended by the lower Court or can be amended only by the Appellate Court. For a discussion of the question, see Notes to O. 41 R. 11, *infra*.

Amendment pending appeal against decree.—From what has been said above, it is clear that an amendment can be made by the Court which passed the decree even when an appeal against the decree is pending in a superior Court.⁵ But the Appellate Court can also amend the lower Court's decree under Section 152 read with Section 107 (2) of the Code.⁹

Power of executing Court to amend.—An executing Court has no power, as such, to amend the decree. It cannot go behind the decree but must take the decree as

('94) 18 Bom 542 (545).

('10) 5 Ind Cas 723 (725) (Cal).

('07) 6 Cal L Jour 512 (543).

('18) AIR 1918 All 341 (342).

('89) 11 All 267 (274) (FB).

('38) AIR 1938 Lah 4 (6).

('35) AIR 1935 Cal 619 (620) : 63 Cal 181.

The following cases to the contrary are not good law especially in view of the Privy Council decision in 32 All 295 (PC) cited above :

('88) 10 All 51 (54).

('69) 11 Beng L R 367n.

('69) 11 Beng L R 368n. (But executing Court cannot question validity of decree on the ground that it was amended by lower Court after it had been confirmed in appeal.)

('74) 21 Suth W R 41 (41). (Decree of trial Court affirmed by lower Appellate Court—Application for amendment must be made to the lower Appellate Court and not to the High Court.)

('97) 24 Cal 759 (762). (Decree confirmed on appeal by High Court—High Court can amend.)

('70) 14 Suth W R 26 (26).

('94) 18 Bom 542 (544, 545).

('89) 11 All 267 (274) (FB).

('89) 11 All 314 (318) (FB).

[See ('89) 9 Cal W N 605 (608).]

3. ('12) 16 Ind Cas 933 (933) (Mad). (Appeal dismissed on the ground that no appeal lay.)

('32) AIR 1932 Pat 238 (240) : 11 Pat 409.

('20) AIR 1920 Lah 321 (322) : 1 Lah 342. (Revision dismissed—Application to amend should be made to the Small Cause Court.)

('35) AIR 1935 Pesh 91 (92).

4. ('25) AIR 1925 All 556 (556).

('17) AIR 1917 Nag 24 (24).

5. ('20) AIR 1920 Cal 286 (286).

[See also ('33) AIR 1933 Cal 335 (336); 36 Cal WN 665 (667). (Decree confirmed by Privy Council—Clerical mistake discovered subsequently as to double payment of court-fees—High Court can correct.)]

6. ('28) AIR 1928 All 679 (680) : 50 All 603.

7. ('34) AIR 1934 All 971 (972).

8. ('18) AIR 1918 Mad 295 (296).

('14) AIR 1914 Cal 220 (221).

('11) 12 Ind Cas 669 (672) (Cal). (Lower Court's control over its decree does not come to an end on the filing of an appeal.)

('24) AIR 1924 Pat 528 (528).

('26) AIR 1926 All 304 (304) : 43 All 224.

('24) AIR 1924 All 127 (127).

('31) AIR 1931 All 766 (766).

('94) 21 Cal 476 (479). (The matter was left to the Appellate Court in the peculiar circumstances of the case.)

Note.—The language of the decision in AIR 1916 All 170 : 32 Ind Cas 194 would seem to lay down a contrary view but the real decision in the case is quite different, namely that after a decree is drawn up, it cannot be altered on the ground that it is erroneous in law.

[See also ('32) AIR 1932 Oudh 291 (293) : 8 Luck 93.]

9. ('28) AIR 1928 All 458 (459).

('23) AIR 1923 All 358 (360) : 45 All 53. (Error in calculating amount.)

('75) 1 Bom 1 (3). (Clerical error in decree ordered to be amended at hearing of appeal.)

[See ('34) AIR 1934 Pat 146 (147). (Decree cannot be amended in appeal arising from proceedings for execution of the decree.)]

2 against it.¹ When an amendment is ordered in this manner, the aggrieved party may
4 apply for a review of the order.²

It has been held that where a plaintiff applies for the amendment of a decree on the ground that by an accidental slip he mentioned in his plaint the name of a wrong person as the defendant which name has been repeated in the decree, and asking that the decree should be amended by the insertion of the name of the right person, it is open to the Court to amend the decree as prayed for after giving notice to the person whose name is sought to be inserted as that of the defendant and giving him an opportunity to show that the mistake is not accidental or clerical.³

13. Effect of amendment. — An amended decree must be taken as in force from the date of the original decree. There is a distinction between a case of amendment and one of revision or substitution. When an instrument is amended so as to express the real intention which it was intended to express but which it did not completely express, the transaction is not in *substantia* varied but its inaccurate description is only rectified.⁴ Hence, where a decree is amended the amended decree operates as *res judicata* from the date of the original decree and not from that of the amendment.⁵ But it has been held by the Oudh Chief Court that though the *general* rule is that an amendment of a decree dates back to the date of the decree, yet the amendment should not be allowed to take effect from the date of the decree so as to affect the rights of a purchaser for value without notice who has acquired the property after the decree but before the making of the amendment.⁶

14. Amendment and limitation. — An amendment of the decree under this Section does not give a fresh starting point of limitation for an appeal or application except an application for the execution of the decree.¹ Where, however, a party is prejudiced by an amendment but finds that at the date of the amendment, an appeal from the decree is barred if the period is calculated from the original decree, the Court will excuse the delay under Section 5 of the Limitation Act.² Again, where a decree is in conformity with the judgment and the Court has no power to amend the decree under this Section, a party affected by the amendment will be entitled to

1. ('30) AIR 1930 Cal 619 (620). (32 Cal 238 (F13).
Applied.)

[See also ('30) AIR 1930 All 541 (541, 542).]

2. ('30) AIR 1930 All 381 (386) : 15 All 281.

3. ('30) AIR 1930 All 541 (544, 545).

[See also ('33) AIR 1933 Bom 200 (203). (Mis-
description of person against whom decree is
passed. This can be amended in execution pro-
ceedings.)]

Note 13

1. ('21) 11 Mad 130 (132).

(92) 13 Mad 103 (100).

2. See cases cited in footnote (1).

[See also ('38) AIR 1938 Mad 373 (373). (Correc-
tion of accidental or clerical mistakes though
requiring to be made in review really falls
under S. 132 and there is no new decree sub-
stituted for the original one in such cases and
appeal lies from the original decree.)]

3. ('37) AIR 1937 Oudh 217 (220) : 13 Luck 101 (105).

Note 14

1. ('20) AIR 1920 Pat 622 (630) : 5 Pat Li Jour
472 (473). (Time for appeal runs from date of

original decree.)

(17) AIR 1917 Low Bur 162 (163). (De.)

(92) 22 Mad 361 (367). (De.)

(105) 32 Cal 808 (809). (De.)

(123) AIR 1923 All 22 (23). (Time for application
under Art. 181 of the Limitation Act runs from
date of original decree.)

(81) 11 Mad 130 (132).

(92) 13 Mad 103 (100).

[But see ('15) AIR 1915 Nag 57 (58) : 11 Nag Li R
93. (Time runs from the date of amendment.)]

2. ('19) AIR 1919 Oudh 91 (91, 92).

(32) AIR 1932 Cal 334 (335) : 59 Cal 1032.

(Amendment having no relation to the grounds
upon which the validity of the decree is sought
to be challenged in appeal. Even in such cases
Court has discretion to excuse delay — 3 Cal Li
Jour 188; AIR 1921 All 60, Dissented from—AIR
1928 Pat 255, Distinguished.)

(105) 3 Cal Li Jour 188 (192, 193).

(101) 24 Mad 616 (619, 620).

(35) AIR 1935 Oudh 161 (162) : 11 Luck 415.

calculate the time from the date of amendment.³ In the undermentioned case,⁴ the Punjab Chief Court expressed an opinion that the defendants were not bound to appeal from the decree at a time when the plaintiff had, within the period of ninety days allowed for an appeal, applied for an amendment of the decree. No reasons are given for this proposition and the decision, it is submitted, cannot be accepted as correct.

Limitation for the execution of decree. — Article 182 clause (4) of the Limitation Act (IX of 1908) expressly provides that where the decree has been amended, time for execution of it runs from the date of amendment. The following decisions to the contrary, passed under the Limitation Act of 1877, which did not contain such a provision, are no longer good law.⁵ The undermentioned cases⁶ decided under the same Act, in which it was held that the limitation was extended, by treating the order for amendment as one for review of judgment, are only of academic interest at the present time in view of the express provision in Article 182 clause (4).

See also the Authors' Commentaries on the Limitation Act, Article 182 Note 50.

15. Successive applications for amendment—*Res judicata*. — An application for amendment of a decree is not a suit. Hence, Section 11 of the Code does not apply to such an application. But the principle of *res judicata* applies to it, Section 11 not being exhaustive. (See Notes under Section 11.) Hence, where an application for amendment has been disposed of on the merits, a subsequent application substantially for the same relief is barred.¹ But where the subsequent application is materially different from the previous application it is not barred.²

16. Consent decree. — A clerical or arithmetical mistake or an error due to an accidental slip or omission in a consent decree, may, as in the case of any other decree, be corrected by the Court under Section 152.¹ Similarly, where a consent decree is not in accordance with the agreement of the parties the Court has power under Section 151 to bring it into conformity with the agreement.² But where there is no such mistake and there is no variance between the decree and the compromise petition, it cannot be amended either under Section 152 or Section 151, on the ground that the compromise itself is bad for mutual mistake or fraud of the parties or on the ground that it does not represent the true intention of the parties.³ In such a case, the remedy of the aggrieved party is to *sue* for setting aside the decree on the ground of mistake

3. ('99) 22 Mad 364 (367).

4. ('19) AIR 1919 Lah 250 (251).

5. ('07) 4 All L Jour 469 (471).

('05) 27 All 575 (577).

('91) 13 All 124 (126).

('98) 20 All 304 (306).

6. ('95) 17 All 39 (41).

('82) 4 All 137 (141).

('98) 25 Cal 258 (260).

('01) 24 Mad 25 (26).

Note 15

1. ('11) 12 Ind Cas 151 (153) : 39 Cal 265.

('15) AIR 1915 Cal 696 (697).

('10) 5 Ind Cas 119 (120) (Mad).

('37) AIR 1937 Oudh 246 (247) : 13 Luck 186.

(But where the application is not decided on merits subsequent application is not barred.)

2. ('27) AIR 1927 Rang 57 (57) : 4 Rang 347.

('28) AIR 1928 Lah 244 (245).

Note 16

1. ('13) 21 Ind Cas 115 (116) (Cal).

('34) AIR 1934 Rang 108 (109).

('29) AIR 1929 Lah 254 (254).

('29) AIR 1929 Lah 400 (401).

('28) AIR 1928 Lah 352 (353) : 9 Lah 172.

('37) AIR 1937 Bom 457 (457, 458) : 12 Bom 1237.

Bom 837.

2. ('34) AIR 1934 Rang 108 (108).

3. ('16) AIR 1916 Cal 446 (446).

('34) AIR 1934 Lah 239 (239).

('29) AIR 1929 Nag 24 (24).

[See ('37) AIR 1937 Bom 457 (457, 458) : 12 Bom 1237. (But where the application is not decided on merits subsequent application is not barred.)]

Where an amendment is sought on the ground of a subsequent change of circumstances, a suit, and not an application, would be the most appropriate remedy.⁶

As to the maintainability of suits to set aside or correct a *consent decree* on the ground of mutual mistake of the parties, see Note 16 above.

19. Appeal. — An order granting or refusing an amendment under this Section is not a decree¹ or an appealable order, and consequently, no appeal lies therefrom.² Where, however, there is no clerical or arithmetical mistake or accidental slip or omission, but the whole method of calculation is altered by the amendment, the order, though purporting to be one under Section 152, must be deemed to be one passed on review under Order 47 and hence will be appealable.³

An order of the High Court rejecting an application to amend a decree passed by it on appeal, is not an order made "on appeal" within the meaning of Clause 39 of the Letters Patent (Calcutta), and is not appealable to the Privy Council under that Clause.⁴ As to whether an order of a single Judge of the High Court on an application for amendment is appealable under Clause 15 of the Letters Patent as a "judgment," see Note 6 to Section 104.

The amended decree is always appealable as a decree.⁵ But, as has been seen in Note 14 above, in the case of an amendment under Section 152, no fresh starting point of limitation for appeal is given by the amendment, though the delay may be excused in appropriate cases under Section 5 of the Limitation Act.

Where the Judge instead of amending the decree passes a fresh decree, there is a right of appeal from the amended decree,⁶ but not from the original decree.⁷

20. Revision. — An order granting or refusing an application for amendment under the Section is, as has been observed already in Note 19 above, neither a decree nor an appealable order. Hence, it is open to revision by the High Court in a fit case.¹

6. ('15) AIR 1915 Cal 696 (698).

Note 19

1. ('88) AIR 1933 Rang 264 (265). (Application to set aside order allowing amendment of decree is governed by Art. 181.)

('36) AIR 1936 Oudh 81 (82).

('39) AIR 1939 Bom 389 (390) : 41 Bom L R 800 (802).

2. ('10) 5 Ind Cas 304 (305) (Cal).

('01) 28 Cal 177 (179).

('88) 1888 Pun Re No. 101.

('26) AIR 1926 Lah 664 (665).

('23) AIR 1923 Lah 147 (148).

('28) AIR 1928 Lah 352 (353) : 9 Lah 176.

('27) AIR 1927 Lah 68 (68).

('11) 10 Ind Cas 850 (850) (Lah).

('19) AIR 1919 All 30 (31).

('18) AIR 1918 Lah 63 (63) : 1918 Pun Re No. 43.

('84) 6 All 125 (129).

('04) 1 All L Jour 701 (702).

('38) AIR 1938 Lah 4 (5). (Order amending decree passed on separate application under Ss. 151/152 but not in execution — Application under Ss. 151/152 does not fall under S. 47—No appeal is competent from order.)

('36) AIR 1936 Oudh 81 (82).

3. ('21) AIR 1921 Lah 250 (251).

4. ('03) 30 Cal 679 (681).

5. ('05) 9 Cal W N 605 (607).

('31) AIR 1931 Cal 578 (579).

('28) AIR 1928 All 194 (196).

('81) 6 Cal 22 (24, 25). (Decree passed on review of judgment. Time for appeal runs from such decree, and not the original decree. See also Note 14 above and the cases cited therein.)

('38) AIR 1938 Lah 331 (332).

6. ('34) AIR 1934 Lah 839 (839).

7. ('36) AIR 1936 Sind 53 (55) : 29 Sind L R 445.

Note 20

1. ('07) 31 Bom 447 (449).

('34) AIR 1934 All 100 (101). (Order to amend is different from amended decree.)

('15) AIR 1915 Mad 1068 (1068).

('12) 16 Ind Cas 933 (933, 934) (Mad).

('25) AIR 1925 All 556 (556).

('93) 15 All 121 (122).

('85) 7 All 875 (876) (FB).

('85) 7 All 876 (878) (FB).

('37) AIR 1937 Lah 894 (894, 895).

('38) AIR 1938 Lah 4 (5).

('39) AIR 1939 Bom 389 (390) : 41 Bom LR 800 (802).

('36) AIR 1936 Oudh 81 (82).

Other Topics (miscellaneous)

Amendment of pleadings. See Notes 2 and 3.
 Amending cause title by substituting legal representatives. See Note 3.
 Answer to interrogatories. See Note 3.
 Change of cause of action. See Note 6.
 Execution petition. See Note 3.

For determining the real question or issue raised. See Note 3.

Notice of motion. See Note 3.

Particulars. See Note 3.

Sale certificate. See Note 3.

1. Legislative changes. — This Section is new. It is based on O. 28 R. 12 of the Rules of the Supreme Court (of England).

2. Scope of the Section. — Section 152 deals with amendments of *judgments, decrees and orders*. O. 6 R. 17 deals with amendments of *pleadings*. The present Section confers a general power on the Court to amend any defect or error in *any proceeding* in a suit and to make all necessary amendments for the purpose of determining the real questions between the parties. The object of the rule allowing amendments is to minimise litigation and avoid multiplicity of proceedings,¹ and also to see that the merest technicality may not be allowed to stand in the way of substantial justice.² Hence, the Court has power to allow all necessary amendments for raising the real questions at issue between the parties provided that no injury or injustice is caused to the opposite party and are such as can be sufficiently compensated for by costs or otherwise.³ But the Court will not aid a party by allowing him to amend his pleading where the mistake was fraudulent or intended to get round a previous decision of the Court.⁴

The power to get an amendment of a proceeding under this Section, is subject to the *discretion* of the Court, and is not claimable as of *right*.⁵ As to the general principles guiding the exercise of discretion in granting or refusing an amendment, see Order 6 Rule 17.

3. "At any time." — The power of amendment conferred by this Section can be exercised "at any time" during the proceedings.¹ The power is vested both in the original as well as in the Appellate Court.² But *prima facie* it is limited to

Section 153 — Note 2

1. ('98) 25 Cal 371 (390).

('15) AIR 1915 Cal 203 (207). (Decree for sale under O. 34 R. 4— But property already sold in revenue sale — Decree amended for disposal of sale proceeds.)

('14) AIR 1914 Mad 256 (258). (Amendment of an application in forma pauperis.)

('19) AIR 1919 Oudh 55 (56). (Amendment of pre-emption decree granting set-off.)

('10) 5 Ind Cas 532 (535) : 37 Cal 399. (Omission of pleader's name in vakalatnama—Amendment allowed.)

('23) AIR 1923 Nag 182 (186) : 19 Nag L R 36. (Do).

2. ('33) AIR 1933 All 295 (297) : 55 All 216.

('37) AIR 1937 Nag 173 (174) : 1 L R (1937) Nag 514. (Courts are to be reluctant to non-suit parties on purely technical grounds if a way of escape can be found.)

[See also ('35) AIR 1935 Mad 118 (118). (Decree-holder applying for execution before date mentioned in decree — Judgment-debtor filing counter only subsequent to such date — Court

has discretion to condone such irregularity if no prejudice is caused to opposite side as it amounts to little more than a mere technicality.)

3. (1889) 14 App Cas 818 (820), *Australian Steam Navigation Co. v. Smith and Sons*.

(1878) 10 Q B 398 (399), *Wildes v. Harper*.

(1888) 32 W R (Eng) 262 (263), *Charapada v. Commercial Union Association*.

(1884) 26 Ch D 700 (711), *Cropper v. Smith*.

(1887) 19 Q B D 394 (399), *Weldon v. Neal*.

4. ('25) AIR 1925 All 142 (142). (Overruling the suit in order to get round a previous decision is an abuse of the process of the Court.)

5. ('97) 21 Bom 570 (571).

('16) AIR 1916 Mad 449 (451, 452). (Great delay on applicant's part due to his negligence — Amendment refused.)

Note 3

1. ('96) 20 All 476 (480). (Formal error as to date in a pending execution application may be amended even after limitation.)

2. ('16) AIR 1916 Pat 247 (248) : 1 Pat L J 404 (1916).

amendments during the actual pendency of proceedings and not after the decree has been drawn up and sealed.³

4. "Defect or error." — Assuming that Section 153 applies to orders of Courts, an order erroneous on the merits is not "a defect or error" in the proceedings within the meaning of the Section, and cannot be amended or corrected under this Section.¹

5. "Any proceeding in a suit." — The term "proceeding" in this Section must be interpreted as including any application to a Court of justice however made, for aid in the enforcement of rights, for reliefs, for redress of injuries, for damages or for any remedial object.¹ See for instance the following —

(i) *Pleadings*. — See Order 6 Rule 17.

(ii) *Memorandum of appeal*. — A memorandum of appeal may be amended under this Section.² Thus, when, through a *bona fide* error, the name of a deceased person instead of that of his legal representative appears in a memorandum of appeal as the respondent, the error may be amended.³ But, it has been held that no such discretion to amend is available to the Court when it is sought to substitute a person for the potential *appellant* who died before the memorandum of appeal was filed, the reason being that in such a case there is no memorandum of appeal at all in the eye of the law.⁴

(iii) *Application for execution*. — See Notes to Order 21 Rule 17.

(iv) *Application for final decree in a mortgage suit*. — The Section applies to the amendment of an application for a final decree in a mortgage suit.⁵

(v) *Application for personal decree under O. 34 R. 6*. — Under Section 153 an application for a personal decree against the mortgagor under O. 34 R. 6 may be amended by allowing a party to sign it, where he has failed to do so in the first instance,⁶ or by allowing the addition of an alternative prayer.⁷

(vi) *Application for restitution*. — Where an application for restitution has not been made in the correct form, it may be amended under this Section.⁸

(vii) *Answers to interrogatories*. — Leave may be given in a fit case to amend answers to interrogatories. Thus, an answer containing an admission made by mistake may be amended.⁹ Similarly, an answer may be amended where subsequent to the filing of the affidavit of answer, it is found that there are other matters which could have been included in it.¹⁰

(122) AIR 1922 All 81 (81). (Amendment may be allowed even in second appeal.)

3. (24) AIR 1924 Bom 166 (166).

(12) 14 Ind Cas 407 (409) : 8 Nag L R 13.

Note 4

1. (22) AIR 1922 Pat 121 (121) : 4 Pat L Jour 287.

Note 5

1. (37) AIR 1937 Mad 342 (343).

2. (30) AIR 1930 All 181 (182).

(13) AIR 1923 Lah 115 (116) : 3 Lah 382. (Grounds of appeal may be amended to make them clear.)
[See (26) 56 Ind Cas 11 (11) (Lah). (Amendment of the respondents's names.)]

3. (37) AIR 1937 Bom 401 (407) : 1 L R (1937) Bom 601.

(36) AIR 1936 Pesh 192 (193).

(23) AIR 1923 Mad 1210 (1210) : 49 Mad 18 (FD).

(Overruling AIR 1924 Mad 56.)

(30) AIR 1930 All 181 (182).

(32) AIR 1932 Lah 335 (336).

[See however (13) 21 Ind Cas 336 (338). (Upp Ban.)]

4. (38) AIR 1934 Nag 271 (276) : 31 Nag L R 57.

5. (22) AIR 1922 All 416 (417).

6. (24) AIR 1924 All 801 (805).

7. (15) AIR 1915 Mad 152 (153) : 35 Mad 677.

8. (21) AIR 1921 All 321 (322).

9. (1882) 3 Ch 226 (236), *Hicks v. Barton*.

10. (1877) 7 Ch D 133 (152), *Scudlors v. J. & J.*

(viii) *Particulars*. — Leave to amend particulars will generally be given on terms, provided the application is made a reasonable time before the trial.¹¹ But leave will be granted at the trial only when it is shown that the new matter has been recently discovered.¹²

(ix) *Notice of motion*. — A notice of motion can be amended under this Section.¹³

(x) *Power of attorney*. — The Court has inherent power to amend a power of attorney filed by the *mukhtiar* of a party by the insertion of the *mukhtiar*'s name which was omitted by mistake.¹⁴ It has been held in the undermentioned case¹⁵ that Section 153 would apply to such a case.

(xi) *Sale certificate*. — The present Section *prima facie* applies to *pending proceedings*.¹⁶ Section 152 applies to the amendment of *decrees and orders*. Although a sale certificate is a document issued by a Court, it is doubtful whether it is an order of Court within Section 152. It may also be doubted whether it is a proceeding in a suit within the meaning of the present Section. A Court has, however, inherent power to amend a sale certificate after notice to the judgment-debtor, where the certificate does not correctly describe the property sold,¹⁷ unless the sale price has been affected by such misdescription.¹⁸

See also the undermentioned cases.¹⁹

6. Amendment by Court suo motu. — Under O. 6 R. 17 the Court has no power to amend the pleadings of its own accord. Under the present Section the Court has a power of amendment *suo motu*. But even under this Section the Court has no power to convert, of its own accord, a suit for declaration into one for possession.¹ The reason is that a Court is bound to adjudicate on a claim as brought and cannot direct parties to alter their claims.²

154. [S. 3, para. 3.] Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

Saving of present
right of appeal.

11. (1895) 2 Q B 148 (155), *Yorkshire Provident Co. v. Gilbert*.

12. (1886) 33 Ch D 603 (604), *Moss v. Malings*.

13. (1897) 1 Ch 266 (270, 271), *Cook v. Andrews*.

14. ('10) 5 Ind Cas 532 (535) : 37 Cal 399.

15. ('34) AIR 1934 All 810 (811). (Omission of name of vakil from body of vakalatnama.)

16. ('24) AIR 1924 Bom 166 (166).

('12) 14 Ind Cas 407 (409) (Nag).

17. ('13) 20 Ind Cas 588 (589) (Cal). (Wrong towji number can be corrected.)

('32) AIR 1932 All 587 (589) : 54 All 800. (Sale certificate and dhakalnama.)

('22) AIR 1922 Mad 63 (64, 65). (Notice to judgment-debtor is necessary.)

('13) 18 Ind Cas 725 (726) (Cal). (No jurisdiction to amend so as to show purchase of large share than actually sold.)

('14) AIR 1914 Cal 527 (528).

('37) AIR 1937 Oudh 144 (144) : 12 Luck 167.

[See also ('35) AIR 1935 Mad 420 (421). (To order an amendment of the sale certificate without ordering a corresponding amendment of the decree is likely to complicate matters, and would not be quite proper, even otherwise for a Court to do.)]

18. ('34) AIR 1934 Lah 29 (30).

19. ('37) AIR 1937 Mad 342 (343). (Application for challan for depositing amount for setting aside execution sale is "proceeding" within S. 153 and may be amended by inclusion of prayer for setting aside sale.)

('37) AIR 1937 Nag 108 (110) : I L R (1938) Nag 245. (Verification in application to appeal in forma pauperis — Verification not made in prescribed manner must be allowed to be corrected.)

Note 6

1. ('13) 19 Ind Cas 672 (672) (Mad).

2. ('11) 9 Ind Cas 673 (674) : 1911 P

Synopsis

1. "Any present right of appeal."
2. Right of appeal being given by new Code but not by old Code — Effect on pending proceedings.
3. Other rights accrued before the present Code.
4. Power of Appellate Court.

1. "Any present right of appeal."—It has been observed in Note 3 to the Preamble that the general principle is that an Act which takes away a substantive right is not retrospective in effect except by express enactment or by necessary implication. This principle is recognized in Section 6 of the General Clauses Act of 1897. But this principle does not apply to enactments merely affecting practice or procedure. For, there can be no vested right in any course of procedure. But a right of appeal is a substantive right and not a mere matter of procedure. When the law permits an appeal, the right of appeal vests in a party on the commencement of proceedings in the lower Court. Any Act coming into force subsequently cannot affect this right prejudicially, except by express words or by necessary implications.¹ This is the general rule apart from Section 154. Under this Section the question has arisen whether this general right is restricted by the words "*any present right of appeal*" in the Section. The question has arisen in this way. Take, for instance, an order which was appealable under the former Code, but is not appealable under the present Code. The present Code came into force on 1st January 1909. Suppose the proceedings in which the order was passed were commenced before 1st January 1909, and also that the order was passed before 1st January 1909. In such a case, there was undoubtedly a *present* right of appeal accrued to a party at the commencement of the Code (1st January 1909) because the order having already been passed, the right of appeal given by the former Code was capable of being exercised immediately on that date. But suppose, in the above instance, the proceedings were started before 1st January 1909, but the order therein was passed *after* 1st January 1909. In such a case, no doubt a right of appeal had accrued to the party at the commencement of the present Code, because when the law permits an appeal, the right of appeal vests in a party on the initiation of the proceedings in the lower Court. But as the order had not been passed at the commencement of the Code but was passed only subsequently, the right of appeal was not therefore capable of being immediately exercised at that date. Is such a right, a *present* right of appeal within Section 154? On this question there is a conflict of decisions. It has been held by the Calcutta High Court,² the Punjab Chief Court³ and the Sind Judicial Commissioner's Court⁴ that such a right of appeal cannot be called a *present* right of appeal because although it has vested in a party, it is not capable of being immediately exercised. But the Madras High Court

(32) AIR 1932 Bom 394 (396, 397). (Suit on pro-note inadmissible for want of stamp—Amendment into a suit on original cause of action—Wholly distinct suit—Not allowable.)

Section 154 — Note 1

1. (1905) 1905 App Cas 369 (372, 373), Colonial Sugar Refining Co. Ltd. v. Irving.
(1900) 1900 Pun Ra No. 12 (FB).
(28) AIR 1928 Lah 627 (630, 631) : 10 Lah 165 (FB).
(21) AIR 1921 Mad 126 (128, 129).
(80) 2 All 735 (736).
(12) 15 Ind Cas 725 (726, 727) (Lah).

(16) AIR 1916 Mad 1035 (1036).

(78) 1 All 668 (670, 671) (FB).

(08) 32 Bom 337 (344, 345).

(01) 24 Mad 39 (42).

2. (12) 15 Ind Cas 679 (681) (Cal).

(13) 14 Ind Cas 53 (54) (Cal).

(10) 8 Ind Cas 3 (4) (Cal).

(13) 17 Cal W N 524 (525).

[See however (12) 16 Ind Cas 690 (691) (Cal).]

3. (12) 16 Ind Cas 834 (834) (Lah).

(12) 15 Ind Cas 725 (726) : 1913 Pun Ra No. 1.

4. (13) 19 Ind Cas 348 (351) : 6 Sind L R 163.

This Section and the Fifth Schedule of the Code have been repealed by Act XVII of 1914, Section 3.

The Section as it stood before the repeal was as follows :—

"The enactments mentioned in the fifth Schedule are hereby repealed to the extent specified in the fourth column thereof."

157. [S. 3, second sentence.] Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

Continuance of orders
under repealed enact-
ments.

Synopsis

1. "Rules."
2. "Consistent with the Code."
3. Retrospective effect of the Code. See Note 3 to Preamble.

1. "Rules." — The expression "rules made" means rules properly and validly made, in other words, made with jurisdiction by the proper authority. Rules, which though purporting to be made under the old Code, were beyond the powers given by the old Code, do not become valid by reason of the fact that, if they had been made under the new Code, they would be valid.¹

2. "Consistent with the Code." — The word 'Code' according to the definition in Section 2 clause 1 includes the rules in the First Schedule. Hence, it has been held that the Madras Civil Rules of Practice made by the High Court under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Code of 1908 are invalid if and in so far as they are inconsistent with any of the rules in the First Schedule of the later Code.¹

3. Retrospective effect of the Code. — See Note 3 to Preamble.

Section 157 — Note 1

1. ('16) AIR 1916 Mad 1165 (1166).

Note 2

1. ('23) AIR 1923 Mad 423 (441); ILR (1923) Mad 734 (FB). (37 Mad 17: AIR 1914 Mad 652 (FB),

Overruled.)

[See also ('35) 1935 Mad 693 (695): 59 Mad 342. (Rule 199 of Civil Rules of Practice, to the extent to which it is opposed to, and inconsistent with, the provisions of Sch. 1, C. P. C., cannot take effect.)]

158. [S. 3, para. 2.] In every enactment or notification

Reference to Code of
Civil Procedure and other
repealed enactments.

passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

"As to the retrospective effect of the Code," see Note 3 to Preamble.



A. I. R. COMMENTARIES JUDICIALLY NOTICED

A. I. R. 1933 Peshawar 61 at 62.

"The law on the subject is lucidly summed up in Chitaley's Commentary on Civil Procedure Code, Vol. 1, p. 182, and is stated as follows: 'A party them.'"

A. I. R. 1934 Allahabad 253 at 255.

" the reason being that no one can have vested right in forms of procedure. The subject is discussed in Chitaley's Civil Procedure Code, Vol. 1, pp. 4 and 5."

A. I. R. 1934 Peshawar 40 at 42.

"The argument is based on Chitaley's Commentary, 1933 Edition, p. 1888 under O. 21, R. 15 of the Code, which is supported by *Gopendra Krishna v. Moti Lal*, A. I. R. 1928 Cal. 559."

A. I. R. 1934 Peshawar 57 at 61.

"These conflicting views are noted on pp. 746 and 747 of Chitaley's Civil Procedure Code."

A. I. R. 1934 Peshawar 94 at 95.

"He (D. J.) quotes from Chitaley as follows: 'All co-promisees as parties.'"

"I have no disagreement with this statement of the law, but in the present case the defendant is not a promisee, but a promisor. A further passage from Chitaley is cited by the learned Additional District Judge to the following effect :

'Where several of suits.'

"That statement of law applies to the facts of the present case."

A. I. R. 1936 Allahabad 811 at 813.

"The ruling cases on this point are collected and noted in Chitaley's Civil Procedure Code, Vol. 3, p. 2318, 2nd Edn."

A. I. R. 1936 Nagpur 228 at 230 =

I. L. R. 1937 Nag. 230 at 234.

"The point is well summed up at pages 2469 and 2470 of Chitaley and Rao's Code of Criminal Procedure, Vol. 3, and the learned authors rightly point out that the view of the High Courts, excepting Rangoon, is consistent with the principles underlying sub-section 3 of the section."

A. I. R. 1936 Peshawar 37 at 37.

"Counsel for the appellants quotes from Chitaley's Commentary to the effect that where the question of costs has been referred to the arbitrator, or where the whole matter in dispute has been referred to the arbitrator, the arbitrator has authority to award costs in the award."

A. I. R. 1936 Peshawar 209 at 210.

"We have been referred to Note (7) under S. 48 in Chitaley's Commentary on the Civil Procedure Code where the distinction between a fresh application and an application in continuation of a previous application is illustrated."

A. I. R. 1937 Allahabad 82 at 87.

"The balance of authority seems to be that an Appellate Court has no power under it to interfere to the prejudice of a person who was a party to a suit, but who was not impleaded in the appeal: vide "Code of Civil Procedure," Chitaley & Annaji Rao, Vol. 3, pp. 3003-3004 (1st Edn). I am, therefore, of opinion that defendants 2-7 ought not to have been impleaded."

A. I. R. 1937 Calcutta 222 at 224.

"On this point there is a considerable mass of case law which will be found set out in Chitaley's Commentary on the Civil Procedure Code."

A. I. R. 1937 Lahore 41 at 49 =

I. L. R. 1937 Lah. 11 at 33.

"I find it stated in Chitaley and Annaji Rao's Code of Civil Procedure that this section (i. e., S. 80) like S. 79 enacts only a rule of procedure. With this view I agree."

A. I. R. 1937 Nagpur 50 at 53 =

I. L. R. 1937 Nag. 277 at 284.

"This question has been well discussed in Note 10 under S. 162, p. 804, of Chitaley and Annaji Rao's recent Commentary on the Criminal Procedure Code. The learned authors favour the view of the Madras and Calcutta High Courts which is with the opinion expressed

A. I. R. 1937 Nagpur 216 at 217 =

I. L. R. 1938 Nag. 280 at 282.

"In Chitaley and Rao's Civil Procedure Code, Edn. 2, p. 2094 under O. 22, R. 1, it is remarked :

'If, in the first Court, the
..... either party.'

"I agree with these remarks which would apply to a dismissal of the suit in appeal. It is further remarked on the authority of 34 *Mad loc. cit.* that the appeal cannot be continued even in respect of costs or other relief which are merely incidental to the main reliefs. I accordingly uphold the contention of the respondent."

A. I. R. 1937 Nagpur 268 at 269 =

I. L. R. 1937 Nag. 519 at 520.

"It appears that the weight of authority is in favour of the view that the Appellate Court has such powers. The dissentients from that view are limited to the High Courts of Allahabad and Rangoon and the Chief Court of Oudh : See also Chitaley and Rao's Code of Civil Procedure, Vol. I, page 712."

A. I. R. 1937 Oudh 481 at 483 =

I. L. R. 13 Luck. 560 at 565 & 566.

"Messrs. Chitaley and Annaji Rao in their Commentary on the Code express the opinion that the present cl. (d) of R. 5 of O. 33 gives effect to the view taken in the Full Bench decision of the Allahabad High Court reported in 7 All 661, and other cases."

A. I. R. 1937 Peshawar 13 at 15.

"In this connexion we may quote the following Note No. 4 from Mr. Chitaley's Commentary under R. 53 which is as follows: 'Other decrees. — A decree this rule.'"

A. I. R. 1937 Peshawar 41 at 41.

"On p. 1480 of Mr. Chitaley's Commentary on the Civil Procedure Code (Edn. 1) it is noted that 'where a plaint is presented on the re-opening date after court-holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4,

Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of the holidays.' This note is supported by reference to rulings in Nagpur, Lahore, Madras and Calcutta Courts, though a Calcutta ruling to contrary is also noted. The proposition as stated appears to me to be correct."

A. I. R. 1937 Peshawar 81 at 81.

"Learned counsel has been unable to show me any decided case in which action of that nature amounts to a public nuisance, and the commentary in Chitaley's Civil Procedure Code certainly indicates the contrary."

A. I. R. 1937 Rangoon 391 at 392.

"The learned authors of the Code of Criminal Procedure by Chitaley and Annaji-rao, Edn. 1, Vol. 1, at p. 200 say : 'Thus an ... Proviso.'

"I agree with this view."

A. I. R. 1938 Calcutta 287 at 289 & 290 =

I. L. R. (1938) 1 Cal. 53 at 58 and 60.

"In the Note to Messrs. Chitaley and Annaji Rao's Code of Civil Procedure, at p. 1388, I find the following comment : 'The first parties.'

"The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions."

A. I. R. 1938 Calcutta 730 at 733 =

I. L. R. (1939) 1 Cal. 112 at 120.

"The expression 'other cause of a like nature' has been the subject of various decisions, most of which will be found mentioned in Chitaley's Limitation Act (1938), pp. 567 to 572."

A. I. R. 1938 Lahore 220 at 222.

"(The amended Rule will be found printed at pp. 252-3 of Chitaley's Code of Civil Procedure, Edn. 2.)"

A. I. R. 1938 Lahore 345 at 346.

"The learned counsel for the present respondents also quoted A. I. R. 1932 All. 446, A. I. R. 1933 All. 264 (a judgment by a Full Bench, one member of which was the present Hon'ble Chief Justice of the Lahore High Court) and the remarks in the Commentary of Mr. Chitaley's Criminal Procedure Code, Vol. 1, p. 676."

A. I. R. 1938 Nagpur 122 at 123.

"It was assumed by the Taxing Judge (Bose J.) in his order of reference that the present case was similar because he assumed that there was no difference for these purposes between a plaint and a memorandum of appeal. This we think is wrong although there are a larger number of rulings collected at p. 44 of Vol. 1 of Chitaley's Civil Procedure Code which take that view."

**A. I. R. 1938 Oudh 45 at 47 and 48 =
I. L. R. 13 Luck. 689 at 693 and 695.**

"The learned counsel (for appellant) maintained that that case stands alone, and he has pointed out to us that in the Commentary on the Civil Procedure Code by Chitaley and Annaji Rao this case is submitted to have been wrongly decided: vide the Commentary, Vol. 1, (Edn. 2) p. 478, (Note 9, F. N. 4).

"In my opinion, the contention of the learned counsel for the appellant must be accepted."

**A. I. R. 1938 Oudh 146 at 147 =
I. L. R. 14 Luck. 116 at 118.**

"As has been pointed out in Chitaley's discussion of this matter in his Notes to S. 115 at pages 924 and 925 of Vol. 1, Edn. 2 of the Civil P. C., the Allahabad view originally depended on a distinction between cases in which the application had been rejected and cases where it had been accepted."

A. I. R. 1938 Peshawar 4 at 5.

"The general result of this conflict has been clearly set out in Note No. 9 of the commentary on that Rule in Chitaley's Code

of Civil Procedure and virtually all the cases which have been referred to in the course of that Note have been cited before us as well as some other rulings in addition."

A. I. R. 1939 Lahore 356 at 357.

"As pointed out in A I R 1921 Lah 369 and A I R 1928 All 236 the absence of a shifting balance is not decisive: see also cases collected in Chitaley's Limitation Act, Vol. 2, p. 1362 *et seq.*"

A. I. R. 1939 Oudh 86 at 89.

"According to Chitaley, (Civil Procedure Code) Vol. 1, p. 517, Note 7:

'A debt debt.'"

A. I. R. 1939 Oudh 116 at 117 =**I. L. R. 14 Luck. 538 at 541.**

"A reference to the Notes to O. 40, R. 1 on the subject of the appointment of a receiver in execution proceedings both in Chitaley's Code of Civil Procedure and the latest edition of Katju and Das's Code of Civil Procedure makes it quite clear that there is no such principle as the one suggested by learned counsel."

A. I. R. 1939 Oudh 284 at 285 =**I. L. R. 15 Luck. 19 at 23.**

"I take the following passage based on various rulings from p. 701 of Chitaley's Commentary on the Code of Criminal Procedure: 'On the making of an Section 517.'"

A. I. R. 1940 Allahabad 263 at 266.

"In Chitaley's Criminal Procedure Code, Vol. 1, p. 797, the learned commentators say: 'It is Evidence Act.' I agree with their conclusion."

A. I. R. 1940 Peshawar 24 at 25.

"At Note 10 to O. 21, R. 15 of Chitaley's Civil Procedure Code the following comments are made as regards the right of appeal against an order made under O. 21, R. 15:

'The question whether of the non-applicant decree-holder.'"

